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JEFFERSON--33 GRATTAN.

1730–1880.

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THOMAS JOHNSON MICHIE.

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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME XIII.

FROM OCTOBER 1, 1855, TO APRIL 1, 1857.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.

WILLIAM DANIEL,	RICHARD C. L. MONCURE,
GEORGE H. LEE,	GREEN B. SAMUELS.

Attorney General: WILLIS P. BOCOCK.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Early v. Garland's Lessee.

October Term, 1855, Richmond.

Sale of Land—Case at Bar.—In 1809 C T assuming to act as the agent of M T, sold to M a lot in the town of Lynchburg, and L, from whom M T purchased the lot, conveyed it to M. M T then filed a bill to set aside the sale, and in 1819 the court made a decree setting the sale aside, and directing M to convey the lot to M T. This decree was affirmed in the Court of appeals as far as it went, but the court held that there should have been a decree over in favor of M against C T, and sent the cause back for this purpose. Pending these proceedings M conveyed twenty feet of the lot fronting on Main street to P and ten feet to C, and C purchased the remainder of the lot from R, who had verbally acquired M's right in the subject; and C had enclosed the ten feet first acquired and twenty feet adjoining that part which he bought of R as an alley leading from the street to his house. After the case went back, M T filed an amended bill making C a party, and C filed a cross bill to obtain the benefit of M's rights against C T. In 1834 C died, and the suits were revived in the name of his administrator; and in 1836 there was a decree in the first suit directing a commissioner to convey that part of the lot obtained by C from R to M T, which was done. In 1837 M T conveyed that part of the lot conveyed to him to L, and L conveyed it to G, who died, having devised it to his son the plaintiff.

2 *In 1835, in a friendly suit between the widow and heirs of C, the alley was allotted to the widow, and after her death to C's daughter H. In an action of ejectment brought in 1849 by the son of G against the trustee of H for the twenty feet included in the alley. HELD:

1. **Same—Adversary Possession—Effect upon Transfer of Title.**—If the ground in controversy was in the actual adversary possession of the widow or daughter of C at the time of the conveyance by M T to L or by L to G, these deeds could not operate as a transfer of the legal title.

2. **Same—Same—Same.**—The fact that M T was not in possession of the ground in controversy at the date of the decree of 1836 or of the deed of the commissioner to him, would not of itself suffice to restrict the operation of the deed to a mere transfer of a right of entry which he could not transfer to another. Nor would the fact of his not being in possession when he conveyed to L, prevent the transfer of the title to L. To prevent the transfer of the title, the possession must have been adversary in another.

3. **Same—Decrees—Effect on Those Not Parties.**—The suit not having been revived against the heirs of C, they are not concluded by the decree of 1836, upon the principle which binds parties to a judgment or decree.

4. **Adversary Possession—Case at Bar.**—There being nothing in the amended bill or any other part of the proceedings having special reference to the part of the lot bought of R by C, the decree does not ascertain that C was a purchaser of the lot *pendente lite;* and the defendant is not thereby estopped from setting up an adversary possession anterior to its date.

5. **Evidence—Decrees—Conclusiveness of—Case at Bar.**—Though the decree was conclusive evidence that such a decree had been rendered, it was not conclusive against the heirs of C that he was a *pendente lite* purchaser.

6. **Instructions—Evidence Tending to Prove the Supposed Case.***—When there is any evidence tending to make out the case supposed in an instruction, it is best and safest to give the instruction if it propounds the law correctly.

In the year 1809, Charles Terrill, assuming to act as the agent and by the authority of Micajah Terrill, sold to Robert Morris a lot in the corporation of Lynchburg, known as No. 79, and procured from John Lynch, who had sold the said lot to Micajah Terrill, but still held the legal title thereto, a deed for the same to said Morris.

Soon afterwards, Micajah Terrill, who

*Instructions—Evidence Tending to Prove the Supposed Case.—For the proposition laid down in the principal case that, when there is any evidence tending to make out the case supposed in the instructions, it is best and safest to give the instructions if it propound the law correctly, see the principal case cited and followed in New York, etc., Railroad Co. v. Thomas, 92 Va. 611, 24 S. E. Rep. 264; Chesapeake & Ohio R. Co. v. Anderson, 93 Va. 657, 25 S. E. Rep. 947; Washington, etc., R. Co. v. Lacey, 94 Va. 468, 26 S. E. Rep. 834; Baltimore & Ohio R. Co. v. Whittington, 30 Gratt. 816; Gordon v. The City of Richmond, 83 Va. 439, 2 S. E. Rep. 727; Honesty v. Com., 81 Va. 297; Dickinson v. Dickinson, 25 Gratt. 330; State of W. Va. v. Betsall, 11 W. Va. 729; Michie v. Cochran, 93 Va. 648, 25 S. E. Rep. 884.

In the last-named case the court after approving the rule above laid down said: "It is still nevertheless the duty of the court, before giving the instruction to determine whether there is *any* evidence upon which it may be founded."

See, in accord, Hopkins v. Richardson, 9 Gratt. 496; Farish v. Reigle, 11 Gratt. 719; Brooke v. Young, 3 Rand. 106.

In addition to the above authorities, see section 4 of monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

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was then in the western country, filed
3 his bill in the County court *of Campbell county, on the chancery side thereof, repudiating said sale, and seeking to set the same aside, and obtain a reconveyance of the property to him, and he made the said Charles Terrill, Robert Morris and John Lynch parties to the suit.

The suit remained on the docket of the County court until the year 1818, when, by consent, it was removed to the Superior court of chancery for the town of Lynchburg, where such proceedings were had, that on the 18th day of May 1819 a decree was rendered by said court, disaffirming the sale aforesaid, and requiring Morris to reconvey the land to Micajah Terrill, and to pay the costs of the suit.

From this decree Morris appealed to the Court of appeals; and that court, on the 22d day of November 1823, affirmed the decree as far as it went, but declared it erroneous in not giving Morris a decree over against the estate of Charles Terrill for the amount paid him, with interest, costs, &c.; and sent the case back to the court below, for accounts, &c., and for relief to Morris.

In 1824, this decree of the Court of appeals was entered in the court below, and a decree was rendered by that court in conformity therewith.

Pending these proceedings, or prior to the institution of the suit, (which, it does not appear,) Robert Morris had conveyed a portion of the lot in controversy, fronting twenty feet on second or Main street, to one John Pointer, and another portion, fronting ten feet on same street, to Dr. John J. Cabell; and on the 9th day of September 1823, Dr. Cabell purchased from one Robert L. Coleman, who had verbally acquired Morris' rights in the subject, the residue of said lot No. 79, the same being contiguous to the ten feet purchased of Morris as aforesaid, and fronting one hundred and thirty-five feet on second or Main street.

After the case came back from the
4 Court of appeals, *viz: in October 1825, the plaintiff, by an amended bill, made Dr. Cabell a party defendant; and some time afterwards, (the record does not show the date,) Dr. Cabell filed in the same court a bill in the nature of a cross bill, referring to the proceedings in Terrill's suit, and seeking to secure to himself the benefit of Morris' claim against Charles Terrill's estate.

The two suits lingered on the docket without final decree in either, until the death of Dr. Cabell in 1834, when they were both revived in the name of his administrator, Thomas R. Friend; but the widow and heirs of Dr. Cabell were not made parties.

On the 22d day of October 1836, a final decree was entered in the two suits, directing, in the first suit, a conveyance by James Benagh, a special commissioner of the court, to Micajah Terrill, of so much of the lot in the proceedings mentioned as had not been conveyed by Morris to Pointer and Cabell; and quieting said Cabell and Pointer and those claiming under them, in their respective purchases, and in the cross suit decreeing to Friend, as administrator of Cabell, the balance shown to be due from Charles Terrill's estate to Morris, &c.

In pursuance of this decree, Commissioner Benagh, on the 29th of October 1836, executed the deed thereby required.

The defendants introduced evidence to prove that prior to the death of Dr. Cabell in 1834, he had enclosed the ten feet lot purchased by him of Morris and twenty feet of the lot purchased by Coleman, forming an alley of thirty feet front on Main Street, and running back to the mansion-house lot of said Cabell. The twenty feet purchased by Coleman, and making a part of the alley, is embraced by the deed from Benagh, commissioner, to Terrill, and forms the subject of controversy. The plaintiff also introduced evidence to prove that the
5 lot had not been enclosed until a *short time before the action was instituted, and that Dr. Cabell did not claim to hold the lot adversely to the title of the plaintiff. The evidence is stated by Judge Lee in his opinion.

After Dr. Cabell's death, viz: in 1835, a friendly suit was instituted in the Hustings court for the corporation of Lynchburg, by a portion of his heirs at law against his widow and the residue of his heirs, for an assignment of dower to the widow, and a division of his lands among the heirs of said Cabell; and a decree was rendered, by which the mansion-house lot, with the alley aforesaid, was assigned to Harry Ann Cabell, widow of said John J. Cabell, as part of her dower.

Mrs. Cabell died in 1843; and after her death the mansion-house lot and alley aforesaid were assigned by another decree made in another suit between the heirs of Dr. Cabell, to his daughter Henrian Cabell; and in 1846, she, being about to marry Samuel H. Early, conveyed the same, with other property, to Jubal A. Early in trust for her benefit.

In the year 1837, Micajah Terrill and wife conveyed to John Lynch the entire lot mentioned in the deed from Benagh, commissioner, embracing the twenty feet of said alley mentioned above as being in dispute.

In February 1837, John Lynch conveyed the same property to Maurice H. Garland; and by his last will, duly recorded on the 13th of October 1840, in the Hustings court of Lynchburg, Maurice H. Garland, after some specific bequests, devised his whole remaining estate to his son, Samuel Garland, jr.

In December 1849, Samuel Garland, jr. instituted his action of ejectment against Jubal A. Early, for that portion of the alley aforesaid fronting twenty feet on Main street, which is embraced by the deed from Benagh to Micajah Terrill.

After all the evidence had been introduced, the defendant moved the court

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6 to give to the jury eight *several instructions; but the court refused to give any except the seventh. It is only necessary to state the first, second and third.

1st. If Micajah Terrill was not in possession of the lot of ground in controversy in the case of Terrill v. Morris & others, at the time of the decree pronounced in said case on the 22d day of October 1836, and at the time the deed from Commissioner Benagh to him, made in pursuance of said decree, was executed, the said decree and deed merely conferred upon said Micajah Terrill a right of entry which he could not transfer to another. And unless he had reduced the said lot of ground into possession at the time he made the deed of bargain and sale to John Lynch on the 14th day of March 1837, the said last named deed conveyed no title to the said John Lynch.

2d. If at the time Micajah Terrill executed the deed of bargain and sale to John Lynch, dated the 14th day of March 1837, Mrs. Harry Ann Cabell, as the widow of John J. Cabell, was in the adverse possession of the lot or parcel of ground in controversy, under an assignment of dower or otherwise, the said deed conferred no title on the said John Lynch to the said lot or parcel of ground.

3d. If at the time of the execution of the deed of bargain and sale from John Lynch to Maurice H. Garland, dated the 4th day of February 1838, Mrs. Harry Ann Cabell, as the widow of John J. Cabell, was in the adverse possession of the lot or parcel of ground in controversy, under an assignment of dower or otherwise, the said deed conferred no title upon the said Maurice H. Garland to the said lot or parcel of ground.

The fourth instruction asked, was that fifteen years' adverse possession under claim of title by the defendant and those under whom he claimed, was a bar to the action. And the fifth was, that the 7 like possession *of John J. Cabell for more than five years, and his dying in possession, was a bar to the action.

There was a verdict and judgment for the plaintiff: Whereupon Early applied to this court for a supersedeas, which was awarded.

Stanard and Bouldin, for the appellant.
Garland and Slaughter, for the appellee.

LEE, J. The only questions material to be considered in this case are those on the first, second and third instructions asked for by the defendant. For if at the time of the execution of the deed from Terrill to Lynch or that from the latter to M. H. Garland the premises in controversy were in the actual adversary possession of those under whom the defendant claims such deed could not operate as a transfer of the legal title and as the plaintiff claims no otherwise than through these deeds, he must fail in this action. On the other hand, if at the time of these deeds or either of them, there was no such adversary possession, then any question upon the statute of limitations is out of the case; for even if the Code of 1849 did not extend the period of limitation (a question upon which I express no opinion) still to make out the bar the possession must have been adversary for at least fifteen years before the suit and must therefore have been carried back continuously embracing the period of both deeds to the 21st of December 1834: nor is it necessary to enquire whether the right of entry was tolled by descent cast from Dr. Cabell, because if so tolled, yet if the possession were afterwards surrendered, the descent cast would become immaterial, or if it were abandoned the right of entry would be restored as the law will refer the possession to him who hath the right. Clarke's lessee v. Courtney, 5 Peters' R. 318, 354; Taylor's devisees v. Burnsides, 1 Gratt. 165, 8 191. *Thus the duration and character of Dr. Cabell's possession become unimportant except so far only as the latter may serve to illustrate the character of the possession of those who came in under and after him.

That Micajah Terrill was not himself in possession of the lot in controversy in the suit against Morris at the date of the decree of the 22d of October 1836 nor that of the deed from the commissioner would not of itself suffice to restrict the operation of the deed to a mere transfer of right of entry which he could not transfer to another; nor although he had not yet taken actual possession himself at the time of his conveyance to Lynch does it therefore follow that no title passed to Lynch. Another element is required to prevent those deeds from operating as transfers of the legal title. The lot must not only have been in the possession of another but that possession must have been under such circumstances and accompanied with such a claim of title as would render it adversary to Terrill. Actual possession by the grantor is not indispensable to give effect to his deed, for if the possession held by another be of a fiduciary character or if its origin and continuance were such as not to amount to a disseizin except at the election of the owner for the purposes of the remedy, it will not impede the operation of the deed. Duval v. Bibb, 3 Call 362; Tabb v. Baird, Ibid. 475; Jackson v. Todd, 2 Caines' R. 183; Williams v. Snidow, 4 Leigh 14. As the first instruction therefore merely supposed the want of actual possession in Terrill without at all referring to the character of the possession of those by whom it was in fact held, the court may for this cause have very properly refused to give it.

The second and third instructions would seem to be unexceptionable in the statement of the rule of law which they undertook to propound, and the only ground upon which the refusal to give them is to be 9 *sustained is either that they presented mere abstract propositions irrelevant and immaterial because there was nothing in the evidence upon which to found the hypothetical case assumed, or that the defendant was in some way es-

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topped or concluded from alleging the possession to have been adversary at the periods referred to. The hypothesis was of adversary possession in a party claiming under Dr. Cabell under whom also the defendant claimed both title and possession: and it was not enough that the court should have thought the evidence of the defendant insufficient to make out such possession or that the proofs which he offered were overcome by stronger and more cogent proofs the other way. Whether adversary possession or not depends upon the fact of possession and the circumstances under which it was taken and held, especially the animus of the party holding and whether with a claim of title or without any such claim. Thus it was a matter proper for the jury and if there was any evidence tending to show possession and that it was of an adversary character not consistent with the plaintiff's title, the instructions should not have been refused. For where there is evidence tending to make out the supposed case however inadequate in the opinion of the court or to however little weight it may be deemed entitled it is best and safest to give the instruction if it propound the law correctly. Hopkins v. Richardson, 9 Gratt. 485; Farish v. Reigle, 11 Gratt. 697, 719.

Now it would seem impossible to say there was a total want of evidence tending to make out the adversary possession supposed. There was such proof however much it may have conflicted with other evidence in the case or been overweighed by the opposing proofs of the plaintiff. It was proved that Dr. Cabell enclosed the ground in controversy by a fence which also enclosed another parcel of ground belonging to him, making of the whole an alley thirty
10 feet wide: *that he erected a gate leading from the street into the alley thus enclosed and another gate leading from the same into a back lot on which his mansion-house was situated: that he used the ground so enclosed as an alley and wagon and carriage way to his mansion-house lot up to the time of his death and that he occupied a small building that stood on the ground in dispute as a lodging-house for servants. It was in evidence that after his death the ground in controversy was assigned to his widow as part of her dower in his real estate and was used and enjoyed by her as such up to the time of her death in 1843: that after her death the same was allotted to Mrs. Early, then Miss Henrian Cabell a daughter of Dr. Cabell, along with the mansion-house property, as a part of her share of his estate and had been used and enjoyed by her and her tenants up to the commencement of the suit. It was also proved that the mansion-house lot was so situated and so surrounded by other lots and steep cliffs that the alley consisting of the ground in dispute and other ten feet adjoining was the only practicable way to and from it for carriages and vehicles, and that the small brick building on the disputed ground had been removed by the defendant since the suit. One of the witnesses also deposed that M. H. Garland the father of the plaintiff had on one occasion admitted that the line separating the alley of thirty feet from the residue of the lot which was the line claimed by the defendant was the true line between the lot purchased by him from John Lynch and the property belonging to the estate of Dr. Cabell. It is true there was evidence offered by the plaintiff of various acts and declarations of Dr. Cabell tending to show that his possession never was adversary to the title of the plaintiff nor so regarded by himself. The allegations of his answer and cross bill in the case of Micajah Terrill v. Morris, &c., were referred to in this connexion.
11 But however *persuasive this evidence may have been, still the whole evidence upon the subject was not perfectly reconcilable and it was proper the jury should weigh it and decide upon the controverted fact. Certainly it cannot be said there was no evidence tending to make out the case which the defendant assumed.

But it is said Dr. Cabell was a party in the chancery suit and that the question both of title and possession must be regarded as res adjudicata under the decree of October 1836; and that even if he had never been a party, yet as he was a purchaser pendente lite, those claiming under him are concluded by that decree and thus estopped from setting up any possession as adversary to the title of the plaintiff.

It is true Dr. Cabell was made a party by an amended bill, but he died in August 1834 and his death was suggested on the record in February 1835. The case was however never revived against his heirs, so that they cannot be concluded by the decree of October 1836 upon the principle which binds those who are parties to a cause at the time a judgment or decree is pronounced and thus have had opportunity to make full defence. Nor is there anything on the face of the decree to authorize the court upon a bare inspection to hold them estopped from setting up an adversary possession even anterior to its date in a subsequent action. It does not ascertain that Dr. Cabell was a purchaser pendente lite. That question was not in issue in the cause. The amended bill contains no allegation whatever in reference to the twenty feet now in controversy. The purchase which it imputes to Dr. Cabell was of the other ten feet not now in controversy. Nor does it make Coleman, of whom Dr. Cabell purchased the twenty feet, a party or allude to him in any manner whatever. It is true Dr. Cabell in his answer states that he purchased the lot of Coleman during the pendency of the case in the Court of
12 *appeals and that Coleman had derived his interest from Morris though he does not state clearly when; but there is nothing more in the whole case upon this subject. This cannot amount to an estoppel upon the question of adversary possession, in a subsequent action, upon which the court can undertake to pronounce and hold the party concluded. It was but

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evidence to go to the jury as the admission of Dr. Cabell to have such weight as they might deem it entitled to, in common with the other evidence offered of his acts and declarations. The decree was no adjudication of the question whether Dr. Cabell was a purchaser under such circumstances that he and those claiming under him would be bound thereby, nor could it be conclusive upon that question. It was evidence and conclusive of the fact that such a decree had been rendered, but it was not conclusive as against the heirs of Dr. Cabell who were no parties, and whose ancestor the record itself showed was dead at the time it was pronounced, that that ancestor was such a purchaser. Even as against a party a judgment or decree is held to be conclusive only upon what was brought directly in issue and not upon a matter incidentally brought into controversy. Duchess of Kingston's Case, 20 How. St. Tr. 358, 538; 1 Phil. Ev. 321, Cow. & Hill's n. 557; Arnold v. Arnold, 17 Pick. R. 4; 1 Stark. Ev. (Phil. ed. 1830), p. 198. And as to those who are no parties though it is always evidence to prove that such judgment or decree was rendered yet it is not so as a medium of proof of ulterior facts upon which it was founded or which may be recited in the record. 1 Stark. Ev. 191 and n; 1 Greenl. Ev. § 527, 538. Of necessity in a subsequent and separate suit against one who was no party to the previous cause, but whom it is sought to hold bound by the judgment as a purchaser pendente lite, resort must be had to proof extrinsic to the judgment that he stood in cir-

13 cumstances *which made the judgment so binding upon him. And although in the record there may be an admission or declaration in regard to the fact it is admitted in evidence against him not as a judgment conclusively establishing the fact but as a deliberate declaration or admission that the fact was so, as indeed it might be admitted for such purpose even in favor of a stranger; and it is to be treated according to the principles governing admissions to which class it properly belongs. 1 Greenl. Ev. § 527, a. In this case it will be noticed the plaintiff introduced Robert Morris as a witness before the jury and sought to prove by him that Coleman's authority to sell the lot was acquired and the sale made by him to Dr. Cabell while the case was pending in the Court of appeals.

If the decree then was not conclusive upon its face as to the character of the previous possession, still less could it be so as to that of Mrs. Cabell's possession after the decree under the assignment of dower. And if it even were so as to the former that could be no good reason why it should be so also as to the latter.

No aid is derived to the argument from the cross bill filed by Dr. Cabell or from the fact that the decree was in that case as well as in the original cause, both being heard together. The object of this bill was to assert the right which Dr. Cabell alleged he had acquired by purchase from Morris of his claim against the estate of Charles Terrill and the decree as to it simply provided for the payment to the administrator of Dr. Cabell of the amount agreed to be due. But the heirs were not parties in this cross suit and there is nothing in it to estop them upon the question of adversary possession. The allegations of the bill, like those of the answer in the original suit, would of course be evidence against them, but they belong to the class of admissions not to that of judgments and decrees by which the fact is conclusively established.

14 *Upon the question of adversary possession as presented by the second and third instructions, I think it should have been left to the jury to weigh the evidence and draw from it the proper conclusion. Undoubtedly the court might instruct the jury as to the nature and effect of the lis pendens as it might upon any other question of law involved in the enquiry, but to withdraw the case in this form from the jury by first passing upon a question of fact and then refusing the instructions because in its opinion the evidence failed to prove the case assumed would as it seems to me necessarily involve a confusion of the boundaries separating the province of the court from that which properly belongs to the jury.

What has been said disposes of the fourth, fifth and sixth instructions, also. The seventh was given by the court but the eighth appears to have passed sub silentio. The failure to give it has however not been assigned as error, nor do I perceive in what view it could be with success. But for the refusal of the court to give the second and third instructions, I am of opinion to reverse the judgment and remand the cause for a new trial.

DANIEL and SAMUELS, Js., concurred in the opinion of Lee, J.

ALLEN, P., and MONCURE, J., dissented. They thought that Cabell was a pendente lite purchaser, and that his possession of the lot was not adverse, but permissive.

Judgment reversed.

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15 *Tichenor v. Allen.

Same v. Mosby's Adm'r.

Same v. Clough's Adm'r.

Same v. Ellett.

October Term, 1855, Richmond.

1. **Discharge in Bankruptcy Conclusive upon Creditors**—A decree discharging a bankrupt from his debts under the act of congress of August 19th, 1841, is conclusive upon all his creditors in all suits which may be brought against him in any court, except where the discharge is impeached for some fraud or willful concealment by the bankrupt of his property or rights of property, contrary to the provisions of that act.

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2. **Same—Impeachment of—Grounds.***—Creditors who have not proved their debts in the proceeding in bankruptcy, may institute suits to set aside fraudulent conveyances made by their debtor before he petitioned for the benefit of the bankrupt law; and may impeach his discharge in bankruptcy on the ground of fraud or the willful concealment of his property or rights of property contrary to the provisions of the act of congress; such suit being instituted more than two years after the decree of discharge in bankruptcy.

3. **Same—Same—Courts Which Have Jurisdiction.***—Such suits may be instituted in any court, state or federal, in which, independent of the bankrupt act, a suit may be properly brought against the bankruptcy.†

4. **Same—Limitation of Suits—To Whom Applicable.**—The limitation of two years after the decree in bankruptcy or after the cause of suit shall first have accrued, provided in § 8 of the bankrupt act, has relation to proceedings by or against the assignee in bankruptcy; and does not apply to suits by creditors who have not proved their debts to set aside fraudulent conveyances by the bankrupt. The only effect of this provision on such creditors is to prevent such a suit until the two years have expired.†

5. **Same—Impeachment by Creditor—Grounds—Statute.**‡—A creditor of a discharged bankrupt who has not proved his debt in the proceeding in bankruptcy, may under the statute, Code, ch. 179, § 2, p. 677, file his bill to set aside a fraudulent conveyance made by the bankrupt and impeach his
16 discharge on the ground of *fraud or a willful concealment of his property, without having first recovered a judgment against the bankrupt.§

6. **Fraudulent Conveyance—Bill to Set Aside—Parties.**—In a bill by a creditor to set aside a conveyance of his debtor as fraudulent, a deed of trust having been given by the vendee to secure the purchase money, and the debtor and the trustee in the deed of trust stating in their answers that the bonds given for the purchase money had been assigned by the debtor before the institution of the suit to a person named, the plaintiff should be required to make such person a party to the suit, if upon a rule for the purpose, it appears he is an assignee of any of said bonds.

In the year 1839, and for years previous thereto, Ira Tichenor carried on the coach-making business in the city of Richmond; and he had taken into partnership with him a certain Isaac L. Cary. On the 10th of October 1839 Tichenor executed to Benjamin W. Green two bonds, each for five thousand dollars; one of them payable on the 10th of October 1842 and the other on the 10th of October 1844; and both bearing interest from the date.

On the 19th of October 1839 the first of these bonds was assigned by Green to Joseph Allen, Tichenor having first assured Allen that it should be paid if he took it; and on the 24th of November following the second bond was assigned by Green to G. N. Clough.

On the 5th of March 1840 Tichenor and wife, in consideration, as expressed in the deed, of fifteen thousand dollars, conveyed to Isaac L. Cary one undivided moiety of a lot on Broad street in the city of Richmond, on which was situated Tichenors' coach-making shop, with an undivided moiety of all the buildings thereon, and also one
17 full moiety of all the *vehicles of every description, and the harness complete, then in the shop aforesaid, and of all the tools and materials for carrying on the business.

By deed bearing date on the same day Cary conveyed to Gustavus A. Myers and Hamilton Crenshaw the undivided moiety of the lot and buildings aforesaid in trust to secure the payment of seven single bills, each for two thousand one hundred and forty-two dollars and eighty-one cents, and payable with interest on the 1st of January 1844, 1845, 1846, 1847, 1848, 1849 and 1850. Two of these bonds, with the deed to secure them, were assigned by Tichenor to Joseph Allen on the 1st day of July 1840.

On the 28th day of January 1841 Tichenor and wife, in consideration, as expressed in the deed, of fifteen thousand dollars, conveyed to Cary the other undivided moiety of the said lot and the buildings thereon.

*Discharge in Bankruptcy—Impeachment of—Grounds.—The proposition laid down in the second and third headnotes of the principal case is approved in Beall v. Walker, 26 W. Va. 746, the court saying: "Under the same act (Bankruptcy Act of August 19, 1841) it was held that creditors, who had not proved their debts in the proceedings in bankruptcy, might institute suits to set aside fraudulent conveyances made by their debtor, before he petitioned for the benefit of the bankrupt law, and might impeach his discharge in bankruptcy on the ground of fraud or the willful concealment of his property or rights of property contrary to the provisions of the act of Congress; such suits being instituted more than two years after the decree of discharge in bankruptcy; that such suits might be instituted in any court, State or Federal, in which independent of the bankrupt act a suit might be properly brought against the bankrupt. (Tichenor v. Allen, 13 Gratt. 15.)"

†See the opinion of JUDGE DANIEL for the statute.

‡Same—Same—Statute.—The proposition laid down in the fifth headnote of the principal case, that a creditor of a discharged bankrupt who has not proved his debts in the proceeding in bankruptcy, may under the statute, Va. Code 1849, ch. 179, § 2, file his bill to set aside a fraudulent conveyance made by the bankrupt and impeach his discharge on the ground of fraud or willful concealment of his property, without first having recovered his judgment against the bankrupt, is quoted with approval in Zell Guano Co. v. Heatherly, 38 W. Va. 415, 18 S. E. Rep. 612, following a similar statute in that state; Code of W. Va. 1891, ch. 133, § 2. See also, Watkins v. Wortman, 19 W. Va. 78; Tuft v. Pickering, 28 W. Va. 330; Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 874.

§Code, ch. 179, § 2, p. 677. "A creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift, conveyance, assignment or transfer of or charge upon, the estate of his debtor, which he might institute after obtaining such judgment or decree; and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover."

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And on the same day Cary conveyed the same to James Beale and Robert G. Scott in trust to secure three bonds of five thousand dollars each, payable with interest on the 28th of January 1843, 1844 and 1845. All these deeds were regularly admitted to record.

On the 5th of June 1841 the Bank of Virginia recovered a judgment against Tichenor for two hundred dollars, with interest from the 21st of October 1839 until paid; and he having been taken in execution upon this judgment, on the 8th of October 1841 took the oath of an insolvent debtor, and was discharged from custody; having declared in his schedule that he had no effects, either real or personal, or debts due to him.

In February 1842 Tichenor applied by petition to the judge of the District court of the United States for the eastern district of Virginia for the benefit of the bankrupt law. In the schedule of his debts accompanying his petition are debts ac-
18 knowledged by *him to be justly due to the Bank of Virginia and James D. Ellett. Then follows a list of debts which he says are claimed of him, but their justice is denied. Of these are the debts due to Allen and Clough of five thousand dollars each, and another due to John Mosby of one thousand two hundred dollars. In the schedule of his assets he states that having been constrained to take the oath of an insolvent debtor under the laws of Virginia during the fall of 1841, he had no property of any kind and no debts due to him.

Upon his petition Tichenor was declared a bankrupt, and a commissioner was directed to report an account of his debts. This report was made in July 1842, from which it appears that notice was given to all the creditors, but that none of them appeared before the commissioner to prove their debts. On the 13th of July the decree was made discharging the said Tichenor from all his debts.

In March 1852 Joseph Allen instituted a suit in the Circuit court of Richmond against Tichenor, Cary, Beale and Scott, the trustees in the second deed of trust, and the Bank of Virginia. In his bill he stated the execution of the bond for five thousand dollars by Tichenor to Green, and its assignment by Green to himself; and charged that Tichenor, with a knowledge of that assignment, with intent to defraud him, in fraudulent concert with Cary executed the deed of the 28th of January 1841 to Cary for the pretended consideration of fifteen thousand dollars; and that for the pretended purpose of securing the purchase money in three installments of five thousand dollars each, Cary had executed the deed of trust to Beale and Scott. He charged that the consideration for which the deed purports to be made was false and fictitious; that it never was intended that Cary should pay that money or any money for the property, for that he was without the means to pay for it.
19 That the object of Tichenor *and Cary in making the deeds, was to hold Cary out to the world as the owner of the property, whilst it would remain as it did remain, the property of Tichenor. That when taken under the execution sued out by the Bank of Virginia Tichenor had given in a schedule stating that he had no property or debts due him, which statement was charged to be false, and was made in continuation of the same fraudulent intent; and that he then was and continued still to be the owner of the property. That the trustees had never been called upon to execute the trust, though it could not be pretended that Cary had paid the money. And that Tichenor had continued ever since the execution of the deeds in the occupation of the property and to hold and enjoy it as his own.

The bill stated the application by Tichenor for the benefit of the bankrupt law of the United States, and his discharge by the decree of the District court of the United States; and insisted that it afforded no bar to the plaintiff's suit, because of the fraud and willful concealment by Tichenor of his property, contrary to the provisions of said act. And it proceeded to specify the fraud and concealment, as consisting in concealing his property in said lot and buildings; or if there was a sale to Cary, in concealing his property in the bonds given for the purchase money: And also that he fraudulently omitted to embrace in the schedule accompanying his petition in bankruptcy a large amount of personal property belonging to him, consisting of carriages, harness, tools and stocks of raw materials used in the coachmaking business.

The bill further stated that the proceedings in bankruptcy in the case of said Tichenor had long since terminated. That no step had been taken by Edmund Christian, the assignee in bankruptcy, in said proceedings, or by any creditor therein, or at his instance, to assert any claim against the property herein before
20 *mentioned, or to recover the same, or against Cary or Tichenor or any one else in respect thereof or of the bonds aforesaid. Nor was any objection made in the course of said proceedings, that Tichenor had not surrendered the said property or bonds in his schedule; and that much more than two years had elapsed since Tichenor was declared a bankrupt, and since his discharge and the final termination of all proceedings in the case; and that all such proceedings were then barred by the eighth section of the act of congress before referred to. That the plaintiff was no party to the said proceedings, and in no wise bound thereby. That Christian was dead, and that there was then no assignee in his place.

The bill prayed that if Tichenor relied on his certificate of discharge as a bankrupt, it might be declared null and void. That the two deeds of January 28th, 1841, might be set aside as null and void; and that after satisfying the debt of the Bank of Virginia, the property embraced in said deeds might be subjected to the plaintiff's debt; and for general relief.

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Tichenor answered the bill. He stated the first sale and conveyance of one moiety of the lot, &c., the execution of seven bonds, the payment of two of them by Cary, and the assignment of the other five bonds to David Hayes of the state of New Jersey, who had assigned them to David A. Hayes. That he (Tichenor) assigned the bonds to David Hayes in part satisfaction of a large indebtedness to the said David Hayes, then bona fide and really existing. That in 1841, finding himself involved in pecuniary difficulties, he sold the other moiety of said lot and buildings to Cary at the price of fifteen thousand dollars, for which Cary executed his three bonds each for five thousand dollars; and that the deeds of January 28th, 1841, were executed. That these bonds were also assigned to David Hayes,
21 who had assigned them to *David A. Hayes, who was then the bona fide holder of them. That David Hayes had since died. That these assignments were made on account of a debt which respondent owed to David Hayes. And he denies all fraud in the said deeds and assignments.

He further alleged that the plaintiff had no legal or just demand against him. That though it was true he executed the bond to Green, he in fact executed it for the accommodation of Green, who was to pay the bond when it became due: And he states that he has been informed that the bond was assigned by Green to the plaintiff as a collateral security for certain claims which have been discharged; and that Allen therefore had no right to the bond. He further pleaded his discharge as a bankrupt, and filed the decree of discharge; and he also relied upon the lapse of time. He denied that he had concealed his property or effects from his just creditors, or that he had resorted to any fraudulent means to defeat their claims. He said that the claim on Cary was no longer his; but belonged to David A. Hayes of New Jersey.

Beside the papers referred to in the bill and answer in this case, several depositions were filed in May 1852, which showed that Cary had no means with which to purchase the property mentioned in the deeds to him; and that he had paid no part of the purchase money. That from 1840 to 1846 he was frequently sued for small sums, and though in the early part of that period he paid when sued, towards the latter period he failed to pay, and finally took the benefit of the act for the relief of insolvent debtors, upon an execution issued by a justice for a sum less than twenty dollars. Wellington Goddin, who was plaintiff as administrator in another suit which will be mentioned presently, stated that Cary informed him that the object of the sale was to avoid the payment of some debt to Joseph Al-
22 len; and his impression *from that conversation was that the purchase money was not intended to be paid, but that the sale was only intended to avoid the payment of Tichenor's debts. To this evidence Tichenor excepted. It also appeared that for a time after 1840 the property seemed to be in the joint possession of Tichenor and Cary, but that for some years prior to 1852 it had been in the possession of Tichenor. The trustees had never been required to execute the trust before the suit was brought, except by Allen, and they had never heard of any other owner of the bonds but Tichenor, except the two secured by the first deed which had been assigned by Tichenor to Allen.

In January 1853 Scott, one of the trustees in the second deed of trust, answered the bill. He said that he knew of no fraud or fraudulent design in making the said deed. That he had been informed that Tichenor had assigned Cary's bonds to David Hayes, who had assigned them to David A. Hayes. That Tichenor by his answer had disclosed the facts of said assignments; and although respondent and his co-trustee were on several occasions in the last year required by David A. Hayes to execute the trust, as he was no party to the suit, yet feeling anxious only to act in such manner as to do justice to all parties, and under the hope and expectation that the plaintiff would make said Hayes a party to the suit, no action was taken under said requisitions until lately. That the trustees delayed proceeding, until finding no action taken to make said Hayes a party, and he having forwarded to them the bonds of Cary with the assignments thereon, with a peremptory requisition to proceed and execute the trust, they did, in December 1852, advertise the property for sale, and shortly after the appearance of said advertisement, the plaintiff and others inserted a notice of the pendency of their suits for setting aside said deed as fraudulent. That this
23 *induced the trustees to postpone the sale, stating the fact of the assignment, and renewing the notice that the property would be sold unless they were restrained by the order of some court of competent jurisdiction. That nothing having been done by the plaintiff and the other creditors of Tichenor, the sale was made on the 3d of January 1853, under the said deed of trust, at public auction, when the property was purchased by the agent of David A. Hayes, at the price of five thousand eight hundred dollars, and the trustees would proceed that day to execute to him a conveyance for the same. That the bonds of Cary, with the assignments made by Tichenor to David Hayes, and by David Hayes to David A. Hayes, were enclosed to the trustees in a letter from David A. Hayes, some months before, and were then in respondent's possession, and would be exhibited to the court whenever desired. The advertisements referred to in the answer were filed with it.

After the commencement of the suit of Allen, Wellington Goddin, as administrator with the will annexed of John Mosby deceased, instituted a suit in the same court against all the parties to Allen's suit, including Allen himself. In his bill he stated that his testator, John Mosby, recovered a judgment against Tichenor for one thou-

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sand two hundred and fifty-seven dollars and sixty-seven cents, with interest, which remained unpaid. He then set out both the deeds of Tichenor and wife to Cary, and the deeds of trust and all the other facts stated in Allen's bill; and he charged that all the deeds were fraudulent, and intended to delay and hinder the creditors of Tichenor in the recovery of their debts. He charged that Tichenor's discharge in bankruptcy was obtained by a fraudulent concealment of his property; and the other allegations were substantially the same as in Allen's bill.

24 *Tichenor's answer and the grounds of defense were the same as in the previous case; and he stated the assignments to David and David A. Hayes, as in that case.

Allen, in his answer, stated that he was the assignee of two of the notes given on the first purchased by Cary, which notes he held as collateral security for the note of five thousand dollars, which had been executed by Tichenor to B. W. Green, and by Green assigned to him for value, with the knowledge and concurrence of Tichenor; and he insisted that he became the assignee of the said two notes, with full knowledge of the assignment on the part of Cary, and without any knowledge at the time he took said assignments of the alleged fraudulent transaction between the said Tichenor and Cary, in which the said notes are said to have originated. And he insisted that he was entitled to the protection extended to a purchaser for value without notice. The evidence in this cause was substantially the same as that in the previous case of Allen.

There were two other cases, one by John D. G. Brown, as administrator of George N. Clough deceased, claiming as a creditor of Tichenor by one of the bonds for five thousand dollars before mentioned, executed on the 10th of October 1839 to B. W. Green, and by Green assigned to Clough; and the other by James D. Ellett, claiming a debt of two hundred and fifty dollars, with interest, for which he had recovered a judgment against B. W. Green and Tichenor. The charges in these cases and the defences are similar to those in the case of Mosby's administrator; and need not be set out. The evidence was likewise substantially the same.

On the 5th of February 1853 the Bank of Virginia filed its answer in all the cases, stating that Tichenor had taken the oath of an insolvent debtor at the suit

25 *of the bank, and that the debt was still unpaid: And the trustees, Beale and Scott, also filed a plea in each case: That the court had no jurisdiction of the causes:

1st. Because, that after the making and recording the several conveyances in the bill mentioned, Tichenor became a bankrupt, and was, on the 19th of August 1842, so declared and discharged from all his debts, and duly certificated.

2d. Because, by the act of congress of the United States establishing a system of bankruptcy, it is provided that no suit touching the rights and property of a bankrupt shall be instituted after the lapse of two years from the decree of bankruptcy; and that more than two years did elapse after the decree declaring the said Tichenor a bankrupt was rendered before the institution of this suit.

The answer of Scott was taken as the answer of both the trustees in all the causes.

On the same day the four causes came on together to be heard, when the court held that both the deeds from Tichenor and wife to Cary, and the two deeds of trust executed by Cary were fraudulent and void as to the creditors of Tichenor. That Allen, as assignee of Tichenor, of the two notes secured by the deed of trust of the 5th of March 1840, was not entitled to the benefit of that security. That the trustees in the deeds being before the court, it was not necessary, under the circumstances, that David A. Hayes, as assignee of the bonds secured by the deeds of trust, should be a party. That it was competent for the plaintiffs, as creditors of Tichenor, who had not proved their debts before the commissioner in bankruptcy, to impeach his discharge as fraudulent. That the limitation of two years in the bankrupt act did not apply to these cases. And that the court had jurisdiction to grant relief in the cases.

26 There was thereupon a decree *in favor of each of the plaintiffs and the Bank of Virginia against Tichenor for the amount of their respective debts. And it was further decreed, that if Tichenor did not pay the sums so decreed against him within six months, a commissioner named should proceed to sell the real estate embraced in the deeds aforesaid, in the manner and upon the terms specified in the decree, and deposit the proceeds in one of the banks in Richmond, and make report to the court.

After the foregoing decree had been made, David A. Hayes applied to the court by petition, stating that he was the owner of the real estate mentioned in the deeds aforesaid, by purchase and conveyance to him; and asking that no decree affecting his rights in the said property might be rendered, until he had been made a party in said causes, and allowed the privilege of defense. This petition the court disallowed. And thereupon Tichenor applied to this court for an appeal, which was allowed.

Lyons and Patton, for the appellant, insisted:

1st. That David A. Hayes was a necessary party. That he was the assignee of the bonds to secure which the deeds of trust were executed, and the decree took from him the property upon which he claimed a lien without giving him an opportunity of defending his interest. They referred to Calvert on Parties, p. 1, 2, 17, 17 Law Libr.; Story's Equ. Plead. § 137, 153, 201; Milf. Plead. p. 73; Chowning v. Cox, 1 Rand. 306; Clark v. Long, 4 Rand. 451.

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2d. That by § 8 of the bankrupt act, suits are barred after two years; and here these suits were not brought for ten years after Tichenor's discharge as a bankrupt.

3d. That the discharge of Tichenor was conclusive on all his creditors, whether or not they proved their debts before the commissioner in bankruptcy; unless
27 *it could be shown in the proper proceeding that it was procured by fraud. Dusar v. Murgatroyd, 1 Wash. C. C. R. 13; Peck v. Jenness, 7 How. U. S. R. 612; Colby v. Ledden, Id. 626; Eden on Bankr. 413. That Mosby having obtained his judgment pending the proceedings in bankruptcy, stood on no better footing than those creditors who had no liens. Clark v. Rowling, 3 Coms. R. 216; Fox v. Woodruff, 9 Barb. Sup. C't R. 498. That the fraud which will avoid the discharge must be a fraud in procuring it; and not a fraud perpetrated long before and without any view to such discharge in bankruptcy. Powell v. Knox, 16 Alab. R. 364; Ragly v. Robinson, 19 Alab. R. 404; Shawhan v. Wherritt, 7 How. U. S. R. 627.

4. That by the decree declaring Tichenor a bankrupt, all his property was vested in the assignee in bankruptcy, and only the assignee in bankruptcy, in whom the property was vested, could sue for it. If indeed he refused to sue, the creditors might do so; but the creditors who could thus sue are the creditors who had proved their debts, as they alone were entitled to have the property subjected to the payment of their debts. Richards & als. v. Maryland Ins. Co., 8 Cranch's R. 84.

5th. That there was no fraud in the sales to Cary. The property was sold for its full value, and bonds taken 'for the purchase money, with deeds of trust to secure them. It was difficult to understand how such a transaction could be fraudulent. As to the statements of Cary to Goddin, they were incompetent evidence as against Tichenor; and Goddin being plaintiff in one of the cases, was an incompetent witness.

6th. That even if there was fraud between Tichenor and Cary, there was no proof that the assignee Hayes was a participant in it, or had any knowledge of it. And without bringing home the fraud to him as an assignee for value, he was
28 entitled in equity to the *benefit of the deeds of trust as securities for the debts due to him. Moore v. Holcombe, 3 Leigh 597.

7th. That the Circuit court had no jurisdiction to determine the questions involved in these causes, but that the subject was only cognizable in the courts of the United States. They referred to § 3, 4, 5 of the bankrupt act; Sturges v. Crowningshield, 4 Wheat. R. 122; Ogden v. Saunders, 12 Id. 213; Golden v. Prince, 3 Wash. C. C. R. 313; Eames, ex parte, 2 Story's C. C. R. 322; Newhall, ex parte, Id. 360; Christy, ex parte, 3 How. U. S. R. 292; Norton v. Boyd, Id. 426; Houston v. City Bank of New Orleans, 6 Id. 486; Shawhan v. Wherritt, 7 Id. 627.

A. Johnston and Daniel, for the appellees, insisted:

1st. That the deeds from Tichenor to Cary were fraudulent and void as to creditors; and they reviewed the facts bearing upon that question. As to the admissions of Cary, they referred to Babb v. Clemson, 10 Serg. & Rawle 419; Platt Card v. Walridge, 18 Ohio R. 411; Claytor v. Anthony, 6 Rand. 285.

2d. That the deeds being fraudulent, Tichenor was guilty of a fraudulent concealment of his property in his application for the benefit of the bankrupt law, and by the terms of the statute his discharge did not protect him. And that this fraudulent concealment of his property might be set up in any court where the discharge was relied on as a defense. They referred to Chapman v. Forsyth, 2 How. U. S. R. 202; McLouth v. Rathbone, 19 Ohio R. 21; Alcott v. Avery, 1 Barb. Ch. R. 347; Suidam, Read & Co. v. Walker & als., 16 Ohio R. 122; Mabry, Giller & Walker v. Herndon, 8 Alab. R. 848; The State v. Bethune, 8 Ired. Law R. 139; Bond & Bennett v. Baldwin, 9 Georgia R. 9; Tuway v. Bourn, 2 Burr. R. 716.

3d. That the state court had jurisdiction to impeach the deeds for fraud at the
29 suit of the creditors *of Tichenor, especially those creditors who had not proved their debts before the commissioner in bankruptcy. Christy, ex parte, 3 How. U. S. R. 292; Norton v. Boyd, Id. 426; Mace v. Wells, 7 Id. 272; Peck v. Jenness, Id. 612; Strader v. Baldwin, 9 Id. 261; Linton v. Stanton, 12 Id. 423; Hubbell v. Crump, 11 Paige's R. 310; Lowry v. Morrison, Id. 327; Platt Card v. Walbridge, 18 Ohio R. 411; Davenport v. Bartlett, 9 Alab. R. 179.

4th. That the limitation of two years, prescribed in the 8th section of the statute, only relates to suits by the assignee; and the assignee not having sued in that time, so that his right to sue was at an end, the right of creditors then to sue was revived. Mabry, Giller & Walker v. Herndon, 8 Alab. R. 848, 863; Deadrick v. Armour, 10 Humph. R. 588; Mitford v. Mitford, 9 Ves. R. 87.

5th. That the allegation that Hayes was assignee of the bonds secured by the deeds of trust was an affirmative allegation, which should have been proved; but there was no proof of the fact in the record. Tennant v. Pattons, 6 Leigh 195; Corbin v. Emmerson, 10 Id. 663; Breckenridge v. Auld, 1 Rob. R. 148, 156. That the suggestion in the answers of Tichenor and Scott was not sufficient to induce the court to require the plaintiffs to amend their bills and make Hayes a party. Barbour v. Whitlock, 4 Monr. R. 180; West v. Sanders, 1 A. K. Marsh. R. 108. That Hayes' application to be made a party was in the character of a purchaser of the property, and as such he was a purchaser pendente lite, and not entitled to be made a party. Morton v. Long, 3 A. K. Marsh. R. 415; Barbour v. Whitlock, 4 Monr. 180; West v.

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Sanders, 1 A. K. Marsh. R. 108; Rugely v. Robinson, 19 Alab. R. 404; Camack v. Bisguay, 18 Id. 286.

30 *DANIEL, J. The first question which we have to decide, is that raised and disputed in the several bills and answers, as to the effect of Tichenor's discharge and certificate as a bankrupt. On the part of the appellees, it is charged that Tichenor "was guilty of fraud and willful concealment of his property and rights of property," in several particulars specified in the bills; and they insist that his discharge and certificate consequently present no bar to the recovery which they seek. Whilst he, denying all fraud and concealment, relies on the said discharge and certificate as a complete bar, and insists that though it should be made to appear that the allegations of fraud and concealment were true, there would still be no ground laid for the jurisdiction of the Circuit court.

The fourth section of the bankrupt act of 1841 declares, that "every bankrupt who shall bona fide surrender all his property and rights of property, &c., shall be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him accordingly, upon his petition filed for that purpose. Such certificate not, however, to be granted until after ninety days from the decree of bankruptcy, nor until after seventy days' notice in some public newspaper designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors or other persons in interest may appear and contest the right of the bankrupt thereto. Provided, that in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard
31 to the distance *at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or willful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall willfully omit or refuse to comply with any order or direction of such court, or to conform to any other requisition of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate." If the section stopped here, there would, I think, appear strong ground for maintaining that it was the intention of the act to make the decree allowing the discharge binding, not only on the creditors who might prove their debts, but on all other persons in interest, who had an opportunity of contesting it, and conclusive as well in respect to questions of fraud or willful concealment of his property by the bankrupt, as in relation to any of the other matters which the act allows to be urged as causes for refusing the discharge. It is difficult to conceive on what principle a creditor who had proved his debt, and who had unsuccessfully contested the right of the bankrupt to a discharge, on the ground of his refusal to comply with "some order or direction of the court," could be heard to dispute the validity of the discharge on the same ground in another forum. And I do not perceive how a creditor, who is served with notice of the proceedings, but declines to make any objection, stands on higher ground in this regard. And if this be so, there is, in this portion of the section, nothing which reserves to any of the creditors a right to impeach the discharge, after it is obtained, for "fraud or willful concealment." All the creditors are allowed to contest the right of the bankrupt to a discharge; and all the conditions to be complied with on his part, before his right to the decree is perfected, are placed
32 in the *same category; the creditors have the same right to show his failure to perform any one of these conditions as they have to show his failure to perform any other of them. His right to have a decree might be defeated by showing a willful refusal on his part to comply with "the orders of the court," as effectually as by proving a "willful concealment of his property." And when the bankrupt shows that he has made a bona fide surrender of all his property, and otherwise obeyed all the other requisitions of the act, this portion of the section declares him to be entitled to a full discharge from all his debts. If, therefore, the act said nothing further in relation to the discharge, the jurisdiction of the court being conceded, the conclusiveness of the decree, on all the creditors who might have resisted its allowance, and in respect to all prerequisites, (including absence of fraud on the part of the bankrupt,) would seem, on general principles, to follow as a legitimate consequence. But the section, a part of which we have already quoted, does not stop here. It proceeds, in terms, to declare what shall be the legal effect of the discharge and certificate, and in doing so, presents an entirely different view of the influence of fraud or willful concealment by the bankrupt, on their conclusiveness. It declares, that "such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever; and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or willful concealment by him of his property or rights of property as aforesaid, contrary to the provisions of this act, on prior reasonable notice, specifying in writing such fraud or concealment."

33 *This clause of the section, it is

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perceived, is wholly silent as to all the matters mentioned as prerequisite to the discharge, except the bona fides of the conduct of the bankrupt. The discharge is declared liable to impeachment for his "fraud or willful concealment," but for nothing else. To that extent, and to that extent only, a conclusive character is denied to the discharge; but is it not denied to that extent fully and in all regards? What is there in the terms employed which would exclude any creditor from the benefit of this proviso? I can perceive none. And I can conceive of no process of reasoning, founded on this section of the act, which would place a creditor in the predicament to be bound by the discharge in other respects, that would not at the same time show him entitled to impeach the discharge for fraud. If the design to debar any of the creditors of the bankrupt of this right is to be found in the act, reference must be had to some other section for its disclosure. I have been unable to discover any language in the act, which, by fair interpretation, can be regarded as having such an aspect, unless perhaps it may be found in one of the clauses in the proviso to the 5th section. That section, after declaring that all creditors, who shall come in and prove their debts in the manner prescribed by the act, shall be entitled to share in the bankrupt's property and effects, provides, among other things, "that no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall thereby be deemed to have waived all right of action and suit against such bankrupt." Whether this clause is to be construed into an inhibition on any of the creditors to open the discharge for fraud, is a question which it is obviously unnecessary for us to decide. Such inhibition can, by the terms of the clause, reach only those creditors who come in and
34 *prove their debts; and, as appears by the report of the commissioner in bankruptcy, none of the appellees (indeed none of Tichenor's creditors) proved or appeared to prove their debts.

The same clause of the fourth section, which declares the effect of the discharge, ascertains clearly, as I conceive, the tribunals or "courts" in which the impeachment of the discharge for fraud may be had. Jurisdiction over the matter is, by obvious implication, conferred on every court in which a suit may, independent of the act, be properly brought against the bankrupt. In the language of the court in the case of Mabry, Giller & Walker v. Herndon, 8 Alab. R. 857, "I cannot understand, by the terms 'all courts of justice,' and 'any court of judicature whatever,' that none other than the federal courts are competent to entertain an objection to the validity of the discharge and certificate of a bankrupt. In employing words of most extensive application and import, when every thing said was, or at least should have been, well considered, it cannot be contended that congress designed to convey a meaning much more limited than is expressed. The fair and natural inference is, that as the discharge and certificate, when duly granted, were effectual in all judicial tribunals in which they should be drawn in question, so they should be invalid in every court in which the bankrupt was sued and relied on them as a bar, if impeachable for any of the causes for which they are declared to be inoperative. If competent for congress to have withheld from the state courts the right to examine the validity of a bankrupt's discharge for extrinsic objections, it is enough to say that this has not only not been done, but that the power has been conferred in terms of unequivocal signification."

These views are fully sustained by numerous decisions of the supreme courts
35 of other states, and are *not in conflict with any decision of the Supreme court of the United States which I have seen. Bond & Bennett v. Baldwin, 9 Georgia R. 9; Beckman v. Wilson, 9 Metc. R. 434; Gupton v. Connor, &c., 11 Humph. R. 287; Humphreys v. Swett, 31 Maine R. 192; Wales v. Lyon, 2 Mich. R. 276; Dorimus, Suidam & Co. v. Walker, 8 Alab. R. 194.

It seems to me, therefore, that it was competent for the appellees to impeach Tichenor's discharge and certificate on the grounds of fraud alleged in the bills, and that the Circuit court had jurisdiction over the question of its validity.

And I do not perceive how the decree in bankruptcy operated as any bar to the jurisdiction which the Circuit court would otherwise have had to hear and determine the matters of controversy, litigated in the cause, in respect to the property conveyed by the several deeds in the bills and proceedings mentioned. It is true that all the property and rights of property of Tichenor were, upon his obtaining the decree declaring him a bankrupt, vested in his assignee in bankruptcy. And it may be conceded that there was a period during which it was competent for the assignee to have instituted suits for the purpose of recovering from any alienee or assignee of Tichenor, property or evidences of debt held by them in virtue of conveyances or assignments made by him, in fraud of his creditors, previously to his being declared a bankrupt; and that during such period such alienees and assignees might have relied on the outstanding title of the assignee in bankruptcy as a defense to suits instituted for a like purpose by creditors of Tichenor seeking to recover in derogation of such title. But that period had passed long before the institution of this suit, the right of the assignee to institute suits for the purpose of recovering the property of the bankrupt, from the adverse holders of it,
36 *being, by the 8th section of the bankrupt act, limited to two years after the decree of bankruptcy, or after the cause of suit shall first have accrued. During that period no suit was instituted by

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him to recover the property in controversy; nor indeed did any exigency arise making it necessary for him, in the performance of the duties of his trust, to institute such suit, as none of the creditors came in to prove their debts; no occasion presented itself calling for the prosecution of the rights of action with which he was temporarily clothed, and they were suffered to expire under the limitation imposed by the law which conferred them.

The creditors who are seeking to subject the property of Tichenor to the payment of their demands, claim nothing by virtue of his assignment in bankruptcy. They do not invoke the aid of the bankrupt law, nor do they seek to interfere with any right of the assignee under it. The appellees, Ellet and the Bank of Virginia, are seeking to enforce liens which had been acquired by them under the laws of the state before Tichenor was declared a bankrupt. Such liens, so far from being invalidated by the act, are expressly recognized in the proviso of the second section; and it is now well settled that the jurisdiction of the federal courts to enforce such liens, is not in exclusion of a like jurisdiction in the state courts. Russell v. Cheatham, 8 Smeades & Marsh. 703; Talbert v. Melton, 9 Id. 9; McCance v. Taylor, 10 Gratt. 580. The jurisdiction of the Circuit court to extend to the appellees Allen, Mosby's administrator and Clough's administrator, the aid sought by them in their several bills, in subjecting Tichenor's property to their demands, is, I think, equally clear, and equally free from the objection of involving an encroachment on the rights of the assignee in bankruptcy, or any claiming under him. The claim of Mosby's
37 administrator is founded on a *judgment obtained against Tichenor in 1842, since the decree in bankruptcy; and upon showing that Tichenor's discharge was procured by fraud, the right of Allen and of Clough's administrator to obtain judgments against him upon their debts, would stand on the same footing as if he had never been declared a bankrupt; and for all the purposes of the jurisdiction of a court of equity, the second section of the 179th chapter of the Code of 1849 places them (on proof of their allegations) on the same footing as if they had obtained judgments against Tichenor before filing their bills. To enforce such judgments against the property of Tichenor in the hands of his fraudulent alienees, would now, on account of the facts already adverted to, defeat no purpose or policy of the bankrupt law, nor interfere, in any manner, with the right of the bankrupt court to administer the assets of the bankrupt.

In a suit brought by the assignee in bankruptcy or any claiming under him, the alienees of Tichenor might rely on the limitation of two years prescribed for such suits. But such defense, so far from presenting a bar to the claims of the creditors in this suit, just mentioned, shows a state of facts remitting them to the rights which they had before the decree in bankruptcy, and protecting the alienees from all danger of being subjected to a double recovery. No effort has ever been made by the assignee in bankruptcy, or any claiming under him, to disturb Cary or his trustees, or the assignees of his bonds, in the enjoyment of any rights which they may have acquired by the conveyances and assignments under which they claim; and no effort of the kind could now be of any avail. They are no longer exposed to demands founded on the proceedings in bankruptcy, and they can no longer set up those proceedings as a defense against those creditors of Tichenor who are in a condition to enquire into the fairness and va-
38 lidity of his conveyances *and assignments. It seems to me that the Circuit court had full jurisdiction of the controversy, and power to determine the conflicting claims of the parties, uninfluenced by the proceedings in bankruptcy. But it seems to me that the Circuit court erred in proceeding to render a decree in the absence of David A. Hayes. Upon the supposition of the truth of the averments contained in the answers of Tichenor and the trustee Scott, he may have most important interests in the controversy, rendering it proper that he should be made a party before the subject is disposed of. For though the deeds from Tichenor to Cary and from Cary to his trustees should, upon a final hearing of the cause, be adjudged to be void as to the creditors of Tichenor, it would not, I think, necessarily follow that assignees, for value without notice, of the bonds given by Cary, might not have a better right to subject the property to the payment of the bonds than any creditor of Tichenor, who did not claim by some lien on the property, acquired prior to the execution of the deeds. No proof was offered of the assignment to Hayes, other than the affidavits of Tichenor and Scott.

These affidavits, however, furnished a sufficient ground for justifying and requiring the court to make a rule on the plaintiffs in the several suits, to show cause why the said Hayes should not be made a party.

And without expressing any opinion as to the extent and nature of the interests in the cause, which may be held by Hayes, or by Allen as assignee of the two bonds which he claims to hold as collateral security for the debt claimed by him in his bill, I think that the cause should be remanded in order that, unless the plaintiffs in the several bills will amend them, and make Hayes a party thereto, they be compelled to do so, if, upon the hearing of a rule to show cause why they should not make him a party,
39 first granted, it *shall appear that the said Hayes is an assignee of any of the bonds given by Cary to Tichenor, as averred in the answers of Tichenor and Scott; and in order for further proceedings, &c.

The other judges concurred in the opinion of Daniel, J.

Decree reversed.

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40 ***Baltimore & Ohio R. R. Co. v. City of Wheeling.**

October Term, 1855, Richmond.

1. **Injunctions—Violation of—Contempt Proceeding, How Reviewed.***—A proceeding for a contempt in disobeying an injunction is not an order in the cause; but it is in the nature of a criminal proceeding, and the judgment in such a proceeding can only be reviewed by a superior tribunal by writ of error, and not always in that way.

2. **Same—Order Overruling Motion to Dissolve—When Appealable.†**—An order overruling a motion to dissolve an injunction may be appealed from, if the principles of the cause are thereby adjudicated; and this though such an order is made in vacation.‡

3. **Same—Same—When Not Appealable.**—The court, for good cause shown, may overrule a motion to dissolve an injunction and continue it to the hearing, without adjudicating the principles of the cause; in which case no appeal will lie from the order.

4. **Same—Same—When Appeal Refused Even Though Principles Are Adjudicated.§**—Where the principles of the cause are adjudicated by such order, an appeal may be refused, if the court or judge to whom the petition of appeal is presented deems it most proper that the cause should be proceeded in further in the court below before an appeal is allowed therein. And if, in such case, an appeal is allowed, it may be dismissed as prematurely allowed.‖

5. **Same—Motion to Dissolve—Objections to.**—In a case which is purely an injunction cause, the parties having had time to prepare the case, and having taken testimony to support their respective pretensions, and it not being probable that any other facts can be brought into the cause which will affect its principles, a motion was made in vacation to dissolve the injunction, on the ground that it was improvidently awarded, and upon the
41 cause *as it then stood. The hearing of the motion was objected to: 1st. Because a foreign corporation, which was a party, had not answered. 2d. Because exceptions had been filed to the sufficiency of the answer of the defendant, which were still pending and undetermined. 3d. Because the answer of the defendant, a corporation, was not verified by affidavit. The judge heard the motion, but refused to dissolve the injunction, and continued it until further order or decree. HELD:

1. **Same—Same—Refusal to Dissolve—Principles Adjudicated—Appeal.**—The refusal of the judge to dissolve the injunction adjudicated the principles of the cause to the extent that the injunction had not been improvidently awarded; and that the cause, as it then stood, ought to be continued. It is therefore such an order as may be appealed from; and it is a proper case for appeal at once.

2. **Same—Same—Failure of Foreign Corporation to Answer—Not Grounds to Refuse Dissolution.¶**—That the defendant which had not answered being a foreign corporation, which could not be compelled to answer, and the answer not being required for a discovery; the absence of such answer is not ground for refusing to dissolve the injunction.

3. **Same—Same—Objections to.**—That as upon a motion to dissolve an injunction all the allegations of the bill, which are not denied by the answer, are taken as true, it is no objection to the motion to dissolve, that the exceptions to the answer for insufficiency had not been acted on.

***Contempt Proceeding—How Reviewed.**—For the proposition laid down in the first headnote of the principal case that, a proceeding for a contempt is in the nature of a criminal proceeding and the judgment in such a proceeding can only be reviewed by a superior tribunal by writ of error, and not always in that way, the principal case is cited and followed in Ruhl v. Ruhl, 24 W. Va. 283; McMillan v. Hickman, 35 W. Va. 714, 14 S. E. Rep. 230; State v. Irwin, 30 W. Va. 415, 4 S. E. Rep. 419.

In addition to the above authorities, see division 3, H., monographic *note* on "Contempts" appended to Wells v. Com., 21 Gratt. 500.

†Injunctions—Order Overruling Motion to Dissolve—When Appealable.—For the proposition laid down in the principal case that an order overruling a motion to dissolve an injunction may be appealed from, if the principles of the case are thereby adjudicated, the principal case is cited and approved in Kahn v. Kerngood, 80 Va. 344; Bristow v. Home Bldg. Co., 91 Va. 23, 20 S. E. Rep. 946; Vance v. Snyder, 6 W. Va. 29; Gallaher v. Moundsville, 34 W. Va. 736, 12 S. E. Rep. 861; *note* to London-Virginia Min. Co. v. Moore, 6 Va. Law Reg. 44. See, in accord, Talley v. Tyree, 2 Rob. 500; Lomax v. Picot, 2 Rand. 247. See, in general, monographic note on "Injunctions."

‡Code, ch. 182, § 2, p. 682. "A person who is a party to" "any case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of the cause, or to any civil case, wherein there is a final judgment, decree or order, may present a petition, if the case be in chancery, for an appeal from the decree or order, or if not in chancery, for a writ of error or supersedeas to the judgment or order, except," &c.

§Same—Same—When Appeal Refused Even Though the Principles Are Adjudicated.—For the proposition that, where the principles of the cause are adjudicated by such order, an appeal may be refused, if the court or judge to whom the petition of appeal is presented deems it most proper that the cause should be proceeded in further in the court below before an appeal is allowed therein, see principal case cited and followed in Kahn v. Kerngood, 80 Va. 346.

‖Code, ch. 182, § 10, p. 684. "The petition shall be rejected when it is for an appeal from an interlocutory decree or order, in a case which the court or judge to whom it is presented deems it most proper should be proceeded in farther in the court below, before an appeal is allowed therein."

¶Same—Same—Failure of Foreign Corporation to Answer—Not Grounds for Refusal to Dissolve.—In N. & W. Ry. Co. v. Old Dominion Baggage Co., 97 Va. 90, 33 S. E. Rep. 385, it is said, citing the principal case, "As a general rule, subject to some exceptions, an injunction, properly granted, will not be dissolved until the defendant has answered." The principal case seems to be one of the exceptions, for it holds, that one of the defendants which had not answered being a foreign corporation, which could not be compelled to answer, and the answer not being required for a discovery, the absence of such answer is not ground for refusing to dissolve the injunction.

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4. **Same—Same—Unsworn Answer of Corporation a Mere Pleading.***—As a corporation cannot be sworn, it must put in its answer under its common seal only. Not being sworn to, it is not evidence for the corporation, though responsive to the bill; but it puts in issue the allegations of the bill to which it responds: and this as well upon a motion to dissolve the injunction, as upon the hearing.

6. **Statutes—Construction of—Case at Bar.**†—The act of March 6th, 1847, Sess. Acts, ch. 99, p. 86, in securing to the city of Wheeling the benefits of the western terminus of the Baltimore and Ohio rail road, does not forbid said company to connect with the Ohio river or a rail road in the state of Ohio, at any point between the mouth of Grave creek and Wheeling.‡

7. **Same—Same—Same.**—To induce the Baltimore and Ohio Rail Road Company to accept the act of March 6th, 1847, the city of Wheeling and the company entered into a contract, by which Wheeling undertook to do certain things therein specified; and the committee of the company agreed to recommend to it to accept said act: "It being the intention of the parties to the agreement, among other things, to secure to the city of Wheeling the practical benefits of the terminus of the Baltimore and Ohio rail road, according to the provi-
42 sions of said *law." The company is not forbidden by the contract to connect with the Ohio river, or a rail road in the state of Ohio, at any point between the mouth of Grave creek and Wheeling.

8. **Same—Same—Case at Bar.**—The Baltimore and Ohio Rail Road Company having been subjected by the act of March 6th, 1847, to the provisions of the act in relation to rail roads, passed March 11th, 1837, "so far as the same are properly applicable;" under this last act, the company has power to make a branch road from the line of her road to low water mark on the Ohio river, between Grave creek and Wheeling, in order to form a connection with the river, and with a rail road in Ohio, terminating opposite on the other bank of the river.‡

9. **Corporations—When Stockholder Has a Right to Enjoin Action of.**—Although a stockholder in a corporation may enjoin it from employing the property or powers of the corporation for a purpose wholly or materially different from that which was designed by the act of incorporation, yet it has no right to enjoin it from doing what is in direct furtherance of the object of its creation, and it is for the benefit of all the stockholders as such; though it may be injurious to such stockholders in another character; or the interest of some other person or the public may be injuriously affected by the work about to be executed.

In November 1854, the city of Wheeling applied to the judge of the Circuit court of Marshall county for an injunction to restrain the Baltimore and Ohio Rail Road Company from forming a connection with the Central Ohio rail road at Benwood, a place on the Ohio river about four miles southwest of Wheeling. In the bill it was set out that the general assembly of Virginia, on the 6th of March 1847, passed the act entitled "An act to authorize the Baltimore and Ohio Rail Road Company to construct the extension of their rail road through the territory of Virginia," thereby intending, among other purposes, "to secure to the said city of Wheeling the benefits of the western terminus" of that road. That the act is framed with a view to require the business of the road at the Ohio river to be transacted or concentrated in the city of Wheeling as "the western terminus." That after the passage of
43 this act a contract in writing *was made between the said company and the said city, dated the 6th day of July 1847, and duly ratified by both parties during the year; it being the intention of the parties, as expressed in the contract, among other things, "to secure to the city of Wheeling the practical benefits of the western terminus of the Baltimore and Ohio rail road, according to the provisions of said law." That it was the duty of the said company so to exercise the privilege conferred upon it by the state as to secure to the said city the practical benefits of the said western terminus. That the practical benefits contemplated by the parties were the transaction in said city of the business between the rail road and the Ohio river, and that between said road and the Central Ohio rail road.

The bill further set out the performance by the city of Wheeling of the stipulations of the aforesaid contract, and especially that the city had subscribed for stock of the company to the amount of five hundred thousand dollars, and was a stockholder to that amount; though in fact at the time the subscription was made and since, the stock was worth little more than half that sum; and it was well understood at the time by the parties to the contract aforesaid, that the chief inducement to the city of Wheeling to make the said subscription and the donations and grants mentioned in said contract, was the expected practical benefits of the western terminus of the road, and not the value of the stock.

It was further stated, that in direct and manifest violation of these obligations of the law and the said contract, the Baltimore and Ohio Rail Road Company were engaged in the construction of certain works

*Same—Same—Unsworn Answer of Corporation a Mere Pleading.—For the proposition that, as a corporation cannot be sworn it must put in its answer under its common seal only, and the answer not being sworn to, is not evidence for the corporation, though responsive to the bill, but puts in issue the allegations of the bill to which it responds, and this as well upon a motion to dissolve the injunction, as upon the hearing, the principal case is cited and followed in the following cases: Teter v. West Virginia Cent., etc., Ry. Co., 35 W. Va. 433, 14 S. E. Rep. 147; Miller v. Aracoma, 30 W. Va. 612, 5 S. E. Rep. 151; 1 Va. Law Reg. 152. See, in accord, Roanoke St. Ry. Co. v. Hicks, 96 Va. 510, 32 S. E. Rep. 295. See generally, monographic note on "Private Corporations."

†Statutes—Construction of.—See the principal case cited and followed in Blanton v. R., F. & P. R. Co., 86 Va. 623, 10 S. E. Rep. 925.

‡See the opinion of JUDGE MONCURE for the statutes.

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at and near Benwood, a place on the east bank of the Ohio river, about four miles southwestward of their depot in the city of Wheeling, for the purpose of there receiving and delivering the travel of the Cen-
44 tral *Ohio rail road; and for the same purpose had adopted and approved, in conjunction with the said Central Ohio Company, certain plans for the ferriage of such traffic and travel across the Ohio river at that place. And that the same structures were adapted and designed for making transfers of freight and passengers to the Baltimore and Ohio rail road from vessels navigating the Ohio river, and to the latter from the former.

The bill further stated, that the road of the Baltimore and Ohio Rail Road Company having been built near the hills, this connection at Benwood could not be made without great expense; and it described the works which the company was constructing. These consisted of a branch road extending from the main track down the bank of the river, and into it to low water mark, the whole being about two thousand feet in length, and a large embankment being made into the river for about three hundred feet, upon which a wharf was to be constructed. Just opposite this structure was one like it, erected by the Central Ohio Company; and by the agreement between the companies, the latter was to run a steamer from the one wharf to the other for the transportation of freight and passengers. And it was charged that the object of this structure was illegal, and in violation of the contract between the city of Wheeling and the Baltimore and Ohio Rail Road Company; that the expenditure of the money of the company upon the work was an improper application of the funds of the company; and that the embankment and wharf extended into the river would be injurious to its navigation.

It is further stated, that the Central Ohio Company is authorized by its charter to extend its road to a point opposite the city of Wheeling; and such had been the declared purpose of that company, until the Baltimore and Ohio Rail Road Com-
45 pany had consented *to make the structures and have the connection between the two roads at Benwood. And it is charged that said company has no authority to make the agreement entered into with the Ohio company.

It is further stated, that the Baltimore and Ohio Rail Road Company have illegally agreed to lend to the Central Ohio Rail Road Company the effects of the former company to the amount of four hundred thousand dollars, being bonds of the Northwestern Virginia Rail Road Company. That this loan was made to enable the Ohio company sooner to accomplish the said connection at Benwood; and was wholly unauthorized by any law of this state, and was in violation of the rights of the city of Wheeling as a stockholder as aforesaid.

It is charged that the city of Wheeling will be injured by the action of the Baltimore and Ohio Rail Road Company, in being thereby deprived of the practical benefits of the western terminus of the road; that as owner of wharfs in the city, from which a revenue is derived, the city will be materially injured, and also as a stockholder of the company; and that the injuries which would be done by the completion of the works at Benwood would be great and irreparable.

The Baltimore and Ohio Rail Road Company and the Central Ohio Rail Road Company were made defendants to the bill, and called upon to answer. And the prayer of the bill was for an injunction to restrain them and each of them from parting with any of the bonds of the Northwestern Rail Road Company aforesaid. That the Baltimore and Ohio Rail Road Company, their officers and agents, might be restrained from carrying into effect the said contract, or any contract between them and the Central Ohio Rail Road Company, or any contract, agreement or arrangement between their respective officers, in pursuance
46 of *which the one of said defendants was to receive from or deliver to the other, at or near Benwood, freight or passengers carried on the rail road of one of them, and to be carried on the rail road of the other, or in pursuance whereof the Baltimore and Ohio Rail Road Company were constructing or were to construct or complete any such works at or near Benwood as they were constructing or about to construct as aforesaid; or to use the same or any part thereof, or to use, employ, or run any such steamboat as aforesaid, or to make any such loan as aforesaid to the Central Ohio Rail Road Company; and to restrain the Baltimore and Ohio Rail Road Company, their officers and agents, from doing any such acts, whether in pursuance of such contract, agreement or arrangement as last aforesaid or not; and from constructing or completing, at or near Benwood, any wharf, pier or embankment within or below the banks of the Ohio river, or connecting the same with their rail road; from receiving or delivering, at or near the same place, goods, &c., freight or passengers, to be carried on the Central Ohio rail road, or which had been carried on said rail road; and from making any expenditure of money, structures or arrangements, or doing any other act designed or tending to cause or induce freight or passengers, brought from or destined for the Central Ohio rail road or the Ohio river, to be received or delivered on or from the said Baltimore and Ohio rail road, at or near Benwood aforesaid; or to cause or induce any business connected with their rail road, which, without such act or acts on their part, might probably be transacted at Wheeling, to be done or transacted at Benwood; from forming any connection with the Central Ohio rail road at that place; and from obstructing the navigation of the Ohio river by making or completing any wharf, pier or other structure, within the bed or between the banks thereof; or

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47 *from doing any other act of the like nature with those herein before specified, designed or tending to take away or withhold from the city of Wheeling the practical benefits of the western terminus of the Baltimore and Ohio rail road, or to injure the interests or violate the rights of the said city as a stockholder in the Baltimore and Ohio Rail Road Company, or as interested in the navigation of the Ohio river. That all such structures made by the said company within the bed or between the banks of the Ohio river might be abated and removed; and for general relief.

The application for an injunction was made to the judge in vacation, upon notice to the Baltimore and Ohio Rail Road Company; and that company and the city of Wheeling having appeared by counsel, the judge awarded the injunction substantially according to the prayer of the bill.

At the April rules for 1855 the Baltimore and Ohio Rail Road Company filed its answer. The company, whilst it admitted the act of 1847 and the contract with the city of Wheeling, referred to in the bill, strenuously contested the construction put upon them in the bill, and referred to their several provisions, as well as the past action of the general assembly and the company, as showing conclusively that the construction insisted on by the city of Wheeling was erroneous; and that both under the law and the agreement the company was entitled to form a connection with the Central Ohio rail road at Benwood, and had authority to make the branch road from its main track to the river, and do all other things which had been done by it to form that connection. The answer admits that it was expected at the time the agreement was made, that the Central Ohio Company would terminate its road opposite Wheeling, and avers that the Baltimore Company desired and endeavored to induce said company to do so: But it was an independent

48 *company, over which the Baltimore and Ohio Rail Road Company had no authoritative control; and judging for itself of its own interests, it had determined to terminate its road, at least for the present, at Bellair, opposite Benwood. It denies that the practical benefits of the terminus which it was intended that Wheeling should enjoy, were such as are stated in the bill. It admits the compliance by Wheeling with the terms of the agreement. And it admits that at the time the injunction was granted they were employed in the construction of works substantially the same as described in the bill, for the purpose of facilitating the connection with the Central Ohio rail road at Benwood, both as to trade and travel; but they deny that these works have reference to the river trade, as the latter would be more convenient to them received at Wheeling. They were advised, however, that if any freight was offered at Benwood, which is a regular station of the company, they could not decline it. They deny that the works constructed by them would in any manner obstruct the navigation of the river; and if it did, they insist that the plaintiff has no right to raise such a question in this form of proceeding: And they demur to so much of the bill as relates to this subject.

The answer further denies that there was any specific agreement between them and the Central Ohio Rail Road Company as to said works or ferry boat. There was simply a concert of action to subserve the mutual convenience of both parties; nor had the Baltimore and Ohio Rail Road Company any interest in the ferry boat referred to. But if such had been the case, they had a right to enter into such an agreement or arrangement as charged in the bill.

The answer further denies that the expenditures were unnecessary, wasteful or illegal. It admits the loan to the Central Ohio rail road of four hundred

49 *thousand dollars, as charged in the bill, but denies that the transaction was illegal or injudicious; and whatever might be its true character, it was not a proper subject of enquiry in this cause; and this part of the bill is demurred to. They say that this loan was in no manner connected with the connection at Benwood; and that these bonds, whether properly or improperly loaned, as above mentioned, have long since been transferred to said Central Ohio Rail Road Company, and are therefore alike beyond the control of the respondents and the court.

They deny that they have in any manner interfered to injure or affect the proper rights and interests of the plaintiff, in yielding to the necessity arising from no act of theirs, of forming the proposed connection with the Central Ohio rail road at Benwood; a right which they are advised properly belongs to them, and which a due regard to the interests of those whom they represent required them to exercise.

The answer was not sworn to, but was under the corporate seal of the company. To this answer the plaintiff filed numerous exceptions for the failure to respond to special allegations in the bill. The cause was, on the motion of the defendant, set for hearing on the bill and answer. And on motion of the plaintiff, the exceptions were set down for hearing and argument at the next term. And the cause was set for hearing as to the Central Ohio Rail Road Company.

At the May term of the court for Marshall county, the plaintiff moved the court for a fine and sequestration, for the contempt of the company in willfully disobeying the order of injunction made in the cause; and a rule was made upon the company to show cause against it upon a certain day in the term.

Upon the hearing of the rule, a number of affidavits and depositions in relation to the action of the Baltimore and Ohio Company were read, which satisfied

50 *the court that the injunction had been violated by the company. But whilst it held that there had been a viola-

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tion of the injunction, yet being of opinion that it was not committed with a willful intent to disobey the order of the court, the rule was discharged upon the payment of the costs thereof by the Baltimore and Ohio Rail Road Company. And the court then proceeded to explain in its order what action by the company would be a violation of the injunction.

On the 12th of May 1855, the Baltimore and Ohio Rail Road Company gave notice to the city of Wheeling that on the 5th of June the company would move the judge in vacation for a dissolution of the injunction. And on that day the parties appeared before the judge, when the counsel of the company moved for the dissolution of the injunction, as well upon the ground that the said order of injunction had been improvidently awarded, as upon the cause as it then stood: And thereupon the plaintiff offered the affidavit of its counsel, and objected to the said motion and to the determination thereof, until a sufficient answer should be filed by the defendant; and also by the other defendant, the Central Ohio Rail Road Company: And also objected, that the Baltimore and Ohio Rail Road Company was not entitled to move for such dissolution upon its answer theretofore filed, because it was not verified by affidavit. And the said matters being argued, upon consideration thereof the judge overruled the motion to dissolve, and ordered that the injunction be continued until further order or decree. And the clerk of the Circuit court of Marshall was directed to enter the certificate of the judge's order among the records of said court.

The affidavit of the counsel stated that he had endeavored, by such means as occurred to him to be legal and effective, to mature the cause as well against the Central Ohio Rail Road Company as the
51 other defendant, *and to obtain the answer of that company; and that he considered it material for the interests of his client that the Central Ohio Rail Road Company should appear and answer the bill. And he stated that almost continually since the said injunction was issued he had been engaged in different courts, so that he had been unable to collect and take the testimony which he considered material for the complainant in the cause.

Beside a mass of documentary evidence, and the affidavits and depositions taken upon the proceeding for contempt, the examinations of the president of the Baltimore and Ohio Rail Road Company and of one other of its officers, taken upon interrogatories, were filed in the cause. The evidence is sufficiently stated by Judge Moncure in his opinion.

The judge having refused to dissolve the injunction, the Baltimore and Ohio Rail Road Company applied to this court for an appeal, both from the order in the proceeding for contempt and from that refusing to dissolve the injunction; which was allowed.

A. Hunter, Patton and Robinson, for the appellant, insisted:

1st. That it was not competent for Wheeling to raise the question whether the navigation of the Ohio river was injured by the construction of the embankment and pier to low water mark, by the Baltimore and Ohio Rail Road Company. That is a question, as they insisted, which can only be raised by the state in a proper proceeding for the purpose. They referred to Beveridge v. Lacey, 3 Rand. 63; O'Brien v. Norwich & Worcester R. R. Co., 17 Conn. R. 372; City of Georgetown v. Alexandria Canal Co., 12 Peters' R. 91; Bigelow v. Hartford Bridge Co., 14 Conn. R. 565; Corning v. Lowerre, 6 John. Ch. R. 439; Crowder v. Tinkler, 19 Ves. R. 617; Dimes v.
52 Petley, 69 Eng. C. L. R. 276. *And they insisted, that in fact there was no obstruction to the navigation.

2d. That it was not a case in which the city of Wheeling, as a stockholder, had a right to come into equity to enjoin the expenditure of money in constructing the works at Benwood, or the loan of the bonds to the Central Ohio Railroad Company. That the loan was not made to enable that company to construct its works at Bellair, opposite Benwood, with a view to the connection of the two roads, but to enable the company to reach the river: and that the expenditure of money in forming the connection was essential to the prosperity of the Baltimore and Ohio Rail Road Company; and the policy of that connection, if the company was authorized to make it, no stockholder of the company, looking to his interest as a stockholder, could for a moment doubt. That in fact the city of Wheeling was endeavoring to use its character of a stockholder to sustain what it deemed its interests as a city. That the only ground on which a stockholder can come into equity in such a case is, where the company is about to apply its effects to an illegal purpose; and then the power will be exercised with great caution, and only where the damage would be irreparable. Ffooks v. London and Southwestern Railway Co., 19 Eng. Law & Equ. R. 7; Graham v. Birkenhead & C. Co., 6 Eng. Law & Equ. R. 132.

3d. That an appeal lies from an order in vacation refusing to dissolve an injunction. That this was so formerly; Lomax v. Picot, 2 Rand. 247; Talley v. Tyree, 2 Rob. R. 500; and that the Code of 1849 was still more explicit. Code, ch. 182, § 2, p. 682; Penn v. Whiteheads, 12 Gratt. 74.

4th. That under the act of March 6th, 1847, which expressly subjected the Baltimore and Ohio Rail Road Company to the provisions of the general rail road law, Code, ch. 61, § 1, p. 316, that company
53 had the *power to construct the branch road at Benwood; and that instead of there being any provision in the act which, either in its terms or by implication, forbade the company to connect with other roads elsewhere than at Wheeling, its provisions plainly showed that such a power was understood to exist as to any point between Grave creek and Wheeling. And

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the act also showed that instead of securing to Wheeling the benefits of the terminus of the road, by forbidding the connection with other roads elsewhere than at Wheeling, that act provided other means for effecting this object. They referred to § 4 of the act, to show that it recognized the existence of the power to make a branch of the road; § 2, to show what were the means relied on to give to Wheeling the benefit of the terminus; and to § 6, to show that the company is also protected. They further denied that the benefits of the terminus of the road contemplated by the statute were such as were claimed by the city of Wheeling. They also referred to the previous and subsequent legislation of the state of Virginia and to the previous action of the company, to show what was the true meaning of the act of March 6th, 1847.

5th. That the agreement between the city of Wheeling and the company did not give the city any greater rights as to the benefits of the western terminus, than was conferred by the act of March 6th, 1847. And they further insisted that the agreement was so indefinite and uncertain in its terms that a court of equity would not enforce a specific execution of it. They referred to James v. Cochrane, 7 Welsb. Hurlst. & Gord. 170; Aspdin v. Austin, 48 Eng. C. L. R. 671; Dunn v. Sayles, Id. 685; Kemble v. Kean, 6 Simons R. 333, 9 Cond. Eng. Ch. R. 296; Kimberley v. Jennings, Id. 340, Id. 300; Baldwin v. Society for the Diffusion of Useful Knowledge, 9 Id. 393, 16 Id. 394; 2 Eden on Inj. 365, note.

54 *6th. That the judgment upon the proceeding for contempt was erroneous, because the original order of injunction was improper. Benwood was a regular station, at which the company was bound by law under a penalty to receive all passengers and freight that were offered. Drewry v. Thacker, 3 Swanst. R. 546; 2 Eden on Inj. 363.

Russell, for the appellee, insisted:

1st. That the appeal ought not to have been allowed from the judgment in the proceeding for contempt, because it was not an order in the cause, but a judgment in a criminal proceeding at the suit of the commonwealth. And the judgment was correct. 3 Eng. Law and Equ. R. 263; Ogden v. Gibbons, 4 John. Ch. R. 174.

2d. That no appeal lies from a refusal of the judge in vacation to dissolve the injunction. And in this case the order of the judge does not adjudge the principles of the cause, and therefore no appeal lies. Code, ch. 182, § 2, p. 682. At least only the bill can be regarded on the appeal, because the order adjudicated the principles only, if at all, by affirming that the bill contains sufficient equity.

3d. That the city of Wheeling, as a stockholder in the company, had a right to come into equity to enjoin the execution of the illegal contract between the Baltimore and Ohio Rail Road Company and the Central Ohio Company for making the connection at Benwood; and also to enjoin the Baltimore and Ohio Company from constructing a work or expending money not authorized by its charter: And of this character, he insisted, was the building a pier in the bed of the river; the transportation of freight and passengers to and from the state of Ohio by ferriage, &c.; and the loan to the Central Ohio Rail Road Company. He referred to Beman v.

55 Rufford, 6 Eng. Law *& Equ. R. 106; Winch v. Birkenhead Lanc. & Chesh. Junc. Railway Co., 13 Id. 506; Code, ch. 62, § 3, p. 326; Dimmett v. Eskridge, 6 Munf. 308, 311; Inhabitants of Springfield v. Connecticut River R. R. Co., 4 Cush. R. 63; Rex v. Trafford, 20 Eng. C. L. R. 498; Trafford v. The King, 21 Id. 272; Rex v. Ward, 31 Id. 92; Peavey v. Calais R. R. Co., 30 Maine R. 498. To show the rule in construing the powers of corporations, he referred to State of Ohio v. Granville Alexandria Soc., 11 Ohio R. 1, 12; State of Ohio v. Washington Social Library Co., Id. 96; Moorehead v. Little Miami R. R. Co., 17 Id. 340; People v. Utica Ins. Co., 15 John. R. 358, 381; New York Fire Ins. Co. v. Ely, 2 Cow. R. 699; Beaty v. Knowler's lessee, 4 Peters' R. 152; Simpson v. Denison, 13 Eng. Law & Equ. R. 359; and New York & Sharon Canal Co. v. Fulton Bank, 7 Wend. R. 412; and insisted that according to the principle established in these cases, the contract between the two rail road companies, establishing between them a partnership in transporting from one state to another, &c., was unauthorized by the charter of the Baltimore and Ohio Rail Road Company. Middle Bridge Corporation v. Marks, 26 Maine R. 326.

4th. That the acts enjoined were illegal, because they were in conflict with the provisions of the company's charter intended to secure to Wheeling the benefit of the western terminus of the road. And that Wheeling would be entitled to enforce these provisions by injunction, even if she had no contract with the company. Blakemore v. Glamorganshire Canal Nav., 6 Cond. Eng. Ch. R. 544; Coats v. Clarence Railway Co., 1 Russ. & Mylne 181, 4 Cond. Eng. Ch. R. 378; Livingston v. Van Ingen, 9 John. R. 507, 585. But that if this were otherwise, the law, he insisted, was incorporated in the contract between Wheeling and the company, and she might sue to enforce the provisions of the law as parts of

56 her contract. And to aid *in the construction of both, he gave a history of the transactions between the parties, and of the legislation of the state on the same subject; and also a statement of extrinsic circumstances existing at the date of the charter and the contract, and having relation thereto.

5th. To show that the paper on which he relied was an agreement binding on the company, he referred to Shepherd's Touchstone 162; Foster v. Mapes, 1 Leonard's R. 324; Hill v. Carr, 1 Ch. Cas. 294; Hallis v. Carr, 2 Mod. R. 86; Rigly v. Great Western Railway Co., 14 Mees. & Welsb. 811; East-

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erly v. Sampson, 19 Eng. C. L. R. 188, 17 Id. 431; Saltoun v. Houston, 8 Id. 368; Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Rail Road Co., 4 Gill & John. 1, 129; Newby v. Forsyth, 3 Gratt. 308; Seddon v. Senate, 13 East's R. 63; Duke of St. Albans v. Ellis, 16 Id. 352.

6th. He insisted, that as by the charter of the company Wheeling was entitled to the benefits of the western terminus of the road, the company could not, unless specially authorized, do any act to defeat that benefit, although the act be of a class which was lawful for such corporations generally. Nor could the enumeration of particular means for securing that object absolve the company from the duty of abstaining from all efforts to defeat the object by the exercise of mere general franchises; especially when its charter explicitly confers these general powers only, "so far as properly applicable." Nothing less than an express grant of power to do the very act in the very case could justify acts opposed to the general purpose. He referred to Angel & Ames on Corporations, p. 84, 96; 2 Kent's Com. 298; People v. Utica Ins. Co., 15 John. R. 358, 380; London & Brighton R. R. Co. v. Cooper, 2 Eng. Railr. & Can. Cas. 229; Blakemore v. Glamorganshire Canal Nav., 6 Cond. Eng. Ch. R. 544. That this was so under the charter; and that the agreement by the company "to secure to
57 Wheeling the practical *benefits of the terminus," rendered it only still more obligatory upon the company to abstain from every act which could defeat that object. That agreement, interpreted in good faith, signified to Wheeling that the company would so exercise its powers and privileges, under the law, as to secure to her these practical benefits as far as it lawfully could. Or at the very least, that it would not voluntarily exercise or abuse those powers so as to defeat her just expectations as to these benefits, unless obliged by law to do so.

MONCURE, J. Before the merits of this case are considered, it is necessary to dispose of several preliminary questions.

1. As to the order of the Circuit court in the proceeding for contempt. It is not an interlocutory order made in the cause; much less an order adjudicating the principles of the cause. A contempt of court is in the nature of a criminal offense; and the proceeding for its punishment is in the nature of a criminal proceeding. The judgment in such a proceeding can be reviewed, by a superior tribunal, only by writ of error, and not always in that way. Code, p. 682, ch. 182, § 2; p. 737, ch. 194, § 24, 25, 26 and 27; and p. 779, ch. 209, § 1 and 4. This appeal, so far as it is from that order, must therefore be dismissed.

2. As to the objection that no appeal lies from the other order; it being a mere refusal of the judge in vacation to dissolve the injunction, and not an order adjudicating the principles of the cause. There seems to be no substantial difference between the provision on this subject in the Code, p. 682, ch. 182, § 2, and the law as it existed when the Code took effect. In Lomax v. Picot, 2 Rand. 247, it was decided that an order overruling a motion to dissolve an injunction might come within the terms of the law allowing appeals from interlocutory orders, and within the
58 mischief *intended to be remedied by that law. The appeal in that case was from such an order, and the court entertained jurisdiction of it. In Talley v. Tyree, 2 Rob. R. 500, it was held, in accordance with Lomax v. Picot, that an appeal lies to this court from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted. The law under which those two cases were decided being the same in effect with the provision on the subject in the Code, they maintain the right of appeal from the order in this case. That order adjudicated the principles of the cause, if any order overruling a motion to dissolve an injunction can have that effect. The court, for good cause shown, may refuse to dissolve an injunction and continue it to the hearing, without adjudicating the principles of the cause; in which case of course no appeal would lie from the order. And even when the principles of the cause are adjudicated by the order, an appeal may be refused, if the court or judge to whom the petition therefor is presented deems it most proper that the cause should be proceeded in farther in the court below before an appeal is allowed therein. Code, p. 684, ch. 182, § 10. Or if an appeal is allowed in such a case, it may be dismissed as having been prematurely allowed, if the court deems it most proper that the cause should be farther proceeded in as aforesaid. The order for the injunction in this case was made by the judge in vacation on the 22d of November 1854. It was made on due notice of the motion therefor to the Baltimore and Ohio Rail Road Company, and after hearing the argument of the counsel of both parties. The reasons of the judge for making the order were given at length, in writing, from which it appears that he then fully considered the principles of the cause as they appeared in the bill and exhibits. The injunction was not perfected by the execution of process until
59 March *1855. The appellants filed their answer on the 30th of April, and on the 12th of May gave notice to the appellee of a motion to dissolve, to be made to the judge in vacation on the 5th day of June next following. On that day the parties appeared by counsel before the judge, and the motion was accordingly made. It was made as well upon the distinct ground that the injunction had been improvidently awarded, as upon the cause as it then stood. The appellee objected to the motion, and to the determination thereof, on the grounds, 1, that the Central Ohio Rail Road Company had not filed an answer; 2, that exceptions had been taken to the sufficiency of the answer of the appellants, which were

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still pending and undetermined; and 3, that that answer was not verified by affidavit. The said matters being argued by counsel and considered by the judge, he (for the reasons given at the hearing of the motion for the injunction, and filed with the order refusing to dissolve it, and upon the authority of certain cases referred to,) overruled the motion to dissolve, and directed the order of injunction to be continued until further order or decree.

Both parties had taken depositions to sustain their respective allegations in the bill and answer; and those depositions formed part of the cause as it stood when the motion to dissolve was made. The refusal of the judge to dissolve the injunction adjudicated the principles to this extent, that the injunction had not been improvidently awarded, and that as the cause then stood it ought still to be continued. It is therefore such an order as may be appealed from. And it does not seem most proper that the cause should be proceeded in farther in the court below, before an appeal is allowed therein. The parties had ample time to prepare and it seems did fully prepare, the cause for the decision of its principles. It is not probable that any other fact will be
60 brought into it *which can at all affect them. It is mainly, if not entirely, an injunction cause, in which the most summary proceedings compatible with its correct decision seem to be proper. Irreparable mischief may be done, not only by denying, but also by granting and refusing to dissolve an injunction. The legislature has provided the most summary means of relief in both cases, and has authorized an application to a judge in vacation, not only to grant, but to dissolve an injunction. An order refusing to dissolve an injunction seems, therefore, to be peculiarly within the meaning and object of the law authorizing appeals from interlocutory orders adjudicating the principles of a cause. That the order in this case was made in vacation can make no difference. It is an interlocutory order made by authority of law in the cause, and comes within the letter as well as the spirit of the law in regard to appeals. In Penn v. Whiteheads, 12 Gratt. 74, this court entertained jurisdiction of an appeal from such an order, and affirmed it so far as it overruled the motion to dissolve, but reversed it in other respects. That case at least shows that it is no objection to the appeal in this case that the order appealed from was made in vacation.

3. As to the objection that the Central Ohio Rail Road Company had not filed an answer. It is a general rule that an injunction, properly granted, will not be dissolved until all the defendants have answered. But to this rule there are many exceptions. 2 Rob. Pr. 242; Adams' Equity 196, and note 1. It may be dissolved upon the answer of one or more defendants within whose knowledge the facts charged specially or exclusively lie, or upon whom the gravamen of the charge rests; and this, too, where all the defendants are implicated in the same charge, and the answer of all can and ought to come in, if the plaintiff has not taken the requisite steps, with
61 reasonable diligence, to *expedite his cause. See the cases cited in the note to Adams, above referred to. In this case the appellee cannot be charged with any want of diligence in expediting the cause. But the Central Ohio Rail Road Company is a foreign corporation, and cannot be compelled to file an answer. An opportunity will be afforded to the plaintiff, in a proper case, to enforce an answer from all the defendants, before a motion will be heard to dissolve an injunction properly granted; but there can be no reason for affording such an opportunity as to defendants who are out of the jurisdiction of the court, and cannot be compelled to answer. Again, the answer of the Central Ohio Rail Road Company is not required for the purpose of discovery. None of the officers or members of the corporation are made defendants, as might have been done for that purpose; and it is not perceived what effect an answer from that company could have upon the right of the appellants to have the injunction dissolved. Where a discovery is required of a defendant who may be compelled to make it, the answer, though it may not be evidence against a co-defendant, may yet properly have some effect in preventing or postponing a dissolution of the injunction.

4. As to the objection that the appellants' answer was insufficient. This objection is answered by the rule that upon a motion to dissolve an injunction on bill and answer, the facts alleged in the bill and not denied by the answer, are taken to be true; which is the most that the appellee could obtain from a full answer. None of the officers or members of the Baltimore and Ohio Rail Road Company are made defendants, as they might have been, for the purpose of discovery. But the president of the company was examined as a witness, and answered all the interrogatories propounded to him by the appellee.

5. As to the objection that the ap-
62 pellants' answer *was not verified by affidavit. A corporation cannot be sworn, and therefore must put in its answer under its common seal only. Story's Eq. Pl. § 235. If the plaintiff wishes to have a sworn answer, he must make some of the officers or members of the corporation parties. The answer of a corporation not being verified by affidavit, is no evidence for the defendant, though responsive to the bill. But it at least has the effect of putting the allegation to which it responds in issue, and of imposing on the plaintiff the burden of proving it. This is, undoubtedly, its effect on the hearing of the cause; and it is not perceived why the same effect does not exist on a motion to dissolve. That it does, was decided by Judge Washington in Haight v. Proprietors of Morris Aqueduct, 4 Wash. C. C. R. 601. The case of Fulton

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Bank v. New York & Sharon Canal Company, 1 Paige's R. 311, seems to be contra. But the circumstances in that case were peculiar. The case of the Union Bank of Georgetown v. Geary, 5 Peters' R. 99, tends to sustain the case in 4 Wash. supra. The difficulty in that case was in not giving to the answer of a corporation, under its common seal, the same effect as to the sworn answer of an individual. But the court inclined to adopt it as a general rule, that an answer not under oath is to be considered merely as a denial of the allegations in the bill, analogous to the general issue at law, so as to put the complainant to the proof of such allegation. Even if it would have been improper to have dissolved the injunction in this case on the bill and answer only, it might still have been proper to have done so in the condition in which the case stood when the motion was made.

It may be remarked, in reference to all of the three last mentioned objections, that whether they are well or ill founded, it was error to refuse to dissolve the injunction if it was improvidently awarded.

63 *Having disposed of all the preliminary questions, I will proceed to consider whether, on the merits, the motion to dissolve the injunction was properly overruled.

Wheeling claims to have the acts complained of enjoined, because they are in violation of her rights; first, under the act of March 6, 1847; secondly, under the contract of July 6, 1847; and, thirdly, as a stockholder. And,

First: Under the act of March 6, 1847.

Wheeling claims that under this act the benefits of the western terminus of the Baltimore and Ohio rail road are secured to her; that the appellants had no power to do, or were bound to refrain from doing, any thing which might deprive her of any of these benefits; and that the acts enjoined would have that effect, and therefore are unlawful. On the other hand, the appellants contend that they have done every thing they were bound to do to secure to Wheeling the benefits of the western terminus; that their interest and duty required them to connect at Benwood with the Central Ohio rail road, which terminated on the opposite side of the river at Bellair; that they were expressly authorized by the act to make such a connection; and that in doing the acts enjoined they were doing no more than was necessary to enable them to effect that object. Let us see what are the relative rights of the parties. And to enable us to do so we must look to the act itself, and as far as may be necessary, to the preceding acts in pari materia, and to the surrounding facts.

The first Virginia act on the subject of the road, the act of March 8, 1827, which re-enacted, with modifications, the Maryland charter passed in the preceding month, did not fix any definite terminus, but required that the road should not strike the Ohio lower down than the mouth of

64 the Little Kanawha. *In the succeeding year an act was passed by Pennsylvania, authorizing the company to make the road through that state, on condition of making it, or a branch, to Pittsburg. Under the acts of these three states, the company had a broad river front, as they call it, extending from Pittsburg to the mouth of the Little Kanawha, in which to select a terminus. It seems they selected two, Wheeling and Pittsburg. But the time limited by these acts expired, leaving the work unfinished beyond Harpers Ferry. In 1836, 1837 and 1838, other acts were passed by Virginia, assuming that Wheeling was to be the terminus, authorizing conditional subscriptions to the work by Wheeling and the state, and extending the period of its completion to 1843. But this period also expired, leaving the work unfinished beyond Cumberland.

Pennsylvania, it seems, was unwilling to renew the permission to make the road through that state, except on condition of making Pittsburg the terminus; and the company could get to the Ohio river at no other point but by passing through the territory of Virginia, without passing through that of Pennsylvania. They accordingly made an application to the legislature at the session of 1843–'44 for the privilege of extending their road to the Ohio, without restriction as to terminus, except that it should be north of the mouth of the Little Kanawha, as in the original act of 1827. "This, (in the language of the learned counsel for Wheeling,) was the opening of the controversy between the company and Wheeling." The application failed. It was renewed at the session of 1844–'45, and again failed. But an act was then passed, (Sess. Acts, p. 69,) the first section of which authorized the company to construct their road, in whole or in part, through the territory of this state, "so as to terminate and strike the Ohio river at the city of Wheeling;" and in the 17th section it was declared that "no part

65 *of this act shall be so construed as to authorize or permit the said company to construct their said rail road, or any branch thereof, to any point on the Ohio river below the said city of Wheeling." The act contained many other provisions objectionable to the company, and they rejected it. In 1845–'46 another act was passed, repealing some of the objectionable features of the act of 1844–'45, but leaving the provisions as to the route and terminus in force. Sess. Acts, p. 88. This act was not accepted. At the next session of the legislature, the act of March 6, 1847, was passed; which was accepted, (after the contract with Wheeling of July 6, 1847, was entered into). The terms of this act and the relative rights of the parties under it, are now to be considered.

The first section authorizes the company to complete their road through the territory of the state, so as to pass from a point in the ravine of Buffalo creek at or near the mouth of Piles' fork to a depot to be established by said company on the northern side

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of Wheeling creek in the city of Wheeling, by such route as, upon minute estimates, &c., shall appear to be the cheapest upon which to construct, maintain and work said road. Provided that it should not be made to enter the ravine of the Ohio river at any point further south than the mouth of Fish creek: or at any point further south than Grave creek, if Wheeling would pay the excess of the cost of the latter over the former route.

The second section is in these words: "That to secure to the said city of Wheeling the benefit of the western terminus, all parts of the said railroad between the Monongahela river and said terminus, shall be opened for the transportation of freight and passengers simultaneously; and the aggregate charge for toll and transportation, upon freight and passengers respectively, shall be the same between
66 Baltimore and *any point on said road within a direct distance of five miles from the Ohio river, as between Baltimore and Wheeling."

The 6th section declares, "that the said company shall be subject to the provisions of the act of assembly passed on the 11th day of March 1837, establishing general regulations for the incorporation of rail road companies, with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable;" and a proviso is added as to charges on way trade and travel.

The 9th section authorizes Wheeling to subscribe to the capital stock of the company such sum not exceeding one million dollars, and upon such terms as may be agreed upon between the council of said city and said railroad company.

By the 11th section, the act is to be accepted in six months, and the road to be begun in three years, and completed in twelve.

By the 25th section of the general rail road law above referred to, authority is given to the president and directors of a company, which is subject to that law, to make branches or lateral rail roads in any direction whatever, in connection with their rail road, not exceeding ten miles in length, &c. This provision is to be considered as much a part of the act of March 6, 1847, as if it had been embodied therein in totidem verbis, if it be "properly applicable." The appellants contend that it is so applicable, and under it claim the right to make the connection at Benwood. On the other hand, Wheeling contends that it is not so applicable; at least to the extent of authorizing that connection. She does not deny that the provision is applicable to some extent; that it confers on the company the branching power. Indeed, the
4th section of the act of March 6, 1847,
67 expressly recognizes the *existence of such a power. But she contends that it must be taken in subordination to the main intent of the act to confer on her the practical benefit of the western terminus; and that it cannot be so exercised as to contravene that benefit: especially, that it cannot be exercised for the purpose of connecting with the Ohio river or the improvements on the other side, except at Wheeling. This is the main, if not the only hinge on which this controversy turns.

I am of opinion that the provision is applicable, and does authorize the connection in question. What was the state of things when the act was passed? Wheeling had desired not only that the road should run to her, but run and terminate in such a way as that it could make no connection with the river or improvements beyond it but in that city. The company had desired so to run and terminate the road as to be in a position to make the most favorable connections with those great highways. The legislature had favored the views of Wheeling, and passed the acts of 1845 and 1846. But those acts could have no effect without the consent of the company. The road was to be made with their money, and would cost about six million dollars. They were unwilling to expend and risk so large a sum without more favorable terms than those acts presented, and therefore declined to accept them. The route to Pittsburg was still within their power; and some of the stockholders, it seems, desired to pursue that route. But a majority were still anxious to terminate the road at or below Wheeling. It very clearly appeared that if it passed through Virginia, it must terminate at Wheeling: and the company were willing to make it to Wheeling, provided they could pursue such a route as would place them in a position to make the connections they desired. There were two great rail roads
then in a course of construction in
68 Ohio, and approaching *the river: The Central Ohio road passing through the centre of the state, and the Cincinnati and Marietta road passing through the southern part. The company desired to connect with both of these roads. They supposed that by running their road to the river at the mouth of Fishing creek, and thence up the river about forty miles to Wheeling, the object they had in view would be effected. They would then have it in their power to connect with those roads at any point or points in all that river front of forty miles, which the termination of those roads on the river might render necessary. They accordingly proposed to the legislature, at the session of 1846-'47, so to run their road. Their proposition was rejected, and the act of that session was passed, the terms of which have already been referred to. Wheeling was in favor of it; and her object was the passage of such an act as would be most apt to attain her views, and at the same time hold out sufficient inducements to its acceptance by the company.

In this state of things, it was important that the act should plainly express the intention of the legislature; that nothing should be intended which was not expressed,

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and nothing expressed which was not intended, in order that there might be no mistake on either side. When, therefore, the legislature by that act gave to the company the branching power without any express restriction, it cannot be fairly presumed that they intended to restrict it. If they had so intended, they ought and would have said so expressly. It was known that the company desired to make connections wherever they could do so to advantage; especially with the river and roads beyond it. And it was known that it might be necessary to connect with those roads below Wheeling, should they terminate below that city. With this knowledge, the act was passed.

69 *Another important fact, tending to show that such a restriction as is contended for was not intended, is, that in the act of 1845, which was rejected by the company, the branching power was given in precisely the same terms as in the act of 1847, but with an express restriction to prevent the road or a branch from striking the river below Wheeling. Why, then, was this express restriction in the act of 1845 left out of the act of 1847, if it was not by design; and because it was known that, with its insertion, the latter act would have shared the fate of its predecessors, and been rejected by the company? We are irresistibly led to the conclusion, then, that the omission was by design.

It was doubtless the desire of the legislature, as well as of Wheeling and the company, that all the connections with the river and the improvements beyond it should be made in Wheeling. But the subject was not entirely within their control. The Ohio companies might terminate their works according to their pleasure, and would do so according to their interest. They were embarrassed; and want of funds might prevent them from reaching Wheeling. It was proper, therefore, that the appellants should be left free to make connections wherever necessity might require and the location of their road along the river might enable them. Wheeling, not being able to do better, was willing to incur this risk for the sake of the benefits she expected to derive from the road. It was expressly required to terminate at Wheeling: That benefit she would certainly obtain by its construction; the benefit of a direct and continuous rail way to one of the largest and most important Atlantic cities; the benefit of daily arrivals and departures of rail road trains from and to that city; and all the local benefits necessarily incident to the terminus of a great rail road. She desired benefits beyond these—the ben-

70 efit *of connections between that and other roads within her limits. But she expected to obtain them by the advantages of her position, her wealth, trade, population and importance; which she hoped and expected would be sufficient to attract to her limits all connections which might otherwise have been made at some other point of the road within its limited river front of ten or twenty miles. For these expected benefits the company did not stipulate by the acceptance of the act, except to the extent of a compliance with its terms. It does contain terms which were intended to promote the attainment of these benefits. But these very terms plainly indicate that the company would have the power to make connections below Wheeling, if necessary. The first section, requiring the road not to enter the ravine of the Ohio lower down than a certain point, shows that Wheeling was to incur the risk of intermediate connections. The second section shows the same thing. In requiring all parts of the road between the Monongahela and Wheeling to be opened for transportation simultaneously, and the aggregate charge for toll and transportation to be the same between Baltimore and any point on the road within five miles of the Ohio river as between Baltimore and Wheeling, it was intended to give to Wheeling these advantages in attracting connections to her limits, but not to prohibit them elsewhere.

These being the relative rights of the parties under the act of March 6, 1847, have the rights of Wheeling been violated by the appellants? They made the road within the time and along the route prescribed by the act. It terminates in Wheeling, to and from which all the through trains run, and where all the depots and other structures suitable to the terminus of such a road have been erected, and where a large force of officers, clerks, mechanics and laborers are constantly employed. The requisi-

71 tions of the 2d section have *been strictly complied with; or, at least, there is no complaint in that respect. And the only complaint on the part of Wheeling, is of the connection at Benwood. Is that a violation of her rights under the act? I think not. I think they had a right to make it, under their branching power. They deny that the necessity which has arisen to make it was the result of any act or course of policy on their part: And in support of this denial, they refer to and exhibit a letter of their late president, Mr. Swann, in reply to one from the president of the Central Ohio rail road of December 18, 1849, made an exhibit with the bill, in which the writer says, "This company have no intention of making a terminus at any other point than the city of Wheeling: nor could I advise you to locate your work under any expectation of this company doing more than making their road under their Virginia charter, to its terminus on the Ohio river at that city. The whole road from the Ohio river to the city of Wheeling will be put under contract at the same time, and pressed to completion, so as to be opened simultaneously throughout its entire length."

It appears, from the evidence of Mr. Harrison, the present president, and Mr. Done, master of transportation, that the company had no agency, directly or indirectly, in the selection of the route of the Central

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Ohio road, or in causing it to stop at Bellair. These witnesses say they were anxious to connect with that road through Wheeling, and endeavored to effect that object, but the president of that road refused, and insisted on the connection between Benwood and Bellair. The appellants, then, had to choose between the alternatives of that direct connection and the circuitous and uncertain one through Wheeling; in the latter case, subjecting passengers to the inconvenience of an additional journey of eight miles, one-half of it by water or in an omnibus, according to the state of
72 navigation, *and to the danger of being delayed on their way by not arriving in time to make the connection; and subjecting themselves, in their competition with other great rival roads, to the disadvantage of such a break. They chose the former, as it was their interest, and I think their right to do. Suppose the Central Ohio road had terminated opposite Moundsville, at the mouth of Grave creek, where the Baltimore road first enters the ravine of the river, and ten or eleven miles below Wheeling, would a connection at that point have been unlawful? It is necessary to maintain that it would, in order to carry out the principle contended for by Wheeling in regard to the connection at Benwood. And so also, if the Cincinnati and Marietta road should reach and terminate at a point opposite Moundsville.

If the company have the right to make the connection at Benwood, it is their right and duty to provide all proper facilities to effect the object in a manner most convenient for their travel and trade; and there is nothing in the manner of making the connection which can give Wheeling a right, under the act of 1847, to complain.

The next question to be considered is as to her rights:

Secondly: Under the contract of July 6, 1847.

So much of what has been said under the preceding head is applicable to this, that it will not be necessary to say much more. I am of opinion that there is nothing in this contract which can restrain the right to make the connection in question any more than in the act of 1847. The contract was obviously designed on the part of Wheeling to induce the company to accept the act, and prosecute at their earliest convenience the construction of the road. It consists almost entirely of terms to be fulfilled on the part of Wheeling. She agreed,
73 1, to grant ten acres of land *for a depot; 2, to secure the right of way within her limits; 3, to subscribe five hundred thousand dollars to the stock of the company; 4, to waive, sub modo, the control given her by the act of 1847 over the selection of routes between Fish creek and Grave creek; and 5, to be bound by the contract so soon as the stockholders of the company should accept the act of March 6, 1847, and agree to prosecute, at the earliest convenience of the company, the construction of the road from Cumberland to Wheeling. The acceptance of the act and early prosecution of the work seem here to be the only consideration for the stipulations made on the part of Wheeling; and this is not affected by any thing that follows in the contract; which contains four other paragraphs: The first of which provides for the return to Wheeling of the amount paid on account of her subscription and cost of depots and interest, in case the road should not be made in time. The second is an agreement on the part of the committee of the company to convene a meeting of the stockholders at as early a day as practicable, and to recommend to them the acceptance of the conditions above referred to. The third is in these words: "It being the intention of the parties to this agreement, among other things, to secure to the city of Wheeling the practical benefits of the western terminus of the Baltimore and Ohio rail road, according to the provisions of the said law." The fourth declares the understanding to be, that the necessary surveys and estimates should be made, and the route decided upon, as soon after the ratification of the agreement by both parties as the company should find convenient.

If any additional obligation is imposed on the company, it is by the third of the four paragraphs above mentioned. It is difficult to perceive the precise purpose for which that paragraph was inserted. Without making any speculations on the
74 subject, it is enough *to say that, in my opinion, it imposes no additional obligation on the company. The words "according to the provisions of the said law," with which the paragraph closes, expressly limits the security referred to, to a compliance with the provisions of the law. It therefore only raises the question which I have already fully considered under the preceding head. Certainly the company, unwilling to accept the act without further inducements from Wheeling, would not have agreed to surrender a right secured to them by that act; especially a right so important to enable them to make the connections they had so long desired. Wheeling knew they desired to make them, and might have an opportunity of doing so at any point in all their river front. She knew they had the branching power, without any express restriction in the act. And if she desired to restrain them, she ought to have done so expressly in the contract. Had she insisted on such a restriction, it would doubtless have resulted in a rejection of the act. The strict rule of construction contended for in regard to charters of incorporation, certainly do not apply to a contract made between two corporations. The waiver by Wheeling of her control over the selection of routes, (thus giving the company, as they then supposed, the right to enter the ravine of the river as low down as Fish creek, twenty-eight miles below Wheeling, instead of Grave creek, eleven miles below,) serves strongly to show that, instead of giving up the right to make favorable connections below Wheel-

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ing, the company desired and intended by the contract to enlarge that right, by extending their river front. That such was their desire and intention, and such their understanding of the contract, plainly appears from the report of the committee, (made in pursuance of a stipulation contained in the contract,) recommending the acceptance of the act and ratification
75 of the contract, *to the stockholders. Upon that recommendation the act was accepted and the contract ratified.

It now only remains to be considered, whether the rights of Wheeling have been violated:

Thirdly: As a stockholder.

The ground on which she bases her claim to relief as a stockholder is, that the acts enjoined are unlawful; and therefore any stockholder of the company may have an injunction to restrain them. Some of these acts are said to be unlawful, without respect to their effect on Wheeling as the terminus; and others, only because in contravention of the purposes of the law to secure to her the benefits of the terminus. I have already disposed of the latter. The former only remain to be considered under this head. As enumerated by the counsel for Wheeling, they are, 1. The construction of a pier in the bed of the river, with a rail way track upon it; 2. The contract with the Central Ohio Rail Road Company; 3. The transportation of freight and passengers to and from the state of Ohio by ferriage, &c.; and 4. The loan to that company. The appellants deny that they have violated, or intended to violate, the law in any of these respects. But I deem it unnecessary to enquire how far the appellants are implicated in these acts, or whether the said acts or any of them be in themselves unlawful or not; as I am decidedly of opinion that, even if they be so, the claim of Wheeling as a stockholder to have them enjoined cannot be maintained. Undoubtedly there are cases in which a stockholder may be entitled to this mode of relief. Cases, for instance, in which the property or powers of the company are about to be perverted to a purpose wholly or materially different from that which was designed by the act of incorporation. If a company incorporated to make a rail road should be about to make a canal; or, incorporated to make a road from A to B, should be about to make one
76 from A to C. These *would be plain and palpable violations of the charter, and would be restrained at the suit of a dissatisfied stockholder.

The cases relied on by the counsel for Wheeling in support of her claim as a stockholder, seem to be of this kind. In Beman v. Rufford, 6 Eng. Law & Eq. R. 106, one rail way company gave up the management of its line to another. Lord Cranworth, V. C., who decided the case, said, "In my opinion, that is delegating the functions which the legislature has given them to other parties; which they have no possible right to do. For the security of the public, there are a vast quantity of duties imposed on the company," &c. But even in that case, he said, "I only restrain them from carrying into execution that portion of it, (the agreement between the two companies,) which we call, for want of a better expression, irreparable injury; that is, the expenditure of money which it will be impossible, perhaps, ever to get back again."

The suit there was brought by some of the stockholders in behalf of themselves and the others. Winch v. The Birkenhead, &c., Railway Co., 13 Id. 506, decided by Turner, V. C., was a similar case; and the right to relief by injunction was sustained on similar grounds. There, too, the suit was brought by one of the stockholders in behalf of himself and all the rest. Even in cases of this kind, relief by injunction has been very cautiously administered; and has been denied to parties in consequence of their acquiescence in the illegal act of the company, or other peculiar circumstances. Graham v. Birkenhead, &c., Co., 6 Id. 132, decided by Lord Cottenham, and Ffooks v. The London, &c., Co., 19 Eng. Law & Eq. R. 7, decided by Stuart, V. C., were cases of this class. Some of the observations of the court in those cases apply very forcibly to this; but I will not prolong my opinion by repeating them.

In this case there has been no perversion of the property or powers of the com-
77 pany to a purpose *wholly or materially different from that which was designed by the act of incorporation. The connection at Benwood seems to have been required by the interest of all the stockholders, and was in direct furtherance of the design of their work to form a part of a great national thoroughfare. Every stockholder, except Wheeling, must have been in favor of that connection; and Wheeling would doubtless have been so, if her relation to the subject had been only that of a stockholder. She has other interests to subserve, which prompt her to endeavor to avail herself of her position as a stockholder to arrest, by injunction, the contemplated connection, though at the imminent risk of loss to all the other stockholders, as well as of great inconvenience to a large portion of the traveling public. Under such circumstances, can she be entertained in a court of equity in her character of stockholder, merely because, in the manner of making the connection, the navigation of the Ohio river may be obstructed, the franchise of some neighboring ferry owner may be interfered with, or the powers of the corporation may, in some other respect, be exceeded or misused. I think not.

I am, therefore, for dismissing the appeal, as improvidently allowed, so far as it is from the order of the Circuit court in the proceeding for contempt; for reversing, with costs, the order of the judge in vacation refusing to dissolve and continuing the injunction; and for dissolving the said injunction.

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ALLEN, P., and SAMUELS, J., concurred in the opinion of Moncure, J.

DANIEL and LEE, Js., concurred in the first, second and third questions considered by MONCURE, J. But on the merits they dissented.

Decree reversed.

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78 *Bull & als. v. Read & als.

October Term, 1855, Richmond.

1. **Chancery Practice—Suit by One or More Persons to Test Validity of Act.***—A statute having provided for a system of free schools in a particular district in a county, and provided for commissioners to establish and manage the schools; some of the inhabitants of the district may file a bill in behalf of themselves and the other inhabitants against the commissioners, to test the validity of the act, and the propriety of the proceedings of the commissioners under it.

2. **Same—Same—Case at Bar.**—Where a large number of persons are interested in a common subject, and acts are done to the injury of the common right, the approval of the majority will neither excuse the wrong nor take away from the other parties their remedy by suit.

3. **Statutes—Power of Legislature to Delegate Authority to Adopt.**†—An act is passed providing for the establishment of a system of free schools in a particular district in a county; and it provides that it shall not be carried into effect until the people of the district shall, by a vote taken for the purpose, approve it. A majority of the people of the district having approved it by their vote, the act is a valid and constitutional law.‡

4. **Same—Levy of Tax to Support District Schools—Constitutionality.**—The act provides for the election of certain commissioners who are authorized to establish schools in the district, and to levy taxes for their support. This is constitutional.

5. **Same—Authority of Commissioners to Build Schools.**—The commissioners being authorized to establish schools and levy taxes sufficient to defray the expenses thereof; they may build the necessary school-houses, and levy sufficient taxes to pay for them.

6. **Same—Same—Ad Valorem Tax upon Slaves—Constitutionality of.**—The act authorizes the commissioners to levy a capitation tax upon the white male inhabitants, and an *ad valorem* tax upon the property of the district, sufficient to raise the amount necessary to defray the expense of the schools. This provision is to be construed in accordance with the constitution; and the capitation tax is properly levied upon the white male inhabitants above twenty-one years of age only; and the *ad valorem* tax upon slaves is property levied upon slaves over twelve years of age, and valued each at three hundred dollars. And the ratio of the capitation to the *ad valorem* tax may be greater than that prescribed in the constitution. Article 4, § 25.

79 *Thomas W. Bull and sixteen others, white male inhabitants of the first magisterial district in the county of Accomack, in behalf of themselves and the other inhabitants of said district, except the defendants, applied to the judge of the Circuit court of that county for an injunction against the board of school commissioners of that magisterial district. In their bill they set out the provisions of an act of the general assembly of Virginia, passed the 31st of March 1853, entitled, "An act to establish the first magisterial district free school in the county of Accomack." By the first section of his act it is provided, that that portion of Accomack county, known by the name of the first magisterial district, shall form a district distinct from the other portions of the county. By the second section, the County court of said county is directed to order a vote to be taken in said district for or against the establishment of a separate free school system within and for that district; and the court is directed to appoint a day not exceeding six months after the passage of the act, and a suitable place within the district for holding said election. The third section provides that commissioners of election shall certify the result of the election to the court within ten days from the time of holding the same.

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*Chancery Practice—Suit by One or More Persons to Test the Validity of a Statute.—For the proposition laid down in the principal case that, one of the inhabitants of the district may file a bill in behalf of himself and the other inhabitants against commissioners, to test the validity of the act and the propriety of the proceedings under it, the principal case is cited and followed in the following cases: McClung v. Livesay, 7 W. Va. 333; Corrothers v. Board of Education, 16 W. Va. 540; Christie v. Malden, 23 W. Va. 670; Williams v. County Court, 26 W. Va. 500; City of Richmond v. Crenshaw, 76 Va. 940; Roper v. McWhorter, 77 Va. 216; Blanton v. Southern, etc., Co., 77 Va. 337; Shen. Val. R. Co. v. Supervisors of Clarke Co., 78 Va. 276; Buffalo v. Town of Pocahontas, 85 Va. 225, 7 S. E. Rep. 288; Lynchburg & R. St. Ry. Co. v. Dameron, 95 Va. 546, 28 S. E. Rep. 951; Redd v. Supervisors of Henry Co., 31 Gratt. 698; Eyre v. Jacob, 14 Gratt. 424; Johnson v. Drummond, 20 Gratt. 428; Douglass v. Town of Harrisville, 9 W. Va. 166; Kuhn v. Board of Education of Wellsburg, 4 W. Va. 511. See, in accord, Osburn v. Staley, 5 W. Va. 85; Doonan v. Board of Education, 9 W. Va. 246; C. & O. R. Co. v. Miller, 19 W. Va. 408; Perkins v. Seigfried, 97 Va. 444, 34 S. E. Rep. 64; Coffman v. Sangston, 21 Gratt. 263, and *note*. See generally, monographic *note* on "Injunctions."

†Statutes—Power of the Legislature to Delegate Authority to Adopt.—Upon the proposition that the legislature has the power to delegate to the voters of any particular district or county the power to adopt the statute, the principal case is cited and approved in the following cases: B. & O. R. Co. v. County of Jefferson, 29 Fed. Rep. 308; *note* to Prison Association v. Ashby, 2 Va. Law Reg. 906; Kuhn v. Board of Education, 4 W. Va. 499; Neale v. County Court, 43 W. Va. 96, 27 S. E. Rep. 373; Savage v. Com., 84 Va. 621, 5 S. E. Rep. 565; *Ex parte* Bassitt, 90 Va. 662, 19 S. E. Rep. 453; Langhorne v. Robinson, 20 Gratt. 665; Gilkeson v. Frederick Justices 13 Gratt. 584, and *note*. See, in accord, Goddin v. Crump, 8 Leigh 120; City of Richmond v. R. & D. R. Co., 21 Gratt. 604.

‡See for the statute the statement of the case.

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The fourth section declares that if three-fifths of the voters be in favor of adopting a separate free school system within and for said district, the said court shall have the fact entered to the minutes of their proceedings: And this section also provides for three commissioners. These commissioners are constituted a corporation under the name and style of "The Board of school commissioners for the first magisterial district free school in Accomack county;" with power to sue and be sued, and to "take and hold, to them and their successors in office, any property which may be given, granted, bequeathed or devised to
80 them, or which they may *purchase, to an amount not exceeding twenty-five thousand dollars." The commissioners are authorized to establish, if they deem it necessary, more than one school for said district, at such place or places therein as they think best, adapted to the wants and convenience of the scholars in said district. The ninth section provides for the boards holding annual meetings to "ascertain the amount necessary to defray the expense of the school or schools for said district;" and declares, that "the said board shall levy a capitation tax upon the white male inhabitants, and an ad valorem tax upon the property of said district sufficient to raise the necessary amount: provided such amount be not less than two hundred and fifty dollars per annum." There is a provision for the appointment of a superintendent, who is to be the treasurer and clerk of the board; and he is to collect the taxes assessed by the board, with the powers of sheriffs in the collection of county and state taxes. And another section provides for abolishing the system by a majority of the votes taken as therein provided.

The vote having been taken according to the directions of the act, the system was adopted by a vote of one hundred and seventy-two to twenty-five; and subsequently, Richard P. Read, Augustus J. F. Kellam and James R. Garrison, were elected commissioners. These commissioners organized by appointing Obed P. Twiford superintendent. They then determined on the number and fixed the location of the school-houses, fixing the number at eight; and they proceeded to let out to the lowest bidder the contracts for building the houses; the aggregate cost of the eight amounting to three thousand seven hundred and ninety-seven dollars and ten cents. At another meeting, in March 1854, they proceeded to assess the tax for that year, laying a capitation tax on white males above twenty-one years old, at five dollars;
81 *slaves over twelve years valued at three hundred dollars, tax on land, slaves and personal property, at fifty cents on the hundred dollars; the whole assessment amounting to about six thousand five hundred and twenty-five dollars.

The plaintiffs in their bill insist that the board had no authority, under the act of assembly, to build school-houses, or to raise funds, by taxation, for that purpose. That the board should have levied a capitation tax on all white male inhabitants of the district, of whatever age, instead of restricting it to those above the age of twenty-one years. That the mode of levying the tax on slaves, in confining it to those above the age of twelve years, and fixing the value of all above that age at three hundred dollars, was in violation of the act of assembly: And that the act itself was unconstitutional and void, in providing that it should be submitted to the vote of the people of the district for ratification.

The defendants to the bill were the three commissioners and the superintendent, who filed their answer, and put in issue the several questions raised by the plaintiffs. And the cause coming on to be heard on the 24th day of January 1855, the injunction which had been granted was dissolved and the bill dismissed. Whereupon the plaintiffs applied to this court for an appeal, which was allowed.

Patton, for the appellants:

1st. To show that the mode of proceeding by bill in equity was proper, referred to Calvert on Parties 35, 17 Law Libr.; Story's Equ. Pl. § 114, 115, a, b; Bromley v. Smith, 2 Cond. Eng. Ch. R. 5; Milligan v. Mitchell, 3 Mylne & Craig 72, 84; Goddin v. Crump, 8 Leigh 120; Osborn v. Bank U. S., 9 Wheat. R. 738; Bonaparte v. Camden & Amboy R. R. Co., Baldwin's R.
82 *205, 218; Gardner v. Village of Newburgh, 2 John. Ch. R. 162; Belknap v. Belknap, Id. 463.

2d. To show that this act was to be construed as a private act, he referred to 7 Dodd's Bac. Abr. title Statute, letter F, p. 444; Dwarris on Statutes, p. 629, 9 Law Libr. And to show that a private statute was not to be liberally construed, he referred to Threadneedle v. Lyman, 2 Mod. R. 57. And that when a law is plain and unambiguous, there is no room for construction, but it is to be understood according to its terms, he referred to United States v. Fisher, 2 Cranch's R. 358, 386, 390, 399; Lofft's R. 438; Dwarris on Statutes, 711, 748, 750, 9 Law Libr.; Rex v. Croke, Cowp. R. 26; Jones v. Smart, 1 T. R. 52.

3d. He insisted that though the act, Sess. Acts 1852-3, p. 232, provides for schools, and authorizes a levy for the amount of the annual expenses of the school, it does not authorize a levy for building school-houses; and the language is inconsistent with and inapplicable to that object. The word school refers to pupils, not the house in which they are taught. And he referred to many acts of the general assembly establishing such schools, in all of which, except those relating to the county of Accomack, the authority to build or purchase school-houses was expressly given. He referred to Priestman v. The United States, 4 Dall. R. 30, note 1; Moser v. Newman & Boole, 19 Eng. C. L. R. 165; and he insisted that if the general assembly intended to give this power, quod voluit non dixit.

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4th. That the act did not authorize the omission of all the white males under twenty-one years old, from the capitation tax; nor the omission of slaves under twelve, or the fixing the price of every slave over twelve at three hundred dollars, in laying an ad valorem tax upon personal property. That when the act said white males, it included all of them, and
83 *when it authorized an ad valorem tax upon personal property, it meant all of it. That the board had no authority to adapt the act to the provisions of the constitution; the board being but a creature of the act and deriving all its authority from it. That if the legislature could not confer the power as given, then it was a void power. That the board derived no power from the constitution but from the law; and the law conferring on them an unconstitutional power, it is void and illegal; and the board could not execute it upon the doctrine of cy pries. Christy v. Minor, 4 Munf. 431; Wilson v. Bell, 7 Leigh 22; Nalle v. Fenwick, 4 Rand. 585; Allen v. Smith, 1 Leigh 231; Chapman v. Bennett, 2 Leigh 329; Jesse v. Preston, 5 Gratt. 120. And in fact the relative amount of the capitation tax and the tax upon property, was not that fixed in the constitution; but to make it conform to that rule the capitation tax should have been thirty-six cents instead of five dollars.

5th. That the law was unconstitutional and void, because the general assembly, instead of exercising the legislative power exclusively vested in it by the constitution, and enacting the law, referred it to a vote of the people, and made its existence as a law to depend upon the vote of the people. He admitted that there had been a number of statutes similar in this respect to this act, but said the subject had not been considered. But the evil had now gone to such an extent as to have attracted attention to it, and the most serious consequences might arise if the system was not arrested. Upon the question of the constitutionality of the act, he referred to Price v. Foster, 4 Harring. R. 479; Parker v. Commonwealth, 6 Barr Pa. R. 507; Bradley v. Baxter, 1 Amer. Law Reg. for August 1853, p. 658, 15 Barb. Sup. C't R. 122; Thom v. Thamer, Id. 112; Barto v. Himrod & als., 6 Monthly Law Rep. for 1853, N. S. 238; People
84 v. Collins, *Amer. Law Reg. 1854, p. 591. And further, that the act was unconstitutional because it gave the power of taxation to these commissioners. That though the courts had sustained the power of the County courts to levy taxes, this was on the ground of immemorial usage; a ground which could not be invoked for such boards as this. And the constitution having required the legislature to levy a tax for schools, it could not confer that power on a part of the people.

Lyons, for the appellees, insisted:

1st. That the act is to be expounded reasonably, and with a view to the end to be accomplished; and the real intention when ascertained, is to be carried out, though against the letter of the statute. Dwarris on Statutes, p. 688, 9 Law Libr. Nor is the intent to be ascertained from a particular expression, but from the whole act. Id. 703; Cooper v. Telfair, 4 Dall. R. 14; Pennington v. Coxe, 2 Cranch's R. 33; United States v. Fisher, 2 Id. 358; Fletcher v. Peck, 6 Id. 87.

The language of the Code, p. 376, is that they shall provide school-houses; and this may be done by building as well as buying. By the act under consideration the commissioners have authority to receive and to purchase property, to establish schools, to visit schools, &c. A school is defined to be a place where any language or science is taught, or a place for all kinds of education. And as a school cannot exist without a local habitation, when the commissioners are authorized to establish schools, and to levy for the expenses attending them, the term must be held to embrace the preparation of a suitable building, as well as the appointment of a teacher, and the regulation of the institution.

2d. That the act did not intend to embrace all the white males in the capitation tax, because it would be impossible to as-
85 certain them at any one moment; *and the omission of one would be as much a violation of the law as the omission of all under the age of twenty-one years. The constitution provides for the levy of a tax for education purposes, upon white males over the age of twenty-one years, and the act should be construed with reference to this constitutional provision, and as not intended to conflict with it.

3d. That as slaves under twelve years old are exempted from taxation by the constitution, it was proper to exempt them in this case. So as the constitution had fixed the value of slaves who are to be taxed, it was proper for these commissioners to adopt that valuation. Indeed, it was necessary for them to do so, as they had no authority to appoint a person to value them; and their assessment of the tax was necessarily based upon the valuations of property made by the state officers. And as to the relative amount of the capitation tax and the levy upon property, the act left that to the discretion of the commissioners.

4th. That the question as to the constitutionality of the law made by the appellants, did not arise in this case. That there was nothing in this act which was not done every day in the creation of corporations for useful or private purposes. The act was passed by the general assembly, and became a law, by its terms, from its passage. The people were not authorized to say whether it should be a law; but whether, it being a law, they would accept its provisions made solely for their benefit. What the people were to do, was precisely what is to be done by those interested in every case of a charter of incorporation granted by the general assembly. That to hold that this act is unconstitutional, would be to condemn and overturn a large mass of our legislation;

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legislation which had been most considerately entered upon, as was to be seen by the provisions in the Code of 1849; and to destroy our whole system of free schools.

86 The counsel *then reviewed the cases cited on this question by the counsel for the appellants, and insisted that they either related to laws essentially unlike the one before the court, or enunciated principles inconsistent with the settled doctrines of this court. And as to conferring the power of taxation on the commissioners, he referred to the Fairfax Justices, 5 Call 139; Goddin v. Crump, 8 Leigh 120; Harrison Justices v. Holland, 3 Gratt. 247.

LEE, J. The mode of suing in this case and the jurisdiction of the court have both been called in question but as I think upon insufficient grounds. The act in question is one necessarily affecting all the inhabitants of the district named who in respect of persons or property were liable to taxation under its provisions; and as they were many in number but had a common interest, it was allowable according to settled practice, for some to file a bill on behalf of themselves and the other inhabitants similarly situated seeking any relief to which they might all in common be justly entitled, although their individual interests might be several and distinct. Calvert on Parties 28; Cockburn v. Thompson, 16 Ves. R. 321; Chancey v. May, Pr. in Chy. 592; Attorney General v. Heelis, 2 Sim. & Stu. 67, 1 Cond. Eng. Ch. R. 348; Gray v. Chaplin, 2 Sim. & Stu. 267, Id. 451; Blackman v. The Warden and Society of Sutton Coldfield, 1 Chy. Cas. 269; Mit. Pl. 137; Milligan v. Mitchell, 3 Mylne & Craig 72, 14 Eng. Ch. R. 72. And it would seem where a large number of persons are thus interested in a common subject and acts be done to the injury of the common right, the approval of the majority will neither excuse the wrong nor take away from the other parties their remedy by suit. Bromley v. Smith, 1 Sim. R. 8, 2 Cond. Eng. Ch. 5. See also Sto. Eq. Pl. § 107, 112, 114, 120; Taylor v. Salmon, 4 Mylne

87 *& Craig 134, 18 Eng. Ch. R. 133, opinion of Lord Cottenham; Wallworth v. Holt, Id. 619; 1 Dan. Ch. Pr. 287, et seq.

Nor is the jurisdiction of the court of equity in such a case more difficult to be maintained. It may be that for each act of the board of commissioners affecting the inhabitants of the district, every one who is aggrieved might have a remedy at law of some sort, more or less effectual, but the remedy in equity would be far more perfect adequate and complete, and as the acts of the commissioners would be in their nature continuing and to be renewed from time to time, to restrict the parties to their legal remedies would be to consign them to interminable litigation and involve endless multiplicity of suits. Hence the court of chancery will interpose by its injunction to prevent the threatened wrong and provide a remedy which shall at once reach the whole mischief and secure the rights of all both for the present and the future: and its jurisdiction in such cases would seem to be well defined and fully sustained by authority. Mit. Pl. 89, et seq. 117; Sto. Eq. Jur. § 33, § 437; Hughes v. Trustees of Modern College, 1 Ves. R. 188; Shand v. Aberdeen Canal Company, 2 Dow. Par. R. 519; Agar v. Regent's Canal Company, Coop. Eq. R. 77; Gardner v. Trustees of Newburgh, 2 John. Ch. R. 162; Belknap v. Belknap, Ibid. 463; Osborn v. U. S. Bank, 9 Wheat. R. 738; Charles River Bridge v. Warren Bridge, 6 Pick. R. 376; Crenshaw v. Slate River Company, 6 Rand. 245; Goddin v. Crump, 8 Leigh 120.

These difficulties being overcome, we are brought to the merits in the front rank of which stands the question raised as to the validity and legal operation of the act of assembly in question. This has been denied upon two grounds: First: because the legislature has no power under the constitution to make the operation of a law depend upon the result of a vote of the people

88 *or a portion of them. Second: because it cannot delegate the power of taxation to a board such as that created by the act for the purpose specified.

There is certainly no express inhibition in the constitution upon the provisional mode of legislation adopted in this case. The fourth article contains various restrictions and qualifications of the legislative power, and prescribes certain rules which the general assembly is required to observe in the exercise of its appropriate functions and the enactment of laws, but there is nothing which directly forbids the legislature to make the operation of an act dependent upon a vote of the people thereafter to be taken or other future contingency. The objection however is that it is inconsistent with the representative principle and the theory of our government, in transferring the power and duty of making the law directly to the people or a portion of them, and thus relieving the representative body of their proper duty and just responsibility.

It will not be questioned that it is entirely competent for the legislature to provide for taking a vote of the people or of any portion of them upon a measure directly affecting them, and if a given number be found in favor of its adoption to enact a law thereupon carrying it into effect. And there would seem to be but little difference in substance in a reversal of the process by first enacting the law in all its parts but providing that its operation is to be suspended until it be ascertained that the requisite number of the people to be affected by it were in favor of its adoption. In regard to many measures especially those of a local character, it might be eminently just and proper that before they should be actually enforced the wishes of a majority or some other proportion of those who are to bear the burdens and reap the benefits, if any, should be ascertained in some

89 *reliable form. And it would be upon

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some occasions a great saving of valuable time especially under a system of biennial sessions of the legislature, if the order may be inverted and the act be first framed and submitted to the forms of enactment and the question as to its acceptance be subsequently determined upon by those interested.

It will be conceded that the legislature may provide that an act shall not take effect until some future day named or until the happening of some particular event or in some contingency thereafter to arise or upon the performance of some specified condition. The exigencies of the government may frequently require laws of this character and to deny to the legislature the right so to fame them would be unduly to qualify and impair the powers plainly and necessarily conferred. Accordingly we find this a familiar feature in the legislation both of the national and state governments. The constitution of the United States was submitted by resolution of the convention, to congress and to the delegates of the different states in convention assembled, for their assent and ratification, with a further resolution declaring it to be the opinion of the convention that the proper steps should be taken to execute the constitution as soon as it should be ratified by nine of the states. By the ordinance of the 13th of July 1787 erecting the territory northwest of the Ohio the governor and judges were to adopt and publish such laws of the original states as were necessary and best suited to the circumstances of the district which were to be in force until the organization of the general assembly therein unless disapproved by congress. The validity and effect of this provision was affirmed both in the Supreme court and in the Court of errors of New York in a case involving the right of the government of

90 the territory of Michigan, which was erected in 1805 out of part of *the northwest territory with a government similar in all respects to that established by the ordinance of 1787, to incorporate a banking company. Bank of Michigan v. Williams, 5 Wend. R. 478; S. C. in error, 7 Wend. R. 539. The noninter course acts of March 1, 1809, May 1, 1810, and May 2, 1811, were expressly made to depend upon the course that might be adopted by England and France with regard to the edicts promulged by them, to be made known by proclamation of the president. And the principle of this mode of legislation was sustained by the Supreme court. Brig Aurora v. United States, 7 Cranch's R. 382. See another illustration, Gray v. State of Delaware, 2 Harring. R. 76. Nothing is more common than for an act of assembly to be made to commence upon a future day. The Code of 1849 is an instance of the kind. All acts of incorporation are in effect acts to take effect upon a future event, the acceptance of the corporators; for without their consent the corporate body cannot be created. 3 Kent's Com. 277. The various acts making subscriptions on the part of the state to works of internal improvement when a certain amount shall be raised by private subscriptions, are of this character. The several acts authorizing the Baltimore and Ohio rail road company to construct their road through the territory of Virginia contain the same feature. Such was the character of the act of March 3, 1835, which authorized the County courts to dispense with the first and second sections of the act in their respective counties and reinstate the road law of 1819. Such also was the act of February 3, 1846, accepting the county of Alexandria upon its retrocession. Instances of the same kind might be multiplied indefinitely.

Now if the legislature may make the operation of its act depend on some contingency thereafter to happen, or may prescribe conditions, it must be for them

91 *to judge in what contingency or upon what condition the act shall take effect. They must have the power to prescribe any they may think proper; and if the condition be that a vote of approval shall first be given by the people affected by the proposed measure, it is difficult to see why it may not be as good and valid as any other condition whatever. There can be no inherent vice in the nature of such a condition which shall serve to defeat the act when it would be legal and effectual if made to depend upon some other event. To say in such a case that the act is made by the voters and not by the legislature is to disregard all proper distinctions and involves an utter confusion of ideas upon this subject. Wherever the contingency upon which a law is to take effect depends upon the action of third persons, it might be said with equal truth that the law was enacted by those persons instead of the legislature. But there is a plain distinction between the act to be done by the voters and the legislative function. They have no power to alter or amend the act or substitute something else in its place. When it passed the assembly with the forms and in the mode prescribed by the constitution, the legislative function was exhausted although by its terms it required a vote of approval by the people interested before it went into operation. But when that vote was given and the result ascertained in the mode prescribed, the act became as operative and effectual as if it had simply fixed upon that day for its commencement. That its operation should depend upon the result of the vote is as much a part of the legislative will as any other of its provisions, and there can be no difference in principle depending on the nature of the event or contingency upon which the act is to take effect though the differences in kind and degree may be without end.

That there can be nothing in the

92 contingency of a *vote of approval of an act by the people which shall serve of itself to nullify and defeat it is well attested by the numerous instances to be found in the legislation both of the general and state governments in which that feature is

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presented. By the act of assembly of the 3d of February 1846 before referred to, provision was made for the reannexation of the county of Alexandria to this state "so soon as congress should by law recede to the commonwealth of Virginia the said county of Alexandria." By the act of congress of the 9th of July 1840 provision is made for submitting the question of retrocession to a vote of the qualified electors of the county: and it was enacted that if a majority should be against accepting the provisions of the act, it should be void and of no effect; but if a majority should be in favor of accepting, it was to be in full force. And in that event it was made the duty of the president to inform the governor of Virginia of the result of the election and that the act was consequently in force. The constitutionality of neither of these laws has so far as I am informed ever been questioned; and indeed the case of McLaughlin v. The Bank of Potomac, 7 Gratt. 68, must have proceeded upon the concessum, that both were constitutional. By the schedule attached to the constitution of 1830, the general assembly was to provide by law for submitting the same to the voters thereby qualified for their ratification or rejection and for organizing the government under it in case it should be ratified. And by the act of February 12, 1830, provision is made both for a vote of the people and for the organization of the government and the election of senators and delegates under the amended constitution in case the same should be so ratified. By the constitution of 1851 a similar provision is made for submitting the same to the people for their ratification or rejection,
93 and in the event of ratification, *for the election of officers under the new constitution and the organization of the government. The general provision in the Code of 1849 (ch. 82) for free schools is upon the principle complained of here. It authorizes a vote to be taken in any county upon the petition of one-fourth of those entitled to vote in the election of delegates, by order of the County court, and if two-thirds of the votes be in favor of adopting a free school system, it prescribes the measures to be taken for carrying the same into effect. Code of Virginia, ch. 82, § 2, et seq. p. 376, 377. The provision for subscriptions on behalf of a county to a work of internal improvement, is upon a similar principle. It authorizes a vote of the freeholders of the county to be taken by order of the County court, and if three-fourths are found in favor of the subscription, provides for making the same and the means of paying the quotas. Code, ch. 62, § 38, 40, 42, p. 324, 325. These general provisions but adopted the principle of submitting the subject to a vote of the people from numerous special acts which had passed from time to time for particular counties and districts and particular works of improvement. And this principle has been adopted and sustained in other states. Thus by an act of the legislature of Pennsylvania, an election by qualified voters of two certain townships was directed to be held in order to determine whether one of the two which had been created out of part of the other should be continued or annulled, the question to be determined by a majority of the votes polled. An election was held and a majority of the votes was given against the continuance of the new township. This act was held to be constitutional. Commonwealth v. Judges of Quarter Sessions, 8 Barr Pa. R. 391. So a law establishing a new county which was to be submitted to the vote of those on whom the burdens were to fall was decided to be
94 not unconstitutional. State *of Missouri v. Scott, 17 Missouri R. (2 Bennett) 521. So an act concerning the removal of the seat of justice of Delaware county, which provided that the question of the removal should first be submitted to a vote of the qualified electors and if a majority should be found in its favor, the commissioners should designate the location for the new public buildings and proceed to erect them, was held to be valid and constitutional. Commonwealth ex rel., Lyons v. Painter, 10 Barr Pa. R. 214. So an act of the legislature of Kentucky which authorized the mayor and council of the city of Louisville with the consent and approbation of a majority of the qualified voters of the city expressed by a vote at a regular election of city officers and upon a regular submission of the question after due notice, to subscribe for stock in the Louisville and Frankfort rail road company, was sustained. Talbot v. Dent, 9 B. Mon. R. 526. In Steward v. Jefferson, 3 Harring. R. 335, a law authorizing taxation for the purposes of free schools by the determination and vote of a majority of the voters of a school district was decided to be constitutional. A similar law was sustained in Maryland. Burgess v. Pue, 2 Gill's R. 11. The case of Bridgport v. Housatonic Rail Road, 15 Conn. R. 475, was upon a similar principle and the act in question was maintained to be valid. In Slack v. Maysville and Lexington Rail Road Company, 13 B. Mon. R. 1, the power of the legislature of Kentucky to impose local taxation for local purposes and its right to employ the agency of County courts, trustees of towns, and other bodies created for the purpose, are fully maintained; and it was held to be no objection to the mode of exercising it that it was referred to the vote of a majority of those to be affected by it. Accordingly the provision of the act incorporating the company which made it the duty of the mayors and councils of the cities of Maysville
95 and Lexington and *of the County courts in certain counties to ascertain the sense of a majority of the qualified voters within their respective limits, and if a majority should be in favor of subscriptions to the stock, to make the same and to levy or borrow money to raise the necessary amounts was held to be within the legitimate powers of the legislature. And in a case which went before the Su-

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preme court of New York, the very question was decided in the most imposing form. The act of that state of March 26, 1849, known as the "free school law" provided (§ 10) that the electors should determine by ballot at the annual election whether the act should or should not become a law. By section 14 it was provided that if a majority should be found against it, the act should be null and void; but if the majority should be for the law, the act should become a law and take effect on a day specified. It was objected that the effect of the act was to transfer the power of enacting laws from the legislature to the electors at the ballot box. The court however distinguished between the exercise of legislative power in framing and enacting a statute which is to become a law, and the exercise of another altogether different and foreign but subordinate power in producing the event or result upon which such enactment is to take effect; and held the act in question to be valid and constitutional. Johnson v. Rich, 9 Barb. R. 680. Other cases will be found to the same effect or asserting a similar principle in several of the states.

I am aware there are cases to be found in the reported decisions in some of the states in which the contrary doctrine has been maintained. Several have been cited by the counsel for the appellants. One of these is the case of Rice v. Foster, 4 Harring. R. 479. This appears to be a leading case as it is cited in all the other cases which I have seen in which the decisions have accorded with it, and the line of
96 argument *adopted in it seems to be very much the same as that which led to the conclusion in the subsequent cases. The act in question provided for taking a vote of the citizens of the several counties upon the question of licensing the sale of intoxicating liquors: and if there should be a majority of votes for "no license" it was declared to be unlawful for any person to retail intoxicating liquors within any county which had given such majority, and the retailing such liquors was declared to be a nuisance. The court held the act null and void because it was a delegation of legislative power to the people which it was said the legislature had no power to make. But it will be observed that the court carefully distinguish this case from Steward v. Jefferson (above cited) in which it was held that the legislature might properly leave it to a majority of the school voters to say whether a tax should be laid for the establishment of free schools. This case was approved, but the distinction in principle between it and Rice v. Foster, has eluded my perception, though the court in the latter case seem to think it very apparent. However this may be the utmost ingenuity will fail to distinguish it from the case in judgment and the authority of the decision in the one case and of the opinion of the court approving it in the other, may both be cited here in support of the argument.

The case of Parker v. Commonwealth, 6 Barr Pa. R. 507, was upon a similar law of the state of Pennsylvania, and the case was decided in the same way as in the Delaware case, and upon very similar reasoning. And yet it will be seen that Judge Bell who delivered the opinion of the majority of the court (two of the judges dissenting) fully sustains the constitutionality of the school law of 1836, one of the provisions of which was that elections should be held at stated periods within each district at which the question of establishing common schools should be decided by
97 the *qualified voters of the district. If a majority should be "for schools" the directors were to go on and establish them according to the provisions of the act: but if the majority should be "for no schools," the system was not to go into operation for a certain period. And if after a district had accepted the system a majority of the voters should be against its continuance (to determine which elections were to be held) it was to be suspended till a majority should otherwise decide. Like Chief Justice Booth in the Delaware case, he distinguishes between such a law and the excise law of which he was treating and which he regarded as but a transfer to the people at the polls of the power to enact a penal statute under which the citizen might be indicted and punished. The authority of this case even on the question which it decides, is however much shaken by the subsequent cases of the Commonwealth v. The Judges of Quarter Sessions and the Commonwealth v. Painter (above cited), although it may not have been directly and in terms overruled. In these cases the court has plainly receded from the ground attempted to be maintained in Parker v. Commonwealth, and both are strong authorities in support of the validity of the act in question here.

The doctrine of Rice v. Foster appears to have been applied to laws concerning free schools in two cases in New York. They are Thome v. Cramer, 15 Barb. R. 112, and Bradley v. Baxter, Ibid. 122. I will not stop to distinguish the law in question in those cases from our act, because whatever respect may be due them, I yet think in point of authority they are far outweighed by the cases establishing a different doctrine. The reasoning of the judges tends rather to demonstrate the inexpediency of this provisional legislation than its unconstitutionality, and to my mind it is far less cogent and convincing as to the latter
98 than that which prevailed *in Johnson v. Rich, in which the same law was sustained by the same court although with a different bench of judges.

As to the wisdom and expediency of this kind of legislation, this is not the place to express an opinion. To say that it is liable to be abused is but to affirm what is equally true of every mode of legislation. Whilst there may be occasions on which it may be adopted with advantage to the public interest, it may also be resorted to upon others to enable the representative to escape from his just responsibilities. Yet however pro-

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foundly impressed the judicial mind may be in any given instance with its impropriety and inexpediency, it will not do to say that for that cause the law may be set aside. This would but be for the judiciary to set itself up as a revisory body upon the acts of the general assembly and would be a plain usurpation upon the powers conferred upon that body. Unlike a question of constitutionality proper which must depend upon fixed principles, this would fluctuate with the varying views of different minds. What one judge might deem most unwise and dangerous another might think highly proper and beneficial. How great soever the evil may be the security against it must be sought in the wisdom and integrity of the legislative body or failing these, the corrective will be found in the virtue and intelligence of the people.

The second ground of objection to the act is equally unsustainable. The maxim potestas delegata non potest delegari however true in the abstract can have no application here. The authority of the legislature to delegate to other bodies the power of taxation for certain purposes can no longer be considered an open question. As early as in the time of Judge Pendleton this court decided that the power of laying levies for county purposes might well be conferred upon the *county courts. Case of the Fairfax County Levy, 5 Call 139.* So the constitutionality of the act of the 13th February 1833 authorizing the common council of the city of Richmond to subscribe to the stock of the James river and Kanawha company and to levy taxes to provide for the subscription was maintained. Goddin v. Crump, 8 Leigh 120. Judge Brooke who dissented from the opinion of the majority of the court in that case, agreed however that the legislature might delegate its power to local authorities for local purposes: and this doctrine was again affirmed in the case of the Harrison Justices v. Holland, 3 Gratt. 247, and receives support from decisions elsewhere. Burgess v. Pue, 2 Gill R. 11; Livingston v. Mayor of New York, 8 Wend. R. 85; Thomas v. Leland, 24 Wend. R. 65; Lockhart v. Harrington, 1 Hawks' R. 408; Cheaney v. Hooser, 9 B. Mon. R. 330; Nichol v. Mayor, &c., of Nashville, 9 Humph. R. 252; Slack v. Lexington and Maysville R. C. 13 B. Mon. R. 1. And it may now be regarded as definitively settled. Nor can any distinction be successfully maintained between the local municipal purposes for which the power of taxation has thus been held to be duly delegated and the support of a district or county free school system. The board of commissioners is a purely local authority and the education of those entitled to admission may also be regarded as sufficiently local in it character to come within the strictest interpretation of the rule, and surely no purpose for which the power may be exercised can be more laudable or more conducive to the public weal.

99 *county courts.

100 *I feel therefore no hesitation in coming to the conclusion that the act in question was perfectly within the constitutional competency of the legislature, and as it has been ascertained in the mode prescribed that the requisite number of votes was given for its acceptance, it is to be respected and enforced as any other act of the general assembly passed in conformity to the constitution.

Upon the construction of the act several questions have been made which I will now briefly consider.

It is insisted that no power is given to the commissioners to levy taxes for school-houses and that they have transcended their authority in so doing. It is true the act does not say in terms that the commissioners may levy a tax to pay for school-houses, but it authorizes them to establish schools and after ascertaining the amount necessary to defray the expense to levy taxes for the same. To establish schools, the first step must be to provide school-houses; and it cannot be supposed that the act contemplated these would be furnished by private contributions. Nor could it have been the intention of the act that the system should not take effect unless school-houses should be so furnished. Had such been the intention it would doubtless have been plainly expressed. There is no reason for supposing that the omission to provide in express terms the power to build or purchase school-houses was intentional with the view of withholding that of levying taxes for that purpose. It was doubtless not expressly conferred because it was thought to be embraced sufficiently in the general powers given to the board. And if it be conceded that the act should receive a strict construction, still it must be such as to enable the board to carry the intention of the legislature into effect. This was to establish free schools and to do this the power to provide school-houses was indispensable. Upon the familiar principle

101 *therefore that a power expressly granted carries with it by necessary implication all such as are required for its due and proper exercise, the power to provide the necessary school-houses may well be maintained.

It is also objected that the commissioners have adopted a mode of taxation unauthorized by the act. The capitation tax levied by them was upon the white male inhabitants over the age of twenty-one years only: and the property tax was an ad valorem tax upon all the property in the district excepting slaves, and upon these was laid a tax of fifty cents for every hundred dollars worth of those above the age of twelve years, every such slave to be valued at three hundred dollars no tax at all being imposed on slaves under that age. These discrimi-

*Note by the Judge.—The date of this decision and the occasion on which it was made do not appear. The opinion was however furnished to the reporter by JUDGE PENDLETON himself and it was no doubt a decision of the Court of appeals in his time. That eminent judge died in October 1803.

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nations it is insisted the board had no power to make.

It must be supposed that it was the intention of the legislature the act should be perfect and complete in all its parts and capable of being executed without further legislation. Now while the ninth section provides for a capitation tax, nothing is any where said of the means by which the number and names of those who would be subject to it are to be ascertained. No provision is made for obtaining a list and no one authorized to require parents or heads of families to give the numbers of those who would answer the description of "white male inhabitants." And it can scarcely be supposed that it was the intention of the legislature the capitation tax which the act authorized should be levied on infants of what age soever, as well as upon adults. Certainly a doubt may well arise upon the construction of the ninth section as to the precise class intended to be embraced by the terms "white male inhabitants" upon whom this capitation tax was to be laid, and reference may properly be had to the constitution under which the law was enacted in aid of its interpretation.

By the twenty-fourth section of the
102 *fourth article of the constitution, a capitation tax, eo nomine, is required to be levied on every white male inhabitant who has attained the age of twenty-one years, one moiety of which is to be applied to education in primary and free schools. It may therefore reasonably be inferred that it was the intention of the legislature the capitation tax authorized by this act should conform to that required to be levied by the constitution and should be laid upon the same class of white male inhabitants, to wit, those of the age of twenty-one years and upwards. Thus the number and names of those who were subject to the capitation tax authorized by this act would be found upon the books of the commissioners of the revenue of the county as listed for the purpose of the capitation tax required to be imposed by the constitution: and to those books in the absence of any provision for making a list, reference may and must be had to enable the commissioners to ascertain the amount of liabilities incurred and fix the rate of the tax to be imposed. The names and number of the white male inhabitants resident within the district would perhaps be found in common with those resident throughout the whole commissioner's district; but it would be the duty of the commissioners to discriminate those resident within the limits of the district from those without.

So with regard to the tax to be laid on property. No provision is made for any assessment of property within the district nor any mode or means prescribed for ascertaining the amount and kinds liable to taxation. Resort therefore must be again had to the books of the commissioners of the revenue. But the constitution declares a particular class of slaves only to be subject to taxation, to wit, those of the age of twelve years and upwards and it also prescribes the ratio in respect to land in which they shall be assessed. So that the commissioner's books made out for state
103 purposes *would only exhibit the number of slaves to be assessed with taxes under the constitution: and it is therefore reasonably to be intended that the term "property" where it occurs in the ninth section is used as it respects slaves, in the sense affixed by the constitution and that the slaves embraced by it are those only who have attained the age of twelve years, each to be assessed with a tax equal to and not exceeding that imposed on land of the value of three hundred dollars. It has been made by the constitution a feature of state policy that the ad valorem property tax when applied to slaves should be in a fixed ratio and according to an assumed standard of value, and any act of assembly providing for levying taxes ought to be regarded as intending to respect this policy and not to enlarge the area of taxation unless the contrary be plainly and expressly declared.

The capitation tax provided for in the twenty-fourth section of the fourth article of the constitution is to be equal to the tax assessed on land of the value of two hundred dollars. But this is a tax which the legislature is required to levy. It may not be less than according to the ratio prescribed, but there is nothing to prevent the legislature from making it greater; and it can scarcely be doubted that it is strictly within the power of the legislature to increase this tax according to its discretion for the promotion of education and any other legitimate purpose: and this power it may delegate to the County courts or to a corporation such as that created by this act for the purposes of education to be by them exercised as it might be by the legislature, with such additional guards and restrictions as that body shall see proper to impose. Hence it was competent to the board to fix the capitation tax at a higher rate than that provided in the constitution, and as education is perhaps more fitly and appropriately the subject of a capitation tax than
104 of a tax on *property (although property also is undoubtedly interested and should contribute its just proportion) there may be good reason why the board in the exercise of its discretion advanced the capitation tax beyond the general ratio and made it relatively larger than the state tax prescribed by the constitution. And I do not feel prepared to say that in fixing its amount the board have abused their power or unduly exercised their discretion.

None of the objections which have been made should as it seems to me be sustained: and I am of opinion to affirm the order dissolving the injunction.

ALLEN, P., and MONCURE, J., concurred in the opinion of Lee, J.

DANIEL and SAMUELS, Js., thought that the commissioners erred in exempting from taxation any of the white males or slaves. On the other questions they concurred in the opinion of Lee, J.

Decree affirmed. Digitized by Google

105 ***Chapman v. Campbell.**

January Term, 1856, Richmond.

(Absent, ALLEN, P.*)

1. **Sale of Chattels—17 Sec. Statute of Frauds—Not in Force in Va.**—The 17th section of 29 Charles 2, ch. 3, requiring that to make good a contract for the sale of goods, wares and merchandise, (for the price of £10 or upwards,) the buyer shall accept and actually receive in whole or in part the thing sold, or give something in earnest to bind the bargain or in part payment; or that some note or memorandum of the bargain be made and signed by the parties or their agents, has not been adopted in this state.
2. **Same—When Complete.†**—When there is a contract for an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the vendor immediately acquired a property in the price, and the vendee a property in the goods; and then all the consequences resulting from the vesting of the property follow, one of which is that if it be destroyed the loss falls upon the vendee.
3. **Same—Same—Delivery Not Necessary.**—Any words importing a bargain whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy it, *in presenti*, for a specified price, would be a sale and transfer of the right to the chattel: and neither the delivery or tender of the property, nor the payment or tender of the purchase money, is necessary to constitute the contract.
4. **Same—Same—Loss of Property—Buyer's Loss.**—A slave on trial for larceny before a County court, is sold; and before he is discharged he makes his escape and is not heard of again. The contract of sale being complete, the purchaser is bound for the price, though the slave was not and could not be delivered.

This was an action of assumpsit instituted in the Circuit court of Page county by Nancy Campbell against William A. Chapman, to recover the price of a slave alleged to have been sold by the former to the 106 *latter. The cause was removed to the Circuit court of Rappahannock county; and when it came on there to be tried the jury found a verdict for the plaintiff for eight hundred dollars, with interest from the date of the contract; and the court rendered a judgment accordingly.

When the verdict was rendered the defendant Chapman applied to the court for a new trial, which was refused; and upon an exception being taken, the facts were certified as follows:

That at a County court held for the county of Page on the 25th of August 1851, a slave, owned by a Mr. Barbee, was tried for larceny, and found guilty, and the judgment of the court was that he should have ten stripes, lightly laid on. That thereafter, a slave named Gilbert, the property of the plaintiff, was tried as accessory, and found guilty; and before the court pronounced any judgment, the counsel for the slave applied to the court not to inflict a heavier punishment on the accessory than had been inflicted on the principal. To which the court replied, that the slave (the principal) had been sold and was to be taken from the commonwealth, and that fact was the inducement to the infliction of so light a punishment. The plaintiff, an old lady, the owner of the slave Gilbert, who was in court, was then applied to, to know if she would sell her slave, to which she assented, and authorized J. Y. Menefee to sell him. The defendant, who was in court, and who it was proved was a justice of the peace of the county of Page, though not a member of the court, and was cognizant of all that was passing, enquired what price she would take for the slave. To which her agent replied, that she would take eight hundred dollars. The defendant then replied, I will give it. The agent replied, the negro then is yours. To which the defendant replied, well I will take him.

107 *The court then remanded the slave to jail, without passing sentence on him; the plaintiff, by her agent and counsel, saying the negro was not to be remanded at the plaintiff's expense, and the defendant saying, the negro was not to be remanded at his expense. A bill of sale was thereafter prepared, and executed by the plaintiff, with an order to pay the money, the price of the slave, to the said agent, J. Y. Menefee, and delivered to Mr. Menefee, who applied to the defendant for payment. The defendant replied, that he had not the money in his pocket, and would like to have some two weeks to pay it in. The agent replied, that he could not give that time; that he should leave court for the county of Rappahannock (where he lived) in a day or two, and if he would pay the money before he left, it would answer his purposes. To which the defendant replied, that he would borrow the money, and would pay it to him before he left. With this understanding the parties separated.

It was further proved, that the defendant applied to the court to have the slave Gilbert confined in an apartment separate

*JUDGE ALLEN was absent during this term; having been confined to his room in this city by sickness.

†**Sale of Chattels—When Complete.**—In Hobbs v. Interchange, 1 W. Va. 66, the court said: "The most satisfactory definition of a consummated contract for the sale of a personal chattel will be seen in 13 Grattan, page 109, Chapman v. Campbell; it is 'where there is a contract for an immediate sale of a chattel, and nothing remains to be done by the vendor, as between him and the vendee, the vendor immediately acquires a property in the price, and the vendee a property in the goods, and then all the consequences resulting from the vesting of the property follows, one of which is, if it be destroyed, the loss falls on the vendee.'" The principal case is also cited in Poling v. Flanagan, 41 W. Va. 193, 23 S. E. Rep. 686, where it is held in accordance with the principal case that in such a case delivery is not necessary. The principal case is also cited in Haxall v. Willis, 15 Gratt. 448.

In addition to the above, see Morgan v. King, 28 W. Va. 1; Dixon v. Myers, 7 Gratt. 240; Pleasants v. Pendleton, 6 Rand. 473.

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from the slave who was the principal in the larceny, and who was still confined in jail for safe keeping by his purchaser. And it was also proved that Barbee, the former owner of the slave, who was the principal, made a similar request, for the reason that the slaves were hostile, and might injure each other. Which order was given by the court to the jailor, and the slaves were accordingly confined in separate apartments.

It was also proved that the defendant applied to the jailor, after the negro Gilbert was remanded to jail, to know whether there was any thing in the jail with which the negro could inflict an injury on himself; the witness proving that the defendant seemed to be apprehensive that the man might do some violence to himself.

108 *It was further proved, that the slave broke jail that night, and made his escape, and the next day, when the agent of the plaintiff was about to leave for Rappahannock, he applied to the defendant for payment of the purchase money, which he refused, and this action was thereupon instituted.

Chapman thereupon applied to this court for a supersedeas, which was awarded.

Patton, for the appellant, insisted:

1st. That the facts did not make out a contract of sale and purchase, and that Chapman did not consider himself the purchaser. And if there was a misunderstanding between the parties at the time on this point, that was good ground for refusing to hold either party liable. Story on Sales, § 150.

2d. That there was no delivery of the slave or offer to deliver on payment of the purchase money, which was necessary before the purchase money could be recovered. And moreover that the slave being in the custody of the court, was not in a condition to be delivered; and therefore the vendor could not recover. He referred to the opinions of Carr and Cabell, Js., in the case of Pleasants v. Pendleton, 6 Rand. 473, 495, 496, 503.

Morson, for the appellee, insisted:

1st. That the proof of the contract was sufficient. He said that the law of Virginia was unlike that of England in this question; that here where there is a contract of sale and nothing remains to be done, the contract is complete, and the title passes. Bell on Contracts of Sales, p. 82, 51 Law Libr.; Brown on Actions at Law 493, 45 Law Libr. And where the property is appropriated by the vendor to the vendee, the property passes although he may retain the possession until he is paid for it.

109 *2d. That if it was necessary to prove a delivery, a legal delivery was proved; and it was not a case, as was known to both parties, in which there could be an actual delivery. The legal delivery was the same in its effects as an actual delivery. Pleasants v. Pendleton, 6 Rand. 473, Carr, J.'s opinion. As to what was constructive delivery, he referred to Bell on Sales 61, 62; Story on Contracts, § 513; Jewett v. Warren, 12 Mass. R. 300.

DANIEL, J. The 17th section of 29 Charles 2, ch. 3, requiring that to make good a contract for the sale of goods, wares and merchandise, (for the price of ten pounds and upwards,) the buyer shall accept and actually receive, in whole or in part, the things sold, or give something, in earnest, to bind the bargain, or in part of payment; or that some note or memorandum of the bargain be made and signed by the parties or their agents, has not been adopted in this state. And we have only to enquire whether the case stated in the certificate of facts satisfies the rules regulating like contracts of bargain and sale at the common law. In the case of Tarling v. Baxter, 13 Eng. C. L. R. 199, we are told that where there is a contract for an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the vendor immediately acquires a property in the price, and the vendee a property in the goods, and then all the consequences resulting from the vesting of the property follow; one of which is, that if it be destroyed, the loss falls upon the vendee. For the same principle, see also 2 Kent Comm. 491; Willis v. Willis, 6 Dana's R. 47; Potter v. Coward, Meigs' R. 22; Ingersoll v. Kendall, 13 Smeads & Marsh. 615; Goodrum v. Smith, 3 Humph. R. 542; Miller v. Koger, 9 Humph. R. 231; Magee v. Billingsley, 3 Alab. R. 680; 2 Rob. Pr.

110 414, *415, 495, 497, 498, and cases there cited; and also DcFonclear v. Shottenkirk, 3 Johns. R. 170.

In the case last cited, decided by the Supreme court of New York, (where they have a statute with provisions like those of the 17th section of the English statute,) the court said, that independently of the statute, any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy it, in presenti, for a specified price, would be a sale and transfer of the right to the chattel. The same view of the nature of such a contract is strongly and concisely stated by the Supreme court of Tennessee in the case of Potter v. Coward, above cited. It is not (say the court) the delivery or tender of the property, nor the payment or tender of the purchase money, which constitutes a sale. The sale is good and complete as soon as both parties have agreed to the terms, that is, as soon as the vendee says, "I will pay the price demanded," and the vendor says, "I will receive it," the rights of both are instantly fixed.

As soon as such a contract is made in respect to a chattel in the possession of the vendor, and ready for delivery, in the absence of contrary indication or agreement, the vendee has a right to demand the thing sold immediately, but must pay the

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consideration; and the vendor has the right to demand the consideration money, but must deliver the property. If the vendee tender the purchase money and demand the property, he may maintain detinue or trover if the delivery be refused; and if the vendor tender the delivery of the property and demand his purchase money, he may have his action of debt or assumpsit, if it be refused. Potter v. Coward and 2 Kent, as above.

The payment of the price and the
111 delivery of the *property, however, may have to be simultaneous and concurrent acts, or they may be performable at different times, according to the express agreement of the parties, or the obvious nature and indication of the contract. Bell on Sales, 41.

A sale may be just as binding if made on credit as if made for ready money. And in such case the vendee may have a right to maintain his action at once against the vendor for refusing to deliver the property, without making any tender of the price.

And on the other hand, the completeness and efficacy of a sale are not necessarily affected by the consideration that the property is not in the actual possession of the vendor, or if in his possession, is not to be immediately delivered. There is no principle of law which establishes that a sale of personal goods is invalid because they are not in the possession of the owner. The sale of a chattel in the possession of a third person (claiming no adverse title) is not the transfer of a right of action, but is the sale of the thing itself. The Brig Sarah Ann, 2 Sumner's R. 211.

Hence the vendee may be bound to pay presently, though there be no obligation on the vendor to deliver presently, or indeed at any time: For it may be obvious, from the nature of the contract, that the vendee is to look for the delivery to some third person, in whose custody the property may be at the time of the sale; or that he is himself to take possession of the property wherever it may be found; as in the case of the sale of a horse which is an estray, or of a slave who is a runaway.

And as where the sale is on credit, the vendee may bring his action for the property before he has paid or tendered the price, so where the sale is of property to be delivered at a future day, or not in the possession of the vendor, the latter may
112 have a right to his suit *for the price before he has made any tender of the property. The application of these principles to the facts stated in the certificate of the judge, will, I think, result in vindicating the propriety of the verdict and judgment rendered on them.

It appears that the slave, for the recovery of whose price the action was brought, was at the time of the contract in custody, and on trial, in the County court of Page, on a charge of larceny. The court had found him guilty, but had not pronounced its sentence; and to an appeal, made by the counsel of the slave, to the court to inflict but a light punishment upon him, urged on the ground that he was but an accessory, and that the principal, another slave, who had just before been found guilty, had been subjected only to a few stripes, the court replied, that the infliction of so light a punishment on the principal had been induced by the fact that he had been sold, and was to be taken from the commonwealth. The defendant in error, an old lady, the owner of Gilbert, (the slave for whose price the suit is brought,) who was in court, was then applied to, to know if she would sell her slave; to which she assented, and authorized J. Y. Menefee to sell him. The plaintiff in error, who was in court, and who, it was proved, was a justice of the peace of the county of Page, though not a member of the court, and was cognizant of all that was passing, enquired what price she would take for the slave. To which her agent replied that she would take eight hundred dollars. The defendant then said, I will give it. The agent replied, the negro, then, is yours. To which the plaintiff in error replied, well, I will take him.

Had this been all that passed between the parties, it is difficult to conceive how, by acts or words, they could have given a better definition or more appropriate illustration of a contract of an immediate
113 sale. *And there is nothing in the subsequent history of the transaction which can, in my opinion, create any serious doubt as to the true intent and effect of the understanding of the parties.

The certificate proceeds to state that the court then remanded the slave to jail, without passing sentence on him; the defendant in error, by her agent and counsel, saying the negro was not to be remanded at her expense, and the plaintiff in error saying the negro was not to be remanded at his expense. A bill of sale was thereafter (evidently on the same day, as appears from facts subsequently stated), prepared and executed by the defendant in error, with an order to pay the money, the price of the slave, to her said agent Menefee, and delivered to Menefee, who applied to the plaintiff in error for payment, who replied, that he had not the money in his pocket, and would like to have some two weeks to pay it in. The agent replied, that he could not give that time; that he should leave court for the county of Rappahannock (where he lived) in a day or two, and if he would pay the money before he left, it would answer his purposes. To which the plaintiff in error replied, that he would borrow the money, and would pay it to him before he left: And with this understanding the parties separated.

Even if the remark by the plaintiff in error, that the slave was not to be remanded at his expense, imported, by necessary implication, an understanding on his part that the sale was not complete, and that the slave was not yet at his risk, it could not detract from the legal force of the plain and unambiguous contract already made. It was not competent for either of the par-

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ties, after having fully assented to the terms of the bargain, to construe away its obligations or escape its consequences by acts done or declarations
114 *made without the concurrence or assent of the other. And as has been seen, the defendant in error, so far from making any concession in respect to the expenses of the future keeping of the slave, was first to protest against his being remanded at her expense. And that the plaintiff in error did not mean to insist on the payment by the defendant of the expenses of the further custody of the slave, as a condition precedent to the vesting of the property and the payment of the price, is fairly to be inferred from his subsequent conduct. When applied to, to pay the price, he did not intimate any incompleteness in the bargain, or insist or suggest that any thing was yet to be done by the vendor to entitle him to demand the price, but asked and obtained a temporary postponement of payment, on the exclusive score of his own ease and accommodation. The control, too, exercised by the plaintiff in error over the slave, in obtaining, on his own motion, an order of the court to the jailor to have the slave confined in an apartment separate from that in which the other slave, the principal in the larceny, was still confined, and the further concern about his safe keeping, manifested in afterwards applying to the jailor to know whether there was any thing in the jail with which the slave could do violence to himself, though susceptible of the explanation that the plaintiff regarded himself as having merely entered on a profitable treaty, which he hoped and expected to conclude, yet tend more strongly to the conviction that he regarded himself as having already acquired a title to the slave.

It is conceded in the argument of the plaintiff's counsel, that if the defendant had delivered to the plaintiff an order on the jailor for the slave, then the title would have passed; but he contends that some such act, a delivery or tender of some
115 symbol or evidence *of ownership, was essential to the passing of the title; and he relies on certain passages from Bell and Story on Sales, to sustain the position.

These citations do not, I think, furnish authority applicable here. They show not what is the common law rule, but what is now the English rule, as modified by the 17th section of the 29 Charles 2, before mentioned. And as, in the absence of such statutory provision, an actual delivery of property in the possession of the vendor, and which can be presently delivered by him, is not essential, so neither is a constructive or symbolical delivery of property out of his immediate possession, in the keeping of a third person, essential, as between vendor and vendee, to the vesting of the property. The virtual or symbolical delivery is the substitute for the actual delivery, and is necessary to be resorted to only where a change of possession (if practicable) would be essential to the validity of the transfer; as in cases of gifts inter vivos or causa mortis, or in cases of sales, to render them valid against the creditors of, or subsequent purchasers from, the vendor.

Whether ordinarily, in the case of a sale of property in the hands of a third person, holding it under an agreement to restore the possession to the vendor at the termination of the bailment, it is necessary for the vendor, in order to maintain his action for the price, to prove that he had delivered or tendered to the vendee an order on the bailee for the delivery of the property, or some other evidence of ownership, is a question which I do not deem it necessary to decide. For when the first application was made to the plaintiff to pay the price, he did not question the readiness of the defendant to perform any thing that by the terms of the contract she was to perform, but as we have seen, requested and obtained a postponement of the payment: And before the time for the payment arrived, the slave escaped. Thus, by his own act, as
116 he could *not have expected to receive an order before he was ready to pay the price, the delivery of the order (if necessary) was postponed to a period which had not arrived before the happening of the event (the escape) which rendered an order in the jailor for the delivery of the slave wholly nugatory. Besides, the slave was not in the possession of the jailor, under any agreement with or authority from the vendor, but was in his custody under the order and warrant of the court. As soon as the purposes of the prosecution were satisfied, the slave would have been discharged from the custody of the jailor by the order of the court, and it would have been for the party entitled to the possession to attend and take the possession of the slave. The payment or tender of the purchase money was all that was needed, under the circumstances, to enable the vendee rightfully to obtain possession of the slave when the order for his discharge should be made. It is, however, to be observed further, that the contract was made publicly in open court, and it is fairly to be inferred, from the evidence, was within the knowledge of the jailor. And were it conceded that there was a duty resting on the jailor not merely to discharge the slave on the termination of the confinement under the prosecution, but to deliver him over to the rightful owner, I should still hold that nothing was wanting in the proof to enable the vendor to maintain his action. A receipt for the price of the slave would, under the circumstances of the case, have been fully equivalent to the most formal order from the vendor to the jailor to deliver the slave to the vendee. Menefee's authority as agent was known to and recognized by Chapman, and his readiness to give a receipt for the price was obviously inferrible from the nature of the transaction and the demand of payment.

To the argument of an incompleteness of

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the sale which the counsel for the
117 plaintiff in error founds on *the improbability that the vendor contemplated parting with his control over the possession of the slave before the price should be paid, it is only necessary to refer to the authorities already cited to see that though the buyer has a right to retain and control the possession until the price is paid or tendered, the contract of sale casts the right of property on the vendee, and subjects him to all risk of accident.

And as to the further argument derived from the absence of a tender by the vendor, of some written evidence of warranty of the soundness of the slave, it is sufficient to observe that the parties did not, in the contract, stipulate for any such warranty.

I think the judgment should be affirmed.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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118 ***Davis' Adm'rs v. Mead.***

January Term, 1856, Richmond.

(Absent, ALLEN, P.)

Memorandum of Agent—Case at Bar.—A paper contains a statement of account of rents collected through a number of years by an agent for his principal. And at the foot of the account there is a written statement setting out the gross amount of the rents received, certain deductions for commissions and expenses, leaving the net sum of one thousand one hundred and thirty-seven dollars and thirty-five cents: and it concludes, "In the foregoing statement all errors to be corrected. As witness my hand and seal." And it is signed and sealed by the agent.

1. **Same—Action of Debt on—Quære.**—Quære: If this paper will sustain an action of debt.
2. **Same—Same—Averments.**—If the paper will sustain an action of debt, in declaring upon it if the plaintiff claims the sum stated in it as the net rents, it must be averred that there is no error in the bond. And if the plaintiff seeks to recover more or less than the sum stated, she should aver such error in the bond as will sustain her demand.

In February 1851, Hannah Mead instituted an action of debt in the Circuit court of Bedford county against the administrators of Thomas Davis deceased, for the sum of one thousand one hundred and thirty-seven dollars and thirty-five cents. The declaration contains four counts, but they are, as to the questions to be reported, substantially the same. The second count set out the cause of action as follows: For that whereas heretofore, to wit, on the 5th of March 1831, at the county aforesaid, the said Thomas Davis in his lifetime accounted with the plaintiff of and concerning divers sums of money received and collected by the said Thomas Davis in his lifetime, before that time to and for the use of the said plaintiff, and then in arrear and unpaid; and upon such a counting the
119 said *Thomas Davis in his lifetime was then and there found to be in arrear and indebted to the plaintiff in the said sum of one thousand one hundred and thirty-seven dollars and thirty-five cents; and being so indebted, the said Thomas Davis in his lifetime afterwards, to wit, on the day and year aforesaid, at the county aforesaid, by his certain writing obligatory sealed with his seal, the date whereof is the day and year aforesaid, acknowledged the receipt of the said sum of one thousand one hundred and thirty-seven dollars and thirty-five cents to and for the use of the plaintiff, whereby the said Thomas Davis in his lifetime became bound to pay to the plaintiff the said sum of one thousand one hundred and thirty-seven dollars and thirty-five cents then he should be thereunto afterwards requested.

The defendants craved oyer of the paper declared on, and demurred generally to the declaration, and each count thereof; and the plaintiff joined in the demurrer.

The paper set out on oyer, was headed as follows: "A list of rents for Hannah Mead from 1815 to end of 1830, made 27th of May 1829, and again on the 8th of March 1831." Then followed an account, in which there was a column for the years, another for the tenants' names, another for the rent per annum, another for money received, and another for balance of rents not collected. And at the foot of this account was the following writing:

In the foregoing list of rents for Hannah Mead, arising on the several tracts of land willed to Hannah Mead as noted in the foregoing lists, in the county of Bedford, the annual amount of rents from 1815 to the end of 1830, amount to the sum of one thousand eight hundred and eighty-nine dollars and ninety-eight cents, of which sum three hundred and ninety-nine dollars and ninety-two cents has not been collected,
120 *and the sum of one thousand four hundred and ninety dollars and six cents have been collected on account of said rents, from which sum of collections is taken seventy-four dollars and fifty cents for commissions, and two hundred and seventy-eight dollars and twenty-one cents for land taxes up to the end of the year 1830, lawyers' and clerks' fees, &c., as per account rendered, leaving the net sum of one thousand one hundred and thirty-seven dollars and thirty-five cents. In the foregoing statement all errors to be corrected. As witness my hand and seal.

Thomas Davis. (Seal.)

March 5, 1831.

Issues were also made up on a special plea of non est factum, and of payment by Davis in his lifetime.

The demurrer to the declaration and to each count thereof was overruled; and upon the trial of the cause there was a verdict and judgment for the plaintiff for the sum of one thousand one hundred and thirty-

*For monographic note on "The Action of Debt," see end of case.

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seven dollars and thirty-five cents, with interest from the 5th of March 1831 until paid. On the trial the defendant took several exceptions to opinions of the court, but it is unnecessary to state them, as they were not noticed by this court. On the application of the defendants, a supersedeas was awarded.

Patton, for the appellants.
Garlands and Wingfield, for the appellee.

SAMUELS, J. The action of debt will lie only for a sum certain, or which may be rendered certain. Upon the argument of this case it seemed to me that the paper writing upon which the suit is brought cannot be construed into an admission of indebtedness in the sum of one thousand one hundred and thirty-seven dollars and thirty-five cents, nor into an acknowledgment of being bound to the supposed
121 obligee in that *amount; nor into a promise or obligation to pay that amount. That all that is written therein is perfectly consistent with the fact that Davis was not indebted to Mead in any amount whatever. Subsequent reflection and investigation have confirmed my first impressions, and I am of opinion to reverse the judgment, and enter judgment for the plaintiff in error upon the demurrer, for that the writing set out upon oyer imposed no obligation upon Thomas Davis, the plaintiffs' intestate. The court here, of four members, being equally divided in opinion on this question, the judgment of the Circuit court thereon cannot be reversed for the supposed error in the decision thereof.

Holding, then, for the purposes of this case, that the action of debt is well brought on this paper, it remains to consider whether it is counted upon in the declaration according to its legal effect. In order to decide this, we must look to the whole paper, commencing with the words "A list of rents," &c., and ending with the word "Seal," and the scroll annexed to the name of Thomas Davis. The legal effect of all this, as the declaration alleges, is to bind Thomas Davis in his lifetime, and his administrators after his death, to pay Hannah Mead one thousand one hundred and thirty-seven dollars and thirty-five cents, as and for a debt of that amount; and to estop the obligor and his representatives from alleging that the debt was more or less; yet the paper on its face contains the reservation for the benefit of either party, that "in the foregoing statement all errors to be corrected." This seems to be an affirmation that errors did exist in the process by which the balance of one thousand one hundred and thirty-seven dollars and thirty-five cents was arrived at; or, at least, that errors might exist therein. If error did exist, by the terms of the obligation it was to be corrected; and this reservation applies to every entry upon the statement by
122 which the amount of one *thousand one hundred and thirty-seven dollars and thirty-five cents might be affected; for instance, to the first entry: "1816—Jeremiah Adams—Rent per annum, $80; money received, $80." If, in fact, the rent had been one hundred dollars, and had been received, the sum of twenty dollars should be added to the one thousand one hundred and thirty-seven dollars and thirty-five cents; so, if money entered upon the statement had been paid over to the obligee, it is error to retain it in the statement so as to require it to be paid a second time. Thus the reservation may be made to enure to the benefit of the plaintiff, by averring in the declaration errors in the statement to her prejudice, and proving them at the trial; so the defendants, by pleas averring specific errors in the entries, or any of them, or any omissions to the prejudice of the obligor, and proving them on the trial, will secure the benefit of the reservation. A bond which contains a substantial provision for the relief of parties thereto, as above stated, is not identical in legal effect with a simple bond for payment of money absolutely, and by estoppel preventing any allegation from either party to vary the amount. There is such a variance between the bond declared on and that set out upon oyer, that the demurrer should, for that cause, have been sustained.

I am of opinion to reverse the judgment, and remand the cause, with directions to the Circuit court to permit the plaintiff below, upon terms prescribed by law, to amend her declaration, by inserting averments either that no error requiring correction, or that error did exist to be specified in the averments; and giving the defendants below permission to plead specifically any errors to their prejudice, and any other proper pleas. And if the plaintiff shall not so amend her declaration, that the court give judgment for the defendants below upon the demurrer to the declaration.

123 *LEE, J. To constitute a good and valid obligation, the law does not require any particular set form of words to be employed. Any words which sufficiently declare the intention of the party and denote his being bound or which expressly or impliedly acknowledge a debt as due from him to another will constitute a good bond: because it is only in the nature of a contract or a security for the performance of a contract which should be construed according to the intention of the parties. 7 Bac. Ab. (Bouvier's ed.) 241; 1 Tuck. Comm. 275; 2 Thomas' Co., Litt. 566, n. S. And I think the paper writing set out in the declaration sufficiently complies with these requisites to constitute a valid obligation. It is headed "A list of rents for Hannah Mead from 1815 to 1830 made 27th of May 1829 and again on the 8th of March 1831." Then follow in parallel columns the different years, the names of the tenants, the rent per annum, the money received, the balance of rents not collected. These different sums are added up and the results stated in figures at the foot of each column. The paper then proceeds to state in words the

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amount of the whole rents thus ascertained, the amount not collected, and the amount that had been collected. From the amount of the collections, it states that the sum of seventy-four dollars and fifty cents is deducted for commissions and the sum of two hundred and seventy-eight dollars and twenty-one cents for land taxes, lawyers' and clerks' fees, &c., as per account rendered, leaving the net sum collected eleven hundred and thirty-seven dollars and thirty-five cents. A provision is then added that all errors in the foregoing statement were to be corrected, and the paper was signed and sealed by Davis and delivered to Hannah Mead. From the terms of the writing it seems to me that the necessary and unavoidable inference is that the money collected for Hannah Mead had been
124 collected by Davis, and *that the net balance stated remained in his hands unpaid. It was therefore an acknowledgment under his seal that so much was still due her and was therefore a subsisting debt to pay which a promise is raised by implication of law. I do not see how the terms of the paper can be reconciled with the hypothesis that Davis may have owed Hannah Mead nothing. That the moneys received were collected by some one as agent of Hannah Mead, is apparent, and if Davis were not the agent why would he make a statement of the business in such terms as would be appropriate only to the party who was the agent and give to it the solemnity not only of his signature but his seal also? And while a portion of the amount collected is accounted for as applied to commissions and clerks' and lawyers' fees, &c., no intimation is afforded that the net balance or any part of it had been paid over to Hannah Mead or any person for her. If it had been intended as a mere statement of his transactions as agent by Davis part of which consisted in the payment over by him of the large balance found in his hands, whilst he was accounting for the smaller sums applied to commissions and fees he would not have failed to state how that large balance was disposed of; nor if the paper was not intended as an acknowledgment of a subsisting debt could there have been any necessity or reason for the provision that errors were to be corrected.

I think therefore the paper set out in the declaration does constitute a good and valid obligation binding Davis to the payment of the balance stated and that it was properly so considered in the Circuit court.

Nor do I think the paper produced varies from the description given of the writing set out in the declaration. That it should be described according to its legal effect, is conceded, but I think it is so described so far as necessary on the part of the
125 plaintiff. It is *true in the paper produced there is a distinct provision with which it ends that all errors in the statement were to be corrected, and the declaration takes no notice of this provision. But it is plain that it is to be construed not as an affirmance that there were errors in the statement, but that if there were, they should be corrected; and in the absence of any allegation of the existence of errors to the prejudice of either party, the paper stands as a valid and binding obligation for the net sum collected of eleven hundred and thirty-seven dollars and thirty-five cents, the same demanded in the declaration. To give it this effect it could not be necessary that the declaration should aver that there were no errors. If in fact there were errors to the prejudice of the defendant in the action, that would be matter of defense more proper to come from that side than to be the subject of negative averment on the part of the plaintiff; and what is matter more properly coming from the other side need not be stated by the pleader because it is not necessary he should anticipate the answer of his adversary which according to Hale, C. J., is "like leaping before one comes to the stile." See Sir Ralph Bovy's Case, Vent. 217; 2 Saund. 62, b; 1 Chit. Pl. (Phil. ed. 1828), p. 205; Steph. Pl. 354.

I do not perceive the force of the argument that as this paper contains upon its face a reservation for the benefit of both parties that all errors were to be corrected it varies materially from that described in the declaration because the latter imports a debt certain of eleven hundred and thirty-seven dollars and thirty-five cents and estops the obligor from alleging that it was more or less. But the party cannot be estopped when the right to show the debt to be less is expressly reserved by the paper itself, and to say there is a variance because this right is not referred to in the declaration and the existence of errors
126 negatived would *be to assail the well established mode of pleading on a bond with a condition where the declaration simply demands the penalty leaving the defendant to plead the condition and his performance of it.

I think therefore the declaration was good and that the demurrer was properly overruled.

Several other questions have been raised in this case but as the other judges are of opinion the declaration is defective in not negativing the existence of errors in the statement, it is unnecessary to express any opinion upon them.

MONCURE, J., concurred in the opinion of Samuels, J.

DANIEL, J., concurred in opinion with Lee, J., that the writing set out in the declaration was a valid and binding obligation, upon which debt would lie against Davis for the net balance therein stated: but he concurred with Samuels, J., in the opinion that the declaration was defective in not averring that there were no errors in the statement.

The following is the judgment of the court:

It seems to the court here, that the Circuit court erred in holding that the bond whereof the defendant in error made profert

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in her declaration, and which is made part of the record by oyer, was a bond for the payment of one thousand one hundred and thirty-seven dollars and thirty-five cents, neither more nor less. It further seems to the court here, that as the bond, in terms, reserved to the parties thereto the right to correct errors in the statement incorporated in the bond, the bond should be held to bind the obligor for so much money as might be found due after correcting all errors in the statement. That the defendant in error should have averred in her declaration that no error existed in the bond, if she
127 sought to *recover the sum above mentioned; or, if she sought to recover more or less, she should have averred such errors in the bond as would sustain her demand. Thus it seems to the court that the Circuit court erred in overruling the demurrer of the plaintiffs in error. Therefore it is considered that the said judgment be reversed and annulled, and that the plaintiffs in error recover of the defendant in error their costs in this court expended. And it is ordered that the jury's verdict be set aside and the cause remanded, with directions to sustain the demurrer, unless the defendant in error shall amend her declaration by inserting an averment that no error existed in the bond, if she shall insist on recovering the principal sum of one thousand one hundred and thirty-seven dollars and thirty-five cents; or, if she shall insist on recovering more or less than that sum by inserting averments to sustain her demand; and that the plaintiffs in error be permitted to file a plea or pleas alleging specific errors in the bond affecting the amount due thereon, and any other proper pleas to the action.

THE ACTION OF DEBT.

I. In General.

II. When Debt Lies.
- A. Simple Contracts.
- B. Bonds.
- C. Judgments.
- D. On Statutes.
- E. Partially Sealed Contracts.

III. When Debt Does Not Lie.
- A. In General.
- B. Bonds Not Payable in Money.

IV. The Pleadings.
- A. The Declaration.
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I. IN GENERAL.

The Action of Debt.—The action of debt is designed to recover a specific sum of money due by contract, sealed or unsealed, verbal or written, express or implied, where the amount is either ascertained, or from the nature of the demand is capable of being ascertained, whether due on legal liabilities (as penalties denounced by statute), on simple contracts, on specialties (or, obligations under seal), on records (as recognizances, judgments, etc.), or otherwise. [3 Bl. Com. 154, 155; 1 Chit. Pl. 123 *et seq.*; 3 Rob. Pr. (2d Ed.) 370 *et seq.*]; 4 Min. Inst. (3rd Ed.) 549. See also, Va. Code 1887 §§ 2852, 2853, and W. Va. Code 1899, ch. 99, §§ 10, 11.

The action has, as a natural consequence of the reforms in procedure, been more or less in disuse in modern practice, being entirely abolished in those states where code practice has been adopted.

The action of debt lies for the recovery of arrears of rent, but at common law no interest on rent was recoverable, unless expressly or by implication contracted for, or where justice required it. Cooke v. Wise, 3 H. & M. 463. But in Virginia and in West Virginia by statute interest is recovered "in any action for rent" as in other contracts. Va. Code 1187, §§ 2787, 3396; 4 Min. Inst. (3rd Ed.) 102; W. Va. Code 1899, ch. 98, § 7.

For the general requisites and qualities of a declaration in debt, and the modes of stating the cause of action, reference is made to 4 Min. Inst. (3rd Ed.) 685 *et seq.*, and 701 *et seq.*, where these subjects are fully treated.

West Virginia Practice.—It is held in State, etc., v. Harmon, 15 W. Va. 115, in interpreting sec. 10 of ch. 99, of the Code of West Virginia of 1868, that so far as it applied to the action of *assumpsit* upon sealed instruments containing a promise, undertaking or obligation to pay money, the court did not feel at liberty to give a more enlarged or liberal interpretation to it, than bound to by the language or terms thereof applicable thereto, but that it regarded it to be the safer practice under the then state of legislation to declare in debt upon a sealed instrument for the payment of money rather than in *assumpsit*.

Necessity to Aver and Prove Consideration.—At common law, in an action to recover money due by promissory note, not negotiable (the action being founded not on the note, but on the contract of which the note is evidence), it is indispensable to aver and prove a valuable consideration, as it is in actions on all unsealed contracts. 4 Min. Inst. (3rd Ed.) 701.

In Va. by statute (Va. Code 1873, ch. 141, § 10; Va. Code 1887, § 2852) in case of notes for the payment of money, a valuable consideration is *prima facie* presumed, at least where an action of debt is brought on the writing (Peasley v. Boatwright, 2 Leigh 198), and by the Code of 1887, § 2853, the same doctrine is applicable to *assumpsit*. Crawford v. Daigh, 2 Va. Cas. 521; Jackson v. Jackson, 10 Leigh 453; 4 Min. Inst. (3rd Ed.) 31. But the defendant may go into evidence touching consideration. Jackson v. Jackson, 10 Leigh 453.

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Joint and Several Causes of Action.—Debt on a single bill and on a *mutuatus* or other simple parol contract, may be joined in the same action of debt. Somerville v. Grim, 17 W. Va. 803. The action of debt lies to recover money lent, paid, had and received. Somerville v. Grim, 17 W. Va. 803.

On Speciality and Simple Contract—Joint Action.—An action of debt was brought on a bond for $207, on which was an endorsement by the obligor and obligee stating that a settlement had been made, and there was due on the bill $152. The declaration demanded $359, and contained two counts, 1st, on the single bill, and 2nd, on the simple contract. It is well established that debt may be brought on an obligation and on a *mutuatus* joined in the same action, though the former be under seal, and the latter a simple contract. The test of the propriety of such junction is that the accounts are of the same nature, and the same judgment may be given in all, though the pleas be different. The declaration in this case was free from objection, and the joint action was proper. Eib v. Pindall, 5 Leigh 109.

Appearance Bail—Bond with Conditions.—Appearance bail is not required in actions of debt on bonds with collateral conditions; and in such cases, it is error to enter a judgment by default against the sheriff for not requiring appearance bail. Ruffin v. Call, 2 Wash. 181; Nadenbush v. Lane, 4 Rand. 413.

Statutory Penalty.—Bail is not requirable in an action of debt, for the penalty of a statute. U. S. v. Mundel, 6 Call 245.

II. WHEN DEBT LIES.

A. SIMPLE CONTRACTS.

Note for Payment of Money or Tobacco.—The action of debt may be maintained on a note in writing, for the payment of money or tobacco, under our statute, and it is immaterial that the declaration should set out the consideration of the note, or that it was given for value received. Crawford v. Daigh, 2 Va. Cas. 521. And it was held in Hatcher v. Lewis, 4 Rand. 152, that debt lies against the endorsers of a note by a joint action.

Foreign Note Unstamped.—If the law of the State where a note is given only declares that it shall not be admissible as evidence unless stamped, an action of debt may nevertheless be maintained upon it in another state. Fant v. Miller, 17 Gratt. 47.

Writing Acknowledging Debt.—When there is a writing, signed by the debtor, acknowledging his indebtedness in a certain amount, the real owner may bring an action of debt thereon. Cunningham v. Herndon, 2 Call 530; Murdock v. Herndon, 4 H. & M. 200. An acknowledgment of indebtedness between the parties to a deed, contained in its recitals is a sufficient acknowledgment of a debt to sustain an action of debt thereon. Newby v. Forsyth, 3 Gratt. 308.

Acceptor of an Order.—Under the 4th section of the Act, 1 Rev. Code, ch. 125, p. 484, the payee of an order can bring an action of debt against the acceptor of an order, because by his acceptance he obliges himself to pay the amount of the order to the payee by an absolute and unconditional obligation, and the subsequent treatment of the paper does not affect him. Hollingsworth v. Milton, 8 Leigh 50.

Bill of Exchange—Acceptor.—An action of debt will lie in the name of the drawer of a bill of exchange against the acceptor, independently of statute, and an action of debt will lie in the name of the endorsee of a bill of exchange against the acceptor under the Virginia Statute, Code 1860, ch. 144, § 10; Regnault v. Hunter, 4 W. Va. 257, overruling Smith v. Segar, 3 H. & M. 394, and Wilson v. Crowdhill, 2 Munf. 302.

Acceptor of Bill of Exchange—Payee—Drawer—Endorsee.—It was held in Regnault v. Hunter, 4 W. Va. 257, that an action of debt will lie in the name of the payee of a bill of exchange against the acceptor, under sec. 10, chap. 144, of the Code of Va. 1860, provided it be averred in the declaration that the acceptance is signed by the party who is to be charged thereby, or his agent. An action will therefore lie in the name of the drawer of a bill of exchange against the acceptor, independently of statute. An action will lie in the name of the endorsee of a bill of exchange against the acceptor under the statute.

Foreign Bill of Exchange.—The action of debt lies on a foreign bill of exchange, which was drawn in another state and endorsed in this State. Stott v. Alexander, 1 Wash. 331.

To Hold Maker and Endorsee Jointly Liable Protest and Notice Necessary.—To make an endorsee of a negotiable note liable, in debt, with the maker, it must appear that the note was duly and formally protested for non-payment, and that he was duly notified of such non-payment, and protest. See Code 1868, ch. 99, § 11. Shields v. Bank, 5 W. Va. 254.

B. BONDS.

Bonds Dischargeable in "Notes or Bonds."—An obligor bound himself to pay to the obligee or order on or before a certain day, a certain sum of money, with interest, "which sum may be discharged in notes and bonds due on good solvent men residing in the county of Randolph, Virginia." This is a bond for the payment of money and for which an action of debt will lie. When the obligation is to pay a sum of money, or some other article in the alternative, on or before a certain day; or to pay a certain sum of money, with a privilege to the obligor to pay it in some other article on or before a certain day, the obligor has his election to deliver the article on or before that day; but if he fail to do so, he is liable absolutely for the money in an action of debt for its recovery. Butcher v. Carlile, 13 Gratt. 520.

Bonds Payable in "Goods or Money."—An obligation was made for the payment of a certain sum of money in monthly installments, "either in goods at regular prices or current money." At the dates of payments neither the goods were delivered, nor the money paid. It was *held* that this was an obligation to pay money, with the privilege to the obligor to discharge the money obligation by the delivery of goods at regular prices in equal amount, on or before the time of payment; and the obligor having failed within that time either to pay the money or so to deliver the goods, was liable in an action of debt thereon. Minnick v. Williams, 77 Va. 758.

On Bond of Sheriff for Trespass.—An action of debt is the proper remedy when proceeding on the official bond of a sheriff who takes the property of A. under an attachment against the property of B. This was a violation of the duty of his office and the condition of his bond, and his sureties are liable therefor. Sangster v. Com., 17 Gratt. 124.

Bonds Payable in Confederate Notes.—A bond was given in 1862, novating several prior transactions between the parties. If the intention of the parties to the bond was that it was payable in Confederate States treasury notes, the defendant is entitled to recover in an action of debt the value of the amount of such notes, scaled according to the value of such

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notes with reference to gold. Dearing v. Rucker, 18 Gratt. 438.

Bonds Payable in "Gold or Silver."—An action of debt was brought on a bond promising to pay, "twenty-four hundred dollars, in gold or silver, or its equivalent." The court was of the opinion that this was an obligation to pay a certain sum, and "gold or silver" was named as the standard of value. The obligor was not obliged to pay in that coin, he could have paid its equivalent. Such an obligation is an absolute one for the payment of a sum certain of money, and as held in Butcher v. Carlile, 12 Gratt. 520, although there was a privilege to discharge it in its equivalent, the action of debt was properly maintainable on it. Turpin v. Sledd, 23 Gratt. 288.

Replevy Bond.—The executors may either maintain the statutory remedy of motion, or the common-law remedy of action of debt on a replevin bond, payable to their testator. Booker v. McRoberts, 1 Call 243; Early v. Owen, 6 Munf. 319.

Defective Forthcoming Bond.—Although a motion has been brought on a forthcoming bond, and dismissed because it was defective, this did not prevent the subsequent bringing of an action of debt upon the same bond, the said bond being taken by the sheriff, and the property was not delivered according to the condition of the bond and the motion on said bond dismissed because of its insufficiency. Hewlett v. Chamberlayne, 1 Wash. 367; Johnstons v. Meriwether, 3 Call 533. The fact that the bond was taken payable to the sheriff instead of to the creditor, does not prevent his bringing an action of debt on it. Beale v. Downman, 1 Call 249.

Act of 1813-14, ch. 13, § 2 Construed—Administration Bond.—M. H. adm'r of R. H. recovers a judgment against E. B. adm'x of R. B. for debt due plaintiff's intestate, and sues out a *fi. fa.* thereon, which is returned *nulla bona*; then, M. H. the plaintiff, dies; and administration *de bonis non* of R. H.'s estate is granted to A. *Held*, the action of debt on the administration bond of E. B. against her and her sureties, lies at the relation of A. the adm'r *de bonis non* of R. H. and not at the relation of the representative of M. H., he first adm'r of R. H., upon the construction of the statute of 1813-14, ch. 13, § 2; 1 Rev. Code, ch. 104, § 63; Allen v. Cunningham, 3 Leigh 395.

Bond to Ancestor—When Heir May Sue.—The heir may maintain an action of debt on a bond to his ancestor, conditioned for the quiet enjoyment of lands, when the breach has happened *since* the ancestor's death. Every decedent leaves two representatives, the executor, who represents his personal rights, and the heir, who represents his real rights. The executor is entitled to the collection and possession of the personal estate for the purposes of payment of debts and legacies, but the heir is entitled to the realty. The bond sued on constituted no part of the testator's personal estate, as no breach occurred during his lifetime, but belonged to the heir as appertaining to the inheritance, and it was proper for him to sue in debt for the breach. Eppes v. Demoville, 2 Call 23.

C. JUDGMENTS.

Joint Judgments—One Defendant Dead.—Where a joint judgment is obtained against two defendants, and one dies, an action of debt on the judgment lies against the representative of the deceased defendant: the law respecting partitions, joint rights and obligations. 1 Rev. Code, 359, being applicable to joint judgments. Roane v. Drummond, 6 Rand. 182.

On Judgment "if Assets."—It was held in Braxton v. Wood, 4 Gratt. 25, that the action of debt could be brought on a judgment, confessed by the administrator in a suit by a debtor of his testator, "if a sufficiency of the assets of the defendant's testator's estate shall remain after payment of debts of superior dignity."

Judgment—When Records Destroyed.—The action of debt may be maintained on a judgment, although the records of such judgment have been destroyed by fire, which also destroys the record of an appeal taken on said judgment. Newcomb v. Drummond, 4 Leigh 57.

D. ON STATUTES.

Statutory Penalty.—By the Supp. to Rev. Code, ch. 88, p. 112, it provides that if any officer of an election, who interferes in the election in any way by showing partiality for any candidate, he shall forfeit a certain sum, to be recovered by bill, plaint, or information in any court of record. In an action of debt brought under this statute it was contended that debt not being mentioned as a means of recovery, the action did not properly lie, but the court held it to be embraced in the words "bill" and "plaint." Sims v. Alderson, 8 Leigh 479.

E. PARTIALLY SEALED CONTRACTS.

Writing Sealed by a Part of Signers—Joint—Joint and Several.—An instrument in writing, binding all of the parties thereto, purporting to be under their hands and seals, is not sealed as to one of the parties. An action of debt is brought on the paper, and on demurrer it is held proper to sue all of the parties to such paper in one action of debt. In order to maintain the action the undertaking must be either joint and several, or joint; it was held to be plainly one joint undertaking. Rankin v. Roler, 8 Gratt. 68.

An action of debt was brought upon the following instrument, "On demand, I promise to pay to David Keller the just and full sum of $200.00, for value received, as witness my hand and seal the 1st day of March, 1862.

Thos. McHuffman, [Seal.]

Security:—David M. Riffe." This action was a joint one, and was brought by Keller's administrator against the obligor and the surety. The court held that this writing constituted a joint and several promise to pay, and that the action of debt was properly brought on it; it was held not necessary to sue in separate actions the obligor and surety. Keller v. McHuffman, 15 W. Va. 64.

III. WHEN DEBT DOES NOT LIE.

A. IN GENERAL.

Bond Payable in Installments.—When the obligation is to pay a sum of money in twenty-five annual installments, debt cannot be maintained on the bond, until the whole amount becomes due and payable. The proper remedy is an action of covenant for the recovery of the installments as they fall due. Peyton v. Harman, 22 Gratt. 643.

Statutory Bonds.—If an act of assembly directs that a bond shall be payable to the justices, and that the penalty shall be £1,000; if the bond be taken payable to the governor, and the penalty be £10,000, and a suit thereon is brought by a succeeding governor for the benefit of the party injured by an action of debt, it cannot be sustained. Stuart v. Lee, 3 Call 421.

Against Drawer and Endorsers of a Specialty.—A single bill, under seal, is not a note, but a specialty; and therefore the drawer and endorsers of such a note made negotiable and payable at the Farmers' Bank, cannot be sued jointly in an action of debt. Mann v. Sutton, 4 Rand. 253.

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Single Bill under Seal.—Since the passage of the West Virginia Code of 1868, as before, a single bill under seal is not a note, but a specialty; and the drawer or endorsers of such a bill, although it be made payable and negotiable at a bank in West Virginia, cannot be sued jointly in an action of debt by virtue of the 11th sec. of ch. 99, of said Code. See Mann v. Sutton, 5 Rand. 253; Laidley v. Bright, 17 W. Va. 779. But see same section in the Code of 1899.

Beneficiary Not a Party.—Where there was an indenture between two parties, in which one of the parties covenanted to pay a certain sum to a third party, within a certain time and there was a breach of this covenant, the grantee or his personal representative only may proceed at law for its recovery, either by covenant for the breach or by debt for the money. The beneficiary cannot do so. So in a similar case when the contract was by parol, the beneficiary was not allowed to maintain debt or assumpsit for the money. The personal representative of the dead grantee alone being allowed to proceed *at law*. Ross v. Milne, 12 Leigh 204, 37 Am. Dec. 646.

Military Certificates.—It was held in Gibbon v. Jameson, 5 Call 294, that as debt could only be supported for money or tobacco, it did not lie for military certificates.

For Levying without Paying Year's Rent Due.—An action of debt was not sustained under an act which did not impose a penalty upon the officer for levying an execution on the property of the tenant, when a year's rent was due to the landlord, which the officer did not pay. The sheriff was liable in such case, but the remedy was an action on the case for consequential damages. Byrd v. Cocke, 1 Wash. 282.

Acceptor of Bill of Exchange.—An action of debt was held in Smith v. Segar, 3 H. & M. 394, and also in Wilson v. Crowdhill, 2 Munf. 302, not to lie against the acceptor of a bill of exchange. Otherwise by Va. Code of 1887, § 2853. See also, Regnault v. Hunter, 4 W. Va. 257, holding same way, that the action does lie.

B. BONDS NOT PAYABLE IN MONEY.

Bond "Payable in the Currency of Virginia and North Carolina Money."—On the 14th of September 1862, H bound himself by bond to pay to D twelve months after date eight hundred dollars for the purchase money of land, describing it, "payable in the currency of Virginia and North Carolina money." The obligation upon which this suit was brought, promised to pay eight hundred dollars "payable in the currency of Virginia and North Carolina money." Bank notes, though they pass generally by common consent as money, and answer the purpose of money, are not money in a legal sense unless they be made a legal tender in payment of debts. The action of debt will not lie where the amount of recovery in money must be ascertained by evidence of value and the intervention of a jury. The action of debt only lies for money and the plaintiff recovers the sum *in numero*, and not a compensation in damages. In this case the quantity of the Virginia and North Carolina currency was fixed, and the insertion of the words eight hundred dollars has no reference to current coin, but to the amount of bank notes which represents so much coin. In cases of indeterminate quantity there can be no other measure of damages than the named sum, and the intervention of a jury is unnecessary. The named sum must necessarily be the amount of the debt, which is then precisely ascertained. But where the named sum is to be paid in any determinate quantity of a collateral article subject to fluctuation in its market price, the value of that article is the thing due, and as it may be more or less than the named sum for which the creditor is willing to take the article, it must be estimated in damages by the jury. This was a promise to pay this sum in the currency named, and the action of debt cannot be maintained upon it. Dungan v. Henderlite, 21 Gratt. 149.

Bonds Payable in Bank Notes.—The obligor in a bond, promised to pay, on or before a certain specified day, the sum of "813 dollars and 79 cents, in notes of the United States Bank or either of the Virginia banks," and an action of debt is brought, on this writing. It is held that the action cannot be maintained. The action of debt will only lie upon a money or tobacco bond, and the plaintiff recovers the sum *in numero*, and not a compensation in damages. This is substantially a contract to pay bank notes to a certain specified amount, expressed in words as appropriate as any other, to signify how much bank paper was to be paid, and is equivalent to an engagement to pay bank notes amounting to 813 dollars and 79 cents, or so many bank notes as on their face will nominally make that sum. Paper may rise or depreciate in value before the day of payment, and if the day passes, when the contract is to be fulfilled, the measure of the obligee's right, and of the obligor's liabilities is the value of the notes on that day to be ascertained by the verdict of a jury, and awarded in damages. But where the promise is to pay a determinate sum in an article of fluctuating or uncertain value, if the quantity be fixed, so that at the day of payment it may fall short of the debt, there debt will not lie, because the essence of the contract was the delivery of the article and the creditor can only recover the value. As where there is an obligation to pay 500 dollars in wheat at a certain day, a failure is made to deliver the wheat on that day, debt will lie because the obligation was for 500 dollars, whether it be paid in coin or wheat. But if the obligation be to pay 500 dollars by the delivery of 500 bushels of wheat, there debt will not lie, although the day be past, for it is possible that the wheat on the day of payment will be worth less than 500 dollars. Beirne v. Dunlap, 8 Leigh 514.

IV. THE PLEADINGS.

A. THE DECLARATION.

1. IN GENERAL.

Omission of Obligor's Residence.—It is immaterial that the words, "of the county of Essex," the place of the obligor's residence, which is stated in the bond, are not stated in the declaration. Evans v. Smith, 1 Wash. 72.

Blank as to Sums, Date, etc.—Where an office judgment was entered for the plaintiff on a declaration in debt, which was blank as to the sum declared for, the date of the bond, the assignment to the plaintiff and the damage, it was incurably erroneous, and the judgment was reversed and the suit was dismissed with costs. Blane v. Sansum, 2 Call 495.

Declaration of Executor in Detinet—Judgment de Bonis Testatoris.—If an executor obtain a judgment against the administrator of the debtor, for a debt due to his testator, to be levied of the goods and chattels of the intestate, and he afterwards bring an action of debt against the administrator suggesting a *devastavit* and declare in *detinet* only, he cannot have judgment *de bonis propriis* of the ad-

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ministrator but only *de bonis testatoris*. To entitle the plaintiff to a judgment *de bonis propriis* he should declare in the *debet* and *detinet*. Spotswood v. Price, 3 H. & M. 123.

Executor's Bonds—How Action is Brought.—On a bond payable to "A. executor of B," the declaration technically should have been in the *debet* as well as the *detinet*, but it was only in the *detinet*. The plaintiff has the right to abridge his demand, and the omission to declare in the *debet* is such mere matter of form, that it will not be held regarded, even on special demurrer. Bailey v. Beckwith, 7 Leigh 604; Waller v. Ellis, 2 Munf. 88.

Declaring against Remote Heir.—In declaring in an action of debt against the heir of an heir on a bond in which such heirs are bound, he should be charged as heir of the heir of the obligor, or as heir of the obligor, with a *videlicet*, setting forth the intervening descent, but it is not necessary for the declaration to state how he is heir. Waller v. Ellis, 2 Munf. 88.

Husband Joined in Suit on Bond to Wife.—In an action of debt on a bond in the name of a married woman as assignee of the obligee the declaration stated that her husband had no interest in the subject matter of the suit but was joined with his wife by way of conformity. *Held*, the declaration was unobjectionable. Tate v. Perkins, 85 Va. 169, 7 S. E. Rep. 328; Hayes v. Va. Mut., etc., Ass'n, 76 Va. 225.

By Assignee on Balance Due.—It is a sufficient declaration in debt, which states that the defendant had acknowledged by his certain writing, the settlement of his account with W. R., and a certain amount due to him, which the said W. R. had by writing on the bill of settlement assigned to the plaintiffs, directing the same to be understood as belonging to the plaintiffs. This stated a sufficient cause of action. Cunningham v. Herndon, 2 Call 530.

On Administration Bond.—As administration bonds are for the use of others, and are specifically designated and provided for by law, it follows, that when such a bond is sued upon, and is to be exhibited as evidence, it ought clearly to appear from the declaration, that the bond declared on, is in its character an administration bond. It ought not to have to be inferable from the declaration that it is a mere private bond, which is the ground of action. When an official bond is the ground of action, it should be laid in the declaration to have been made to the obligee in his official capacity; that the declaration should manifest in what right the plaintiff sues is a general principle of law. The failure to state in a declaration in debt on an administration bond that the plaintiffs sued as justices of the court is a fatal variance, and the bond was inadmissible in evidence. Cabell v. Hardwick, 1 Call 345.

What Omissions in Declaration Fatal.—The declaration in an action of debt on a negotiable note, which fails to state that the plaintiff is the payee or endorsee or holder of the note, though the drawing of the note, and its endorsement by the payee in blank is alleged; which also fails to state that it was duly presented for payment at the place where it was payable, at the time when it became due and payable, that it was not paid, and that thereupon it was then duly protested for non-payment, of all of which the endorser had prompt notice, is fatally defective on general demurrer. Bank of Huntington v. Hysell, 22 W. Va. 142.

Against Heirs of Obligor.—In an action of debt on bond with collateral condition, the writ (which by the defendants' praying oyer was spread on the record) was against four persons, as heirs of the obligor, but the declaration only charged three as such heirs, the declaration was too defective for a judgment to be entered thereon, and such defect was not cured by verdict. Watson v. Lynch, 4 Munf. 94. See Va. Code 1887, § 2668.

2. THE DEBT.

On Joint Bond against One Obligor.—In an action of debt against one only of two joint obligors, where the declaration described the bond as joint, and did not state that the other obligor was dead, this was a fatal error, and though it was not pleaded in abatement, was not cured by verdict. Newman v. Graham, 3 Munf. 187. But it is held in Meredith v. Duval, 1 Munf. 76, that if the bond be spread on the record by oyer, and appear to be a *joint and several* bond, the defect in the declaration will be obviated. In neither case was the statute of *jeofails* adverted to. See Va. Code, 1887, § 3449.

When Interest Not Part of Debt.—The declaration in an action of debt on a judgment, which does not carry interest, demands the sum with interest. When the plaintiff, in an action in nothing extrinsic, but depending on a deed or other instrument, and *pari ratione* on a judgment, demands more than by his declaration he shows himself entitled to, the declaration is bad upon demurrer. Shelton v. Welsh, 7 Leigh 175.

On Maryland Judgment.—A Maryland judgment was rendered for a debt, damages and costs, with a memorandum at the foot that the plaintiff shall release the damages on payment of the interest due on the debt. In an action of debt brought on this judgment in Virginia, the declaration demanded the debt with interest, and not the damages. The demand of the plaintiff was substantially for the debt with interest, and hence there was no error in the declaration, which was held to be good in Kemp v. Mundell, 9 Leigh 12.

Acknowledgment of Indebtedness in a Deed.—In a declaration in debt on a deed, which contains the acknowledgment of the debt, it was held unnecessary to set out any more of the deed than that which contains the acknowledgment; and that only according to its legal effect. Newby v. Forsyth, 3 Gratt. 308.

On Statement of Agent.—An action of debt was instituted on a paper, which contained a statement of account of rents collected through a number of years by an agent for his principal. There was a statement at the foot of the account setting out the gross amount received, certain deductions, leaving the net sum due, concluding, "In the foregoing statement all errors to be corrected. As witness my hand and seal." This was signed and sealed by the agent. If this paper will sustain an action of debt, the declaration should declare that there are no errors in the bond; if plaintiff claims the net sum, and if she claims more or less, she should aver such error as will sustain her demand. Davis v. Mead, 13 Gratt. 118.

Defective Declaration—Statute of Jeofails.—The declaration in an action of debt on a judgment for a certain sum to be discharged by a lesser, demanded a wrong sum, and no special demurrer was filed. The error was cured by the statute of *jeofails*, there being enough in the declaration to show the true amount of the judgment. Roane v. Drummond, 6 Rand. 182.

Amendment of Declaration.—An action of debt was

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brought upon a judgment for a certain sum. In the declaration the sum declared for was slightly different from the judgment. The plea of no such record was filed. Upon the trial of the cause, the plaintiff moved to amend the declaration by inserting the true sum, which was allowed. There was no error in permitting the amendment. Anderson v. Dudley, 5 Call 529.

Date of Bond Blank in Declaration.—An action of debt was brought on two bonds, which were described in the declaration as dated on the — day of —— 1859, and the — day of —— 1860. The objection on general demurrer to these counts was not held sound, the bonds being fully described. Simmons v. Trumbo, 9 W. Va. 358.

Omission of Sum.—In an action of debt upon a protested negotiable note against the makers and endorsers, the accidental omission of the sum for which the note was given, in the description of it in the declaration, where it appears from other parts of the declaration, is not ground of demurrer. Archer v. Ward, 9 Gratt. 622.

Demand Less Than Amount of Note Sued on.—If the demand in the declaration in an action of debt be for less than the right of recovery shown by the note described in it, it would be disregarded on demurrer by reason of sec. 29, ch. 125 of the Code, and as the variance does not aggrieve the defendant, but is to his benefit; and also, in the absence of a demurrer, it is cured after judgment by sec. 3, ch. 134 of the Code of W. Va. Long v. Campbell, 37 W. Va. 665, 17 S. E. Rep. 197 (1893).

Variance—Several—Joint and Several.—If a declaration describe a note of several parties as several, while the note is joint and several, and no objection is made on account of the variance before judgment, though it be rendered on demurrer to evidence, it is unavailing to reverse the judgment by reason of sec. 3, ch. 134 of the Code of W. Va. Long v. Campbell, 37 W. Va. 665, 17 S. E. Rep. 197 (1893).

Declaration Defective.—A judgment was rendered in favor of testator of the defendant, against the plaintiff for 64£, 8s, 4d, to be discharged by the payment of 32£, 4s, 2d. The declaration in an action of debt, brought upon the above judgment, claimed only the latter sum, and a verdict was given to the plaintiff, and judgment entered. On appeal the judgment was reversed, because by the declaration it is manifest that the suit should have been for 64£, 8s, 4d, instead of 32£, 4s, 2d. Ragsdale v. Balte, 2 Wash. 201.

Interest Not Claimed.—An action of debt was brought upon a promissory note, bearing interest from date. The declaration stated the principal sum right, but omitted to state the amount of interest. Judgment for the principal sum without interest must be entered upon *non sum informatus*. Hubbard v. Blow, 1 Wash. 70. See also, Brooke v. Gordon, 2 Call 212. But now under the act which took effect April 1805, the clerk issues executions for interest, though not mentioned in the writing, nor demanded in the declaration. Wallace v. Baker, 2 Munf. 334; Baird v. Peter, 4 Munf. 76. See Va. Code, §§ 3390, 3391.

A judgment entered upon *nil dicit* or *non sum informatus*, in an action of debt in a penal bill, will not be reversed because the declaration, although describing the bill penal correctly as to the principal, penalty, and date, omitted to mention that the debt was payable "with interest from a day prior to the date," and judgment, in conformity with the penal bill was entered for the penalty, to be discharged by the principal, with such interest and costs. Harper v. Smith, 6 Munf. 389.

Variance between Bond and Declaration.—In an action of debt on a bond, the latter was recited in the declaration as bearing date in 1811; the bond produced, and made part of the declaration upon oyer was dated in 1810. This variance was held to be a matter of substance, and fatal to the case. Bennett v. Loyd, 6 Leigh 316.

On Judgment for Penalty Dischargeable by Smaller Sum.—In an action of debt on a judgment for the penalty of a bond, "to be discharged by a smaller sum with interest," the declaration ought not to demand "the smaller sum with interest till paid," but "the penalty to be discharged thereby." On the ground of this defect the court was of opinion that the error was a fatal one, even after verdict. Anderson v. Price, 4 Munf. 307.

Penalty and Not Aggregate of Bonds Sued on Demanded—Not Error.—The *queritur* in an action of debt brought upon an injunction bond should demand the aggregate of all the injunction bonds named in the declaration, where there are several counts, and there are apparently several bonds. But if the *queritur* demands only the penalty and not the aggregate it will not be so material an error as to be available on general demurrer. Bank v. Fleshman, 22 W. Va. 317.

3. THE BREACH.

Demurrer—Joining Causes of Action.—A declaration in debt contained but one count for the sum of $569 made up of the aggregate amounts due by two single bills, one of which alleged the defendant had bound himself to pay $100 in cash and $65.00 in good cash notes, the other that he bound himself to pay $385. The breach laid was that "the defendant has not paid the said several parcels of the said sum of $569, or any, or either of them, or any part thereof, in money or good cash notes." The defendant demurred because (1) the declaration was double in blending debt with covenant; (2) debt cannot be maintained on money to be paid in cash notes; (3) debt and covenant cannot be joined in the same action, and (4) debt is an entirety and indivisible. These objections cannot be considered on a demurrer to the whole declaration. The demurrer cannot be sustained. Henderson v. Stringer, 6 Gratt. 180.

Official Bond—From Whom Money Received—Injury from Breach—Damage.—In an action of debt on a bond conditioned for the faithful discharge of the duties of an office, the declaration need not set forth the particular persons from whom money was received, nor the sums received from each, nor the time when the breaches were committed, if it appears that they occurred during the continuance of defendant in his office; nor is it necessary to state the damages occasioned by the breaches. It is not necessary for the declaration, after the assignment of breaches, to allege that the plaintiffs have been injured by the breaches, but it is sufficient if it is stated that an action has accrued to the plaintiffs to demand and have the penalty of the bond. In an action for the penalty of a bond, it is not necessary to state that in consequence of the refusal of the defendant to pay, the plaintiff sustained damage. Allison v. Bank, 6 Rand. 204.

Bond by Distributees to Indemnify Administrator.—In an action of debt on a bond given by distributees to indemnify an administrator for dividing the estate among them, the condition being, "that they should pay him their respective proportions of all debts which he should be *compelled* to pay, that

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should thereafter come against said estate," it was a sufficient assignment of the breach for the declaration to say, "that the plaintiff on a day subsequent to the date of the bond, had paid, by the *consent* of the defendants, a debt which was then due from the estate aforesaid, and which, as administrator he was *bound* to pay, and that the defendants had not paid him their respective parts nor any proportion thereof, but the same had refused, although often requested." Moss v. Moss, 4 H. & M. 298.

Insufficient Assignment of Breach.—An assignment of a breach of a bond with collateral condition, in the declaration which commenced "and whereas, etc.," and continued in this way of recital to the end, and which did not contain any direct averment, was held insufficient, and the error was fatal on general demurrer. Syme v. Griffin, 4 H. & M. 277. See Va. Code 1887, § 3272.

Bond with Collateral Condition.—It is sufficient in declaring on a bond with collateral condition, if the declaration in debt on such bond assign the breach in the very words of the condition. Craghill v. Page, 2 H. & M. 446. Judgment was sustained although no damages were laid in the declaration in an action of debt on bond with a collateral condition. Craghill v. Page, 2 H. & M. 446.

In an action of debt on a bond with collateral condition, if the breach be assigned in as *general* terms as those of the condition, this is sufficient. In such cases, the plaintiff may recover more damages than he has laid in the declaration. Winslow v. Com., 2 H. & M. 459.

On Bond with Interest.—The declaration in an action of debt described it as being for a certain sum of money, with interest from a certain day. The breach laid was that the defendant had not paid "the aforesaid sum of money," without alleging the non-payment of interest. The defendant was not allowed to object to errors which were for his benefit, and the defect was cured by the verdict for the principal sum, together with damages and costs. Hammitt v. Bullett, 1 Call 567.

Counts in Declaration—General Conclusion—Breaches.—Where an action of debt is based upon a single bill and simple contracts for money lent, money received, or money paid, and the aggregate of all the counts is demanded, the usual conclusion need not be added to each count, and if the general conclusion of the declaration is in the proper form and good, it will be considered as applying to each count, as well as to all collectively. And when the breach in the count on the single bill is alleged to have been defective, and the breach at the end of the declaration is sufficient, the breach to the count of the single bill will be cured by the breach at the end of the declaration. Somerville v. Grim, 17 W. Va. 803.

Variance Cured after Verdict.—The defendant gave a bond, with condition, that he would collect certain debts due to obligee, make return of amounts collected, and surrender all bonds not paid, except such as might be lodged with lawyers for collection, agreeing to perform the duty of collector for the obligee to the best of his skill. An action of debt was brought on this bond, and the breach was laid on the defendant's neglecting to bring suits for the recovery of the debts, etc. This variance was held immaterial, particularly after verdict. Hawkins v. Berkley, 1 Wash. 204.

4. THE AVERMENTS.

Sheriff's Bonds—Bad Averment.—When the action of debt was brought on a sheriff's bond, and the declaration averred that the deputy sheriff *acknowledged* that he had received the amount of the execution, not that he had *received* it, this was a bad averment. For though it may be true, that the deputy made the acknowledgment, it may be false that he received the money. The receipt of the money was the gist of the action, and it should have been directly averred, that the defendant might put in an issue. The *acknowledgment* of the receipt of it did not offer proper matter upon which an issue could be made up. An issue made up on it would have been immaterial. Bennett v. Loyd, 6 Leigh 316.

Officer of Election—Statutory Penalty—Recitals.—In an action of debt under a statute imposing a penalty on the sheriff for partiality in conducting an election, the declaration was objected to because it contained mere recitals and not express averments; because it did not aver that there was an election, nor that defendant conducted it, the words "being, etc.," were mere recital. The court held that while the facts of the election, of the plaintiff being a candidate, and that the defendant was the sheriff, were set forth by way of recital, the fact that the defendant "did interfere and show partiality," which was the gist of the action, was set forth directly and not by way of recital, and that the declaration was good on general demurrer. Sims v. Alderson, 8 Leigh 479.

On Sheriff's Bond—Fatal Omission.—A declaration in an action of debt upon a sheriff's official bond, for the use of the county court of his county, for failing to pay over moneys received by him in his official capacity for the use of such county, which fails to aver that before such action was commenced, the county court had, by its order entered of record, or by a draft made in pursuance thereof, ordered him to pay such moneys to his successor in office, or to some other person, and that said sheriff had notice thereof, is, upon general demurrer, fatally defective. State v. Hays, 30 W. Va. 107, 3 S. E. Rep. 177.

Averment of Penalty in Penal Bond.—A declaration in debt on a penal bond executed to an individual must contain an averment of the non-payment of the penalty; and if it does not, the defect will be fatal on general demurrer. Rigg v. Parsons, 29 W. Va. 522, 2 S. E. Rep. 81.

On Executor's Bond—Averment of Assets Necessary.—In an action of debt on an executor's bond, the declaration must aver that assets sufficient to pay the debt came to the executor's hands, or the amount of assets that came to his hands, and the *devastavit* thereof; and if the declaration contain no such averment, it is bad on general demurrer. Burnett v. Harwell, 3 Leigh 89.

Attachment Bond—Insufficient Allegation.—In an action of debt upon an attachment bond, the condition of which was that the defendant should pay all costs and damages that might accrue from wrongfully suing out the attachment, the declaration averred that the defendant "did not pay all such costs and damages as have accrued, etc." But there was no averment that the attachment was wrongfully sued out, or that costs and damages had been sustained. This was not a sufficient declaration; a direct averment was essential. Dickinson v. M'Craw, 4 Rand. 158.

Executor's and Commissioner's Bond—Declaration Sufficient.—A bond is executed to an executor and commissioner under decree of court, with conditions reciting that the obligor has borrowed of the executor and commissioner a certain sum of his testa-

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tor's estate, which by said decree he is authorized to put at interest, on real estate security and to take bonds in his own name as executor, the interest to be paid semi-annually, and the principal when he may so require. The declaration in debt on this bond did not aver any order of the court authorizing the collection of the money. On demurrer the declaration was held sufficient. Cabell v. Cox, 27 Gratt. 182.

By Administrator of Assignee.—On general demurrer the declaration, in an action of debt by the administrator of the assignee of the obligee against the administrator of the obligor, was held to be essentially defective, because it did not aver that the defendant had not paid the assignor, before notice of assignment, nor the plaintiff's intestate in his lifetime afterwards. Mitchell v. Thompson, 2 P. & H. 424.

Statute of Limitations Pleaded.—The plaintiff in an action of debt, if he wishes to take his case out of the statute of limitations by relying on a subsequent acknowledgment of the debt by the defendant within the period of limitation, must count on such subsequent acknowledgment in his declaration; it is otherwise in an action of assumpsit. Butcher v. Hixton, 4 Leigh 519.

Promissory Note—Presentment.—In an action of debt on a promissory note, brought by an indorsee against the maker, the declaration stated the note as one made negotiable at the Bank of Va. at Petersburg, and averred that the note was presented at the bank at maturity and protested for non-payment; the note offered in evidence, was made negotiable at the bank; there was no proof that it was presented at the bank for payment. The note was not made payable at any particular place, it was only made negotiable at the bank at Petersburg, and was not necessarily payable there. The averment of presentation at the bank is mere surplusage and immaterial, and need not be proved. Barrett v. Wills, 4 Leigh 114.

Penal Bill—Demand.—In an action of debt on a penal bill payable on demand, the declaration contained no averment of a special demand. An obligation to pay money on demand is evidence of a present debt payable *instanter*, and the writ is a demand, which entitles the plaintiff to the penalty. Payne v. Britton, 6 Rand. 101.

Consideration—Value Received.—It is an unnecessary averment in the declaration of an action of debt in a writing for the payment of money, that there was any consideration, or that it was for value received. The plea is *nil debet*, which calls for proof of note, and allows evidence to be given that the consideration is bad or lacking. Crawford v. Daigh, 2 Va. Cas. 521; Peasley v. Boatwright, 3 Leigh 195. See Va. Code 1887, § 2852.

On Debt Due Testator.—In an action of debt brought by the surviving executor for a debt due to the testator in his lifetime, the declaration charged that the debt was not paid to the plaintiff, but did not charge also that it was not paid to the testator, nor that it was not paid to either of the co-executors. This was a fatal defect, and was not cured by verdict. Buckner v. Blair, 2 Munf. 336.

On Assigned Promissory Note.—A declaration in debt on an assigned promissory note, which did not state that the defendant had failed to pay the money to the drawee, as well as to the plaintiff, was held to be too defective to maintain the action. Norvell v. Hudgins, 4 Munf. 496.

Sheriff's Bond.—In an action of debt on the bond of a sheriff, with collateral condition, it was held that where the declaration charged that he failed to pay the taxes *on demand*, instead of *at the time appointed by law*, that this was sufficient after verdict. Winslow v. Com., 2 H. & M. 459.

On Assigned Bond.—In an action of debt upon an assigned bond, the declaration did not aver that neither the defendant, nor her testator, in his lifetime, paid the debt to the obligee, or to either of the assignees of the said bond, but only averred that neither of them paid the same to the plaintiff. The declaration should state a failure to pay to the obligee, and each of the assignees, as well as to the plaintiff, and a failure to do so is too great a defect to permit the action to be maintained, and such defect is not cured by verdict. Braxton v. Lipscomb, 2 Munf. 282; Green v. Dulany, 2 Munf. 518; Nicholson v. Dixon, 5 Munf. 198.

And in a similar case although the partner, who did not sign the debt, put in a plea of payment, and verdict and judgment is given against him in the lower court, still this is too defective to support a judgment against him, in the absence of other averments binding him, and the judgment was reversed. Garland v. Davidson, 3 Munf. 189.

On Bond of Partner for Firm.—In an action of debt against a partnership, on a bond signed by only one partner for the firm, the declaration charged that "W." for "W. G." bound himself, his heirs, executors and assigns to pay, etc. This was adjudged insufficient in law to maintain the action against the firm in the absence of other averments binding them. Shelton v. Pollock, 1 H. & M. 423.

5. THE DAMAGES.

Bond with Collateral Condition—Assessment of Damages—Penalty.—In an action of debt upon a bond with a collateral condition, the jury may assess damages beyond those laid in the declaration, if the penalty be sufficient to cover them. Payne v. Elizey, 2 Wash. 143.

Damages Omitted in Declaration.—The omission to lay damages in the declaration in an action of debt although in an action sounding in damages was cured after verdict by the statute of jeofails. Stephens v. White, 2 Wash. 203.

Recovery on Collateral Bond Limited to Breaches Assigned.—In an action of debt on a bond with collateral condition, the plaintiff cannot recover any costs or damages, which he did not demand in the assignment of breaches in the declaration. Woodson v. Johns, 3 Munf. 230.

Variance between Writ and Declaration—Interest—Protest Charges.—An action of debt was brought upon a protested negotiable note. The writ demanded the principal sum, but did not demand interest, nor the costs of protest. The declaration contained demands for the principal sum, together with interest and the protest charges. The demand for interest in the declaration, which is not claimed in the writ, is no objection, since by the statute in that case provided, the interest follows the principal as the shadow does the substance. It is error to claim charges of protest not claimed in the writ. Where judgment is by default this error may be taken advantage of. Hatcher v. Lewis, 4 Rand. 152.

B. THE PLEAS.

1. IN GENERAL.

Wrong Plea—Amendment.—Where the plea of payment was filed by the attorney, through inadvertence, and for want of information, to a declaration in debt on joint bond against the executors of one obligor, instead of the plea of discharge, which was

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proper (the death of one obligor on a joint bond, prior to the Act of 1786, discharged his executors), the plea was allowed to be amended, after trial and verdict for plaintiff. Richardson v. Johnson, 2 Call 327. See Va. Code 1887, § 2855.

Attachment before Notice.—In debt by the assignee of a bond, it is not a sufficient plea, that, before notice of the assignment, the effects of the assignor were attached in the defendant's hands, and a decree entered that he should pay the debt to the attaching creditor, etc.; and that, accordingly, he had made such payment;—it appearing by the pleadings, that the bond was assigned before the attachment was instituted, and suit brought upon it by the assignee before the payment made. Wilson v. Davisson, 5 Munf. 178.

Plea of Statute of Limitations—Acknowledgment of Debt.—In an action of debt upon a promissory note against principal and surety, the surety plead the statute of limitations, and to which the plaintiff replied generally. It was held that proof of the acknowledgment of the debt by the principal, within five years next before the action was brought, did not sustain the issue on the part of the plaintiff. Butcher v. Hixton, 4 Leigh 519.

Demurrer to Plea.—An action of debt was brought on the official bond of a sheriff in the name of G. successor of T., governor of Virginia, to whom the bond was given. A plea was filed that G. was not, and that M. was the successor of T. A demurrer was filed to the plea. The plea although filed to entrap, cannot be pronounced bad in substance on demurrer, for that merely decides whether the plea is a good one, not whether the defendant should be permitted to file it. Bennett v. Loyd, 6 Leigh 316.

Upon a demurrer to a plea, the court goes back to the first fault, and if plaintiff's declaration is defective, gives judgment for defendant on the demurrer, nor is defect cured by the defendant pleading over. Bennett v. Loyd, 6 Leigh 316.

Issuable Plea.—In an action of debt against an executor, the defendant pleaded that the testator in his lifetime was the guardian of an infant, that his account as guardian had been settled by the commissioners of court, which showed a large balance due to the ward, and that this was a debt of higher dignity than that claimed by the plaintiff. This was held not to be an issuable plea. Wyatt v. Woodlief, 1 Leigh 473.

Plea of Covenants Performed.—Where an action was brought on a bond, the condition of which was that the obligor should make a title to a tract of land, when thereunto lawfully required, and the defendant plead covenants performed, the plaintiff was not bound to prove on his part any demand of a deed. Pate v. Spotts, 6 Munf. 394.

Repleader Awarded—Not Prayed for.—An action of debt is brought against M as heir and devisee of his father, upon a bond entered into by the father for the payment of money. The defendant pleaded "nothing by descent," and issue was joined. A repleader was awarded, though not asked for in lower court, because the issue only tried the right as to the descent, but not as to the devise. Baird v. Mattox, 1 Call 257.

2. EVIDENCE UNDER.

Parol Evidence under Plea of Payment.—This was an action of debt brought on a bond, to which the defendant filed a plea of payment. On the trial the defendant introduced a witness, who stated that he heard the plaintiff, before the institution of the suit, tell the defendant that $35 only of the bond remained unpaid. The plaintiff's counsel moved to exclude this evidence from the jury on the ground that no such payment as that was stated in the account of payments filed with the plea. But as by the act of assembly, 1 Rev. Code 487, ch. 127, it was provided, that in an action of debt due by judgment, bond, bill or otherwise, the defendant shall have liberty, upon the trial thereof, to make all the discount he can against such debt; and upon proof thereof the same shall be allowed in court; it is competent under the plea of payment to give in evidence parol admissions of the plaintiff, that but a portion of the debt claimed was really due. Rice v. Annatt, 8 Gratt. 557.

Proof under Specific Plea in General Terms.—In an action of debt brought on a bond given for the price of a slave, a special plea under the act of 1831 is good, which avers in general terms, that the slave was unsound at the time of the sale, and that the plaintiff knew the fact and fraudulently concealed it from the defendant; and that upon discovering the fact the defendant offered to return the slave and demand a rescission of the contract, which was refused, laying damages to the whole amount of the price, or not laying any damages, and praying for judgment in bar of the action. If such a special plea avers in general terms the unsoundness of the slave, and then adds a specific unsoundness, the defendant may prove any unsoundness under this plea, and is not confined to the specific unsoundness named in the plea. Fleming v. Toler, 7 Gratt. 310.

Lost Bond—Copy Admissible in Evidence.—An action of debt was brought upon a bond, with *profert*, the defendant craved *oyer*, which was given, but the bond shown was a copy, and the defendant plead payment, by doing which he waived the necessity of producing the original, and a copy may be given in evidence at the trial, upon due proof of the loss or destruction of the original. Taylor v. Peyton, 1 Wash. 252.

3. IN BAR.

Plea in Bar of Action on Bond with Collateral Condition.—In an action of debt on a bond with collateral condition the declaration was in the usual form. The defendant prayed oyer of the condition of the said bond which was as follows: "Whereas the obligor did lend to J. W. $2,500 of the obligee's money, and the said J. W. having failed, but before he failed he paid $500, and whereas the said obligor hath instituted a suit against said J. W. for the recovery of said money; now, if the said obligor shall pay the whole sum so lent, if it can be recovered from the said J. W. or, in case it cannot be wholly recovered, will lose the one-half of that sum which cannot be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue:"—a plea was filed stating "that he, the said obligor, could not recover of J. W. or his endorser the sum of money in the said condition mentioned, or any part thereof, and that he paid to the obligee one-half of the sum which could not be so recovered, and the further sum of five hundred dollars." This was held a good and sufficient plea in bar to an action upon the bond, without any further averment that the said obligor has used due diligence in prosecuting the suit, and without stating what measures he had taken to recover the money, or who the endorser was. Cooke v. Graham, 5 Munf. 172.

Issue Refused—Rejection of Pleas.—In an action of

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debt against an executor, judgment by default having been regularly entered and confirmed, the defendant tendered four good pleas in bar, to which the plaintiff immediately put in replications tendering issues. The defendant refused to join in the issues, rejoin or demur. The court thereupon rejected the pleas of the defendant, and proceeded to judgment. Wyatt v. Woodlief, 1 Leigh 478.

Plea to Action on Injunction Bond.—This was an action of debt on an injunction bond in a penalty. The declaration stated that the injunction was dissolved whereby the action had accrued. A plea was filed, stating, "that the injunction was not dissolved unconditionally; but upon terms, that the plaintiff at law should execute a bond for securing the title to a tract of land," but did not aver that such bond had not been given. This was a defective plea and should not have been received to set aside an office judgment. Gray v. Campbell, 3 Munf. 251.

Conditions Performed.—In an action of debt upon a sheriff's official bond, the plea of conditions performed, properly pleaded, is an answer to the whole cause of action in the declaration mentioned, and controverts the plaintiff's right to any recovery whatever. State v. Hays, 30 W. Va. 107, 3 S. E. Rep. 177.

Unchartered Banking Company.—To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action. Hamtramck v. Selden, 12 Gratt. 28.

4. NIL DEBET.

Plea of Nil Debet.—In an action of debt upon a negotiable note, the defence that the plaintiffs are not holders for value of the note, may be made under the plea of *nil debet*. Fant v. Miller, 17 Gratt. 47.

For a general discussion of what may be proved under the plea of *nil debet*, reference is made to 4 Min. Inst. (3rd Ed.) 770.

In the recent case of Richmond City & S. P. Ry. Co. v. Johnson, 90 Va. 775, 20 S. E. Rep. 148, it was held that in order to prove payments under the plea of *nil debet*, he must file with his plea such a descriptive account as is required by sec. 3298 of the Va. Code of 1887, citing 1 Bart. Law Pr. (2d Ed.) 492, 498.

Foreign Judgment—Nil Debet—Special Plea.—To an action of debt brought in Virginia upon a judgment entered in the District of Columbia, the defendants tendered a plea of *nil debet*, and a special plea, alleging that the said judgment was recovered on a bill of exchange given while in a state of intoxication for money won at gaming. The judgment of the court of the District of Columbia is a foreign judgment, the "full faith and credit" clause of the Constitution only applying to "States," and the plea of *nil debet* is admissible, but the special plea should be rejected, as the defendant cannot bring into question the merits of the original judgment. Draper v. Gorman, 8 Leigh 628.

Improper Plea Set Aside.—An action of debt was brought in Virginia on a Maryland judgment. The defendant pleaded no such record, on which issue was joined. He afterwards tendered a plea of *nil debet*, which was allowed, and issue was joined on it. At the next term as on general demurrer to the plea of *nil debet*, judgment was entered for the plaintiff on both pleas. It was error to receive the improper plea of *nil debet* (Clarke v. Day, 3 Leigh 172), and the court might properly have corrected this by subsequently setting aside the issue and the plea. This was substantially done by entering a judgment as if there had been a demurrer. The proceedings were not reversed for the irregularity. Kemp v. Mundell, 9 Leigh 12.

Foreign Judgments—Plea of Nil Debet.—This was an action of debt brought in the state of Virginia on a judgment rendered in Kentucky. The Constitution and Acts of Congress of the United States have placed the judgments of the courts of other states, when sued on here, on the same ground and as having the same effect, as they would have if sued on in the state where they were obtained. The plea filed was *nil debet*, which assumes that the judgment is not conclusive evidence. Such judgment was affirmed on appeal to the Supreme Court of Kentucky, and was conclusive on the parties in that state. The plea was held bad. Clarke v. Day, 2 Leigh 172; Kemp v. Mundell, 9 Leigh 12.

Plea of Nil Debet—Apportionment of Rent.—In action of debt for rent, the defendant, on a plea of *nil debet*, may give in evidence any special circumstance showing that the rent ought to be apportioned. Newton v. Wilson, 3 H. & M. 470.

Accord and Satisfaction Must Be Pleaded.—Several smaller promissory notes were given for a large one, and suit was brought on the large one. The plea was *nil debet*. The smaller notes were held not to be a discharge, but at most an accord and satisfaction, which would have to be pleaded. It could not be admitted under the general issue. McGuire v. Gadsby, 3 Call 234.

5. NON EST FACTUM.

Plea of Non Est Factum after Plea of Payment—Affidavit to Plea.—In an action of debt upon a single bill under seal, the defendant pleaded payment and the office judgment was set aside. On trial the defendant moved for leave to file the plea of *non est factum*, with affidavit annexed that said plea was true "to the best of the defendant's knowledge and belief." The lower court rejected the plea. The plea, being one which goes to the merits, should have been received, especially so, when it was not offered for the purpose of delay. An objection that the affidavit was not positive was not sustained. No man can swear positively to legal inferences, and the words of the affidavit do not render it defective. Jackson v. Webster, 6 Munf. 462.

Non Est Factum—Execution—Fraud.—In an action of debt founded on a bond or other deed, the defendant may put in issue the execution of the instrument by pleading *non est factum* generally and in the common form. In a court of common law, fraud may be given in evidence to vacate a deed on the plea of *non est factum*, if such fraud relates to the execution of the instrument; as the essential element of delivery. American, etc., Co. v. Burlack, 35 W. Va. 647, 14 S. E. Rep. 319.

6. PAYMENT.

Plea of Payment—Part of Debt Due.—When an action of debt was brought on a bond with a condition, which was made a part of the declaration by *over*, and that condition only showed that a part of the money secured was due at the time of the institution of the suit, the plea of payment put in by the defendant only extended to such sums, and not to those which afterwards became due. Thatcher v. Taylor, 3 Munf. 249.

Plea of Payment—Set-Off.—In an action of debt on

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a bond, the defendant plead, as a set-off, the obligation of the plaintiff assigned to him by a third person, and also put in the general plea of payment. The writing when produced proved not to be an obligation, but a promissory note executed by the plaintiff. This was held to be evidence under the second plea of payment, but not under the first. Anderson v. Bullock, 4 Munf. 442.

Plea of Payment—When General Issue.—The plea of payment is responsive to the negation of non-payment in the declaration. The act of assembly, by allowing a general plea of payment in all cases, with a right to prove all anterior payments, makes it a general issue in this country. Henderson v. Southall, 4 Call 371.

Condition Performed Equivalent to Payment.—The plea of condition performed, to an action of debt for money, is equivalent to the plea of payment. Defendant was not allowed to object to errors in pleadings which are for his benefit. Hammitt v. Bullett, 1 Call 567.

Misjoinder of Issue—Cured by Statute of Jeofails.—In an action of debt on bond, the defendant files as his plea, this, "that he has well and truly paid the debts in the declaration mentioned, and the statute of limitations; and of this he puts himself upon the country, and the plaintiff likewise, and issue was joined." The pleas of the statute of limitations and payment should have concluded with a verification, and issue could not have been joined upon them by adding a *similiter*, but only after replication. This was a misjoinder of issue and improper, but was cured after verdict by the statute of jeofails. Simmons v. Trumbo, 9 W. Va. 358.

7. OF FRAUD.

Action at Law—Special Plea of Fraud.—The action of debt was brought on a specialty, and the defendant sought to avoid it by a plea, which stated that the bond had been obtained by fraudulent misrepresentations made by the plaintiffs. The circumstances relied on did not relate to the *execution*, only to the consideration of the bond. A specialty cannot be avoided in a court of law on this ground. Wyche v. Macklin, 2 Rand. 426. Since 1831 this rule has been changed by statutory provision. See Va. Code 1887, § 3299; Code of W. Va. ch. 126, § 5.

Plea of Misrepresentation—Estoppel—Waiver.—In an action of debt on bond, the defendant plead that it was obtained by false representations and suggestions by the plaintiff, "as per preamble in the said bond." The plaintiff joined issue as to the fact, and the jury found against him. If there had been any estoppel to such plea it was thereby waived, and judgment ought to have been for the defendant. Chew v. Moffett, 6 Munf. 120.

In Tomlinson v. Mason, 6 Rand. 169, it was held to be immaterial in a plea to an action of debt on a bond, that the bond was obtained by fraud and covin, without saying whether the fraud was in the consideration of the bond or in its execution.

C. THE REPLICATION.

Special Replication—Rejoinder.—A bond was given with condition to perform an award to be made by certain arbitrators. In an action of debt on this bond, the condition was made a part of the record by *oyer*, and the defendant pleaded "conditions performed." The plaintiff may set forth the award, and aver a breach of condition, by a special replication, not having done so in his declaration. But if he neglect to do this, and reply generally, the judgment ought to be arrested, after a verdict in his favor. The proceedings subsequent to the plea should be set aside, and a repleader awarded. Green v. Bailey, 5 Munf. 246.

Replication Defective in Setting Forth Condition of Bond.—In an action of debt on a bond in a penalty, with a condition for the payment of a less sum by installments, upon certain prescribed conditions, the plaintiff in his declaration claimed the penalty, but made no mention of the conditions. The defendant pleaded payment. The plaintiff in his replication set forth the condition of the bond, and averred non-payment of the sum mentioned in the condition at the times therein specified. This replication was held bad on general demurrer. Mitchell v. Thompson, 2 P. & H. 424.

Replication to Plea of Feme Covert.—In an action of debt on bond, the defendant pleaded in bar that she was, at the time of executing the bond and yet remained, a *feme covert*. The replication of the plaintiff was, that the defendant's husband had abjured the commonwealth and was not then or now a citizen thereof. To this replication a general demurrer was filed and the replication was held to be wholly defective. If it was intended that the common-law abjuration of the realm was to be relied upon, that never existed here. If it was intended that the expatriation of the husband under our statute was to be relied upon, it should have been shown how he expatriated himself, by a recorded declaration by deed, or in open court and that he had departed from the commonwealth. Even this would not have been sufficient, without the further allegation that he resided abroad at the time of the execution of the bond by his wife. The replication was held defective. Branch v. Bowman, 2 Leigh 170.

Peremptory Judgment—When Rendered on Plea.—If in an action of debt against an heir, he pleads "no assets by descent, nor at the time the writ issued, nor at any time since, except a tract of 107 acres of land;" and issue is joined on the replication, that he had sufficient other lands by descent; and the jury find for the plaintiff, peremptory judgment will be rendered thereon. Cohoons v. Purdie, 3 Call 431.

Defective Replication—Repleader Awarded.—In an action of debt against the executors of one obligor, on a bond given by the testator and one John Pattie, the defendant, without taking *oyer*, pleaded in bar, "that the said John Thornton was jointly bound with a certain John Pattie, and the said John Pattie survived him." To this plea the replication was "that it is not expressed in the bond that the said John Thornton was jointly bound with the said John Pattie, as alleged in the plea, and if they were jointly bound, that by Act of 1786 it is declared that the representative of one jointly bound with another, may be sued as well as the surviving obligor himself." The plea was held good, the replication faulty and a repleader awarded. Stevens v. Taliaferro, 1 Wash. 155.

Plea of Payment—General Replication.—An action of debt was brought against the defendant on a note. The defendant plead payment, to which plea a general replication was filed, and issue joined. At the trial the defendant moved for an amendment to set aside the proceedings subsequent to the replication, and proved that issue was joined by the clerk without his consent and against his wish. The general replication to the plea of payment did not constitute an issue. The defendant should have been permitted to prove that the *similiter* entered was against his consent. The proceedings should have been cor-

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rected by giving him a rule to take other measures to the replication. Nadenbousch v. McRea, Gilmer 228.

For statutory provisions regarding the *similiter*, see Va. Code 1887, §§ 3268, 3449; Code of W. Va., ch. 125, § 25; ch. 34, § 8.

V. VERDICT.

A. WHEN VALID.

Aggregate of Principal and Interest.—In an action of debt upon a bond, with a penalty, for the payment of money, the jury may make their verdict of the aggregate of principal and interest. The defendant will not be allowed to appeal for that cause, since that mode of finding the verdict was for his benefit. Smith v. Harmanson, 1 Wash. 6.

Verdict for Erroneous Sum—When Immaterial.—In an action of debt on a judgment for a certain sum, to be discharged by a lesser, when the declaration demands a wrong sum, a verdict which finds an erroneous sum, "that being the debt in the declaration mentioned," is substantially good, the sum being surplusage, and the conclusion of the verdict being, of itself, sufficient to show the real sum demanded. Roane v. Drummond, 6 Rand. 182.

Above Amount Claimed in Declaration.—In an action of debt on a bond with a collateral condition, the penalty is that for which the plaintiff sues, and any sum given below that is within the sum declared for. The jury may assess damages beyond those laid in the declaration. Payne v. Elizey, 2 Wash. 134; Johnstons v. Meriwether, 3 Call 523; Winslow v. Com., 2 H. & M. 459.

Against Part of Obligors.—In an action of debt on a bond against five obligors, the sixth was omitted; it appeared from the declaration that the former were securities for him. It was not alleged that he had sealed the bond, and no plea in abatement having been filed, the court gave verdict for the plaintiff. The presumption was that the unnamed obligor was dead, although not so stated in the declaration, and the judgment will be sustained. Winslow v. Com., 2 H. & M. 459.

Sufficiently Certain.—A verdict and judgment for a debt claimed in the declaration with interest, subject to a credit for a specified sum, paid at a specified date, is certain enough. Barrett v. Wills, 4 Leigh 114, 26 Am. Dec. 315.

Plea of Fraud—Sufficient Verdict.—In an action of debt issue was joined on a plea that the bond which was sued upon was obtained by fraud. A verdict "for the defendant, because the jury believed the bond was obtained by fraudulent means" was held to be sufficiently positive and certain. Chew v. Moffett, 6 Munf. 120.

Bond for Tobacco with Pecuniary Penalty.—A executes a writing obligatory to B for the payment of tobacco, under a pecuniary penalty, with a condition annexed, that it shall be void if G shall pay the tobacco, or its value to A. In an action of debt brought on this writing the declaration assigns a breach of the condition, and the defendant pleads payment. The verdict and judgment ought to be for the penalty, to be discharged by payment, not of the tobacco with interest thereupon, but of damages, for breach of the condition. Overstreet v. Marshall, 1 H. & M. 381.

B. WHEN DEFECTIVE.

Verdict on "Fully Administered"—Insufficient.—In an action of debt on bonds brought by the executor of the creditor against the administrator of the debtor, issues were joined on the pleas of payment and fully administered. Verdict was given for the plaintiff on the first issue, and on the last, "that assets more than sufficient to pay the debt came to the defendant's hands to be administered." CARR, J., reviewed the cases cited and said: "It seems clear to me, from the whole tenor of these decisions, and the reason on which they stand, that the verdict before us must be pronounced insufficient. All the cases decide substantially, I think, that it must appear from the verdict, that at the institution of the action, there were in the hands of the representative, assets not bound by superior claims, sufficient to discharge the debt due the plaintiff: or if not sufficient, that the amount of such assets must be found. Here it is found that assets more than enough to pay the debt came to the defendant's hands; but whether he had them at the institution of this suit; or whether before he had not properly disbursed them, or whether if he still held them, they were not bound by prior judgments, does not appear. There is therefore, all that uncertainty and insufficiency, for which in the other cases, the verdicts were set aside; and I think this must share the same fate." Sturdivant v. Raines, 1 Leigh 481.

Verdict against Administratrix Insufficient—Judgment de Bonis Testatoris.—An action of debt was brought against an administratrix on a bond of her intestate. The defendant plead fully administered. A verdict was given in general terms that the defendant had not fully administered, and judgment thereupon for the debt was demanded to be levied *de bonis testatoris*. The verdict was held insufficient to warrant the judgment. Brizendine v. Tisdale, 5 Leigh 51.

Against Survivor.—Where an action of debt was brought against two persons on a bond executed by both and it abated as to one by his death, a verdict which only found that the surviving defendant had not paid the debt, is bad in that it does not negative the payment of the money by the deceased defendant. Triplett v. Micou, 1 Rand. 269.

Defective Verdict on Plea of Payment.—An action of debt was brought against the appellant upon a bond of his testator. Issue was joined on the pleas of payment and fully administered, and the jury found "for the defendant, he having fully administered all the assets which came to his hands." This verdict was held defective in not being responsive to the issue joined on the plea of payment, and the judgment will be reversed by the appellate court, although no objection was taken in the court below: and a *venire facias de novo* will be directed as to both the issues. Brown v. Hendersons, 4 Munf. 492.

Defective Verdict on Plea of "No Assets."—On the plea of "no assets" to an action of debt brought against the administrators of their intestate, a verdict which found that the administrator had in his hands assets belonging to the estate of his intestate, without saying of what amount, was held defective and a new trial directed. Eppes v. Smith, 4 Munf. 466.

Insufficient Verdict on Plea of Plene Administravit.—The defendant to an action of debt brought upon a bond given by the testator, pleaded a special *plene administravit*, and that he hath not, nor had any goods except to a certain value, which were not sufficient to satisfy the judgments mentioned in the plea. To this special plea a replication was filed that the defendant hath, and had goods more than sufficient to satisfy the said judgments, whereof he could have satisfied the plaintiff. The verdict was "for the debt in the declaration mentioned." This was in-

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sufficient; the verdict should have found that the defendant had goods more than sufficient to satisfy the judgments, whereof he could have satisfied the plaintiff, or the value of the assets, if they were not sufficient. Booth v. Armstrong, 2 Wash. 301.

An action of debt was brought against an administrator on a penal bill, said to have been executed by the testator in his lifetime. Among other pleas the defendant filed the plea of fully administered. The jury found a verdict "that the writing obligatory in the declaration mentioned, is the deed of the defendant's intestate; that the debt in the declaration mentioned hath not been paid, and that assets sufficient hath come to the hands of the administrator to pay the same: that he hath not fully administered the said assets." The court gave judgment for the amount of the penalty in the declaration mentioned. On appeal the court held that the verdict in this case was clearly insufficient in respect to the plea of fully administered. A verdict upon that plea should have ascertained the amount of the assets in the hands of the defendant at the commencement of the suit, and at the time of the plea pleaded, to enable the court to pronounce the proper judgment. It ought not only to have found the amount of assets in the hands of the defendants at the commencement of the suit or that they were sufficient to pay the plaintiff's demands; but also the amount in his hands at the time of pleading, or that they were sufficient to pay the plaintiff's demands; since the defendant might have received or duly disbursed assets between the commencement of the action and the time of pleading. The verdict should also have found the time when the assets came to the defendant's hands. For these reasons the judgment was reversed, the verdict set aside and a new trial awarded. Gardner v. Vidal, 6 Rand. 106.

VI. THE JUDGMENT.

A. WHEN SUFFICIENT.

Bond for Payment of Debt by Instalments.—A judgment to an action of debt on a bond, for the payment of a debt by instalments, should be, "for the debt in the declaration mentioned, to be discharged by the sum due at the time of the institution of the suit; reserving liberty to the plaintiff to resort to a *scire facias* to recover such other damages as might thereafter arise under the condition of the bond." Thatcher v. Taylor, 3 Munf. 249. See Code of Va. 1887, § 3504.

Judgment Beneficial to Defendant Will Not Be Reversed at His Instance.—A bond was given for making a title to a tract of land, and an action of debt was brought thereon. The defendant plead "covenants performed." Verdict and judgment were rendered for *damages* for non-performance, but said nothing of the *penalty* of the bond. Such judgment should not be reversed at the instance of the defendant, as such irregularity cannot be injurious to him, because the true ground of action appears by the declaration, and the satisfaction thereby demanded extending to the whole injury, the action can in no form be repeated. Pate v. Spotts, 6 Munf. 394.

Judgment on Bond Conditioned—Surplusage.—In an action of debt for rent, the verdict was for a certain sum, the debt in the declaration mentioned, and for a certain sum as damages. Judgment for the same to be discharged by the payment of a different sum. This latter sum is no part of the judgment, but is merely surplusage and is to be considered as a release of the difference. Ross v. Gill, 1 Wash. 87.

Against an Administrator—Estoppel.—If a judgment be rendered against an administrator for a debt of his intestate, and after his death, an action of debt, suggesting a *devastavit* to have been committed by him in his lifetime, be brought against his administrator, such defendant is estopped by the judgment from pleading that no assets of the estate of the original intestate ever came to the hands of the administrator. Eppes v. Smith, 4 Munf. 466.

Joint Judgment—Where One Made Default and Other Pleaded.—A joint promissory note was given by M and P. An action of debt was brought on this, and judgment by default was entered against M. P appeared and pleaded *nil debet*, and verdict was given against him. There should be given one and the same joint judgment against both. Peasley v. Boatwright, 2 Leigh 195.

On Note of Executor for Debt of Testator.—The executor of the intestate executed his note as executor for a debt of his testator. An action of debt was brought on this note, and he was declared against as executor. The count was in the *debet* and *detinet*, and the breach was laid in his failure to pay. Upon a judgment by default; *Quære*, If it should be *de bonis testatoris* or *de bonis propriis*. If it was error to enter judgment *de bonis propriis*, it was a clerical error, which should be amended on motion, and was no ground for an appeal. Snead v. Coleman, 7 Gratt. 300, 56 Am. Dec. 112.

Judgment on Bond in Penalty and Condition in Same Sum.—The penalty and condition of a bond for the payment of money is in the same sum, and it is proper to treat it as a single bill. Proper judgment on such a bond in an action of debt is for the amount of the bond with interest from time of payment. Fleming v. Toler, 7 Gratt. 310.

Separate Judgments Separately Confessed.—The administratrix and other defendant gave separate confessions of judgment to an action of debt against them, where the suit had been revived against the administratrix. It was not error to enter separate judgments against each. Richardson v. Jones, 12 Gratt. 53.

Verdict for "Amount Named in Declaration"—Judgment Including Interest Valid.—The verdict in an action of debt on a protested inland bill of exchange was simply for "the amount of the debt in the declaration mentioned," which, as stated in the declaration, was "the sum of $1,102.60, *with interest* thereon from the 14th of October, 1890, until paid," and there was judgment accordingly, with costs. § 2853 of the Va. Code provides that in a case of this sort judgment may be given "for the principal and charges of protest, with interest thereon from the date of such protest." The legal effect of the verdict was a finding for the principal sum mentioned in the declaration, with interest, as therein claimed; so that the judgment is in conformity both with the verdict and the statute. Lake v. Tyree, 90 Va. 719, 19 S. E. Rep. 787.

It was held in Metcalfe v. Battaile, Gilmer 191, that a negotiable note as to the indorser, was not a note for the payment of money within the meaning of the Act of 1804, ch. 8, and that therefore neither interest, nor final judgment for the principal sum, could be given upon it in an action of debt without the intervention of a jury, as could have been done if it had come within that act, as was decided by the cases of Wallace v. Baker, 2 Munf. 334, and Baird v. Peter, 4 Munf. 76.

A judgment which has been entered upon *nil dicit* or *non sum informatus*, to an action of debt upon a

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bill penal, which omits to mention interest, ought not to be reversed because it was entered as in conformity with the bill penal, and was to be discharged by the payment of principal, *with such interest* and costs. Harper v. Smith, 6 Munf. 389.

Judgment Confessed for Interest on a Declaration Which Omitted It is Valid.—The declaration in debt against joint obligors on a single bill was in the usual form, but said nothing about interest. A common order was entered and confirmed against the obligors and their appearance bail. On motion of the appearance bail at the next term this was set aside and he pleaded payment; but he subsequently waived his plea and acknowledged the debt, with interest. Judgment was properly entered against the principal, as well as the bail. Wallace v. Baker, 2 Munf. 334. Decision was based on Act of 1805, and the case was distinguished from Brooke v. Gordon, 2 Call 212. Approved in Baird v. Peter, 4 Munf. 76.

On Injunction Bond with Condition.—The declaration in an action of debt brought upon an injunction bond demanded the aggregate of all the injunction bonds named, where there were several counts, and there were apparently several bonds. The bond was for $940, to be discharged by the payment of the damages assessed by the jury, the judgment was entered up in the old form for $940, the penalty of the bond to be discharged by the payment of $920.76, the damages assessed by the jury. The Code of W. Va., ch. 131, § 17, says that in such suits "judgment shall be entered up for what is so ascertained to be due by the jury." If this statute was regarded as requiring, not simply permitting, the judgment to be entered in this new form, the defendant would not be prejudiced by the old form, the judgment would not be reversed for such error, if any. Bank v. Fleshman, 23 W. Va. 317.

Penalty in Current Money, Condition in Sterling.—The penalty of a bond was in *current* money, with condition to pay so much *sterling* money. After verdict for the plaintiff in an action of debt upon the bond, the judgment should be for the *current* money mentioned in the penal part of the bond, to be discharged by the *sterling* money in the condition. Terrell v. Ladd, 2 Wash. 150.

Against a Convict—Process Served before Sentence.—The process to institute an action of debt was served upon the defendant on the day on which he was convicted of a felony, but before sentence was pronounced. The court under these circumstances fairly acquired jurisdiction of the cause and parties, which continued notwithstanding the subsequent disability of the defendant. The utmost that could have been exacted of the plaintiff was a suspension of all proceedings until the disability was removed, or the appointment of a committee to defend the suit for the convict. The plaintiff did not pursue either course, but prosecuted the suit to a judgment. If this be conceded to be an error, it was not such an error as would invalidate the judgment, for the reason that jurisdiction having been once properly acquired over the person and the subject matter of controversy, no error in its exercise or irregularity in the proceedings can make the judgment void. The authority to decide being once shown, it can never be divested by being improperly or erroneously employed. The fact that the judgment was by default does not affect this principle, for whether the judgment be the act of the court or be entered up by the clerk under the statute, the effect is the same. In either case it is the act of law and until reversed by the court which rendered it or by a superior tribunal, it imports absolute verity, and is as effectual and binding as if pronounced upon a trial of the merits. The judgment cannot be collaterally assailed in a court of equity or elsewhere, and is valid until reversed by the court which pronounced it or by a superior tribunal. Neale v. Utz, 75 Va. 480.

Judgment "When Assets."—Where an executor has confessed judgment in favor of the creditors of his intestate, "when assets" or "if assets," and an action of debt has been brought thereon, the executor pleaded *plene administravit*. The issue was found for the executor, but the plaintiff may take another judgment "when assets." Braxton v. Wood, 4 Gratt. 25.

Judgment Quando Acciderint—Statute of Limitations.—When a plaintiff in an action against an executor or administrator takes judgment of assets *quando acciderint*, it is well settled that he cannot at any future time proceed to execution on the judgment, without first suing out a *scire facias* to state that assets have come to hand, and to warn the defendant, should he be able to allege anything against such execution. These judgments are not barred by the statute, until the lapse of that period *after* assets have come in the hands of the executor or administrator, and not from the date of the judgment. Smith v. Charlton, 7 Gratt. 425.

B. WHEN INSUFFICIENT.

Sheriff's Bond.—In an action of debt upon a sheriff's bond in the name of the commonwealth, for the benefit of a person aggrieved by the misconduct of the sheriff, the judgment should be entered for the penalty, to be discharged by the payment of the damages assessed and costs, "and such other damages as may be hereafter assessed upon suing out a *scire facias*, and assigning new breaches, by the said C or any other person or persons injured." It was error in the judgment, in attaching the recovery to C as to future injuries, excluding all others. Bibb v. Cauthorne, 1 Wash. 91.

Bond Subject to Credit—Writ of Inquiry.—A judgment ought not to be entered in an action of debt on a bond for a sum of money, "subject to a credit for a hogshead of tobacco," without ascertaining its value. The amount of such credit should, in the first place, be ascertained by a writ of inquiry, and judgment should be entered for the balance. Early v. Moore, 4 Munf. 262.

If the jury find a verdict for the amount mentioned in the declaration in an action of debt, and the plaintiff, in court, release so much thereof as is equal to the credits endorsed on the bond, judgment ought not to be rendered, to be discharged by the payment of the sum stated in the condition of the bond, subject to a deduction of the credits endorsed. Such deduction ought to be made, and judgment rendered for the real balance due. Grays v. Hines, 4 Munf. 437.

On Pleadings—No Bar.—A judgment for the defendant to an action of debt on a bond, which was given upon the pleadings, does not go to the foundation of the action, and is no bar to the plaintiff's bringing another action for the same cause. Lane v. Harrison, 6 Munf. 573.

Judgment upon All the Pleadings Erroneous, if They Do Not Go to Foundation of Action.—In an action of debt on the bond of a deputy sheriff, with a collateral condition, the defendant filed, among others, the plea of conditions performed. The plaintiff by replication to this plea charged the breach defectively, but fully avoided by other replications the

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other pleas of the defendant, which went to the foundation of the action, to which replication demurrers were improperly filed. A judgment entered for the defendant generally upon all the pleadings was erroneous, as it barred any future action on the bond. It should be limited to the replication of the plaintiff to the plea of conditions performed. Lane v. Harrison, 6 Munf. 573.

Judgment on Declaration Blank as to Sums, etc., Erroneous.—The assignee of the obligee brought suit against the obligor in a bond. The writ was in debt, and the declaration was also in debt, but was blank as to the sum declared for, the date of the bond, the assignment to the plaintiff, and as to the damage. A judgment entered thereon was held erroneous and reversed in Blane v. Sansum, 2 Call 495.

Office Judgment without Writ of Enquiry.—In an action of debt on a decree for money, a conditional judgment was entered in the office, without awarding a writ of enquiry of damages, and the judgment not being set aside, became final at the next term, and execution was sued out on the judgment. At the ensuing term the judgment was set aside as irregularly entered, and defendants were given leave to plead. It was held error to enter judgment in the office without awarding an enquiry of damages, that this was a clerical error, which was properly corrected at a subsequent term. Shelton v. Welsh, 7 Leigh 175.

Judgment for Interest Not Demanded in Declaration Invalid.—If the plaintiff does not demand interest in his declaration in debt on a promissory note, and the defendant waives his plea of payment, judgment cannot be given for the interest on the note, not claimed in the declaration. Brooke v. Gordon, 2 Call 212.

On Debt Due in Sterling Money.—On an action of debt brought upon a protested bill of exchange, drawn for sterling money, if the declaration is for the *current money value* of the sum for which the bill was drawn, the judgment, being for the sum so demanded, will be reversed on a writ of error. The suit should have been for the sterling money. Scott v. Call, 1 Wash. 115.

A sterling debt may be sued for without laying the value in *current money*; if it be laid it is merely surplusage, and will not vitiate; but in such case, the damages should be laid in *sterling* money; the verdict and judgment should be for *sterling* money, and the court is to fix the rate of exchange. Skipwith v. Baird, 2 Wash. 165.

Judgment Exceeds Penalty—Defendant Elects.—The judgment is always entered for the penalty, in an action of debt on a bond with collateral condition, to be discharged by the principal and interest, and if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty. Atwell v. Towles, 1 Munf. 175.

No Breach Assigned on Administration Bond.—In a suit on an administration bond, if no breach of the condition of the bond be stated in the declaration, or by an assignment of breaches in some other part of the record, a judgment upon it is erroneous, and must be reversed. Ward v. Fairfax, 4 Munf. 494.

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128 ***Raines v. Barker & als.**

[67 Am. Dec. 762.]

January Term, 1856, Richmond.

1. **Will Made Prior to Code 1849—Law Controlling.**—Testator made his will in 1842, purchased a tract of land in 1849, and died in 1852. His will, in respect to this land, is to be construed as the law was prior to the Code of 1849.
2. **Wills—After-Acquired Lands—Statutes—Construction of.***—The construction given to the act of 1785 authorizing the devise of after-acquired lands, in the case of *Allen* v. *Harrison*, 3 Call 289, adhered to.
3. **Wills—Case at Bar.**—Testator by his will made in 1842 emancipates his slaves; and directs his executor to sell the land on which he lives and another tract which he specifies, and also certain stocks which he names, all his household and kitchen furniture, all his stocks of all kind, plantation tools, with every article of property belonging to him, except his wearing apparel; and after directing that when there is money enough collected from the proceeds of the sale, the negroes shall be sent to Africa and furnished plentifully with every thing necessary for their comfort, he gives five hundred dollars to a nephew, and the balance of his estate, after paying all expenses, he wished to go to furnish the expense of carrying the negroes away and furnishing them in a situation to live. A tract of land purchased after making the will, does not pass under the devise.

This was an action of ejectment in the Circuit court of Sussex county, by Alexander Barker and others, nephews and heirs at law of John Barker deceased, against Nathaniel Raines. The object of the action was to recover a tract of land of which John Barker had died seized, and which, since his death, had been sold by his executor, John R. Mason, to the defendant Raines; and the only question was, whether it passed under the testator's will; it having been purchased by him after the making of the will.

On the trial the jury found a special verdict, in which, in addition to the facts above stated, they set out the will of Barker. By his will he emancipated
129 *his slaves. Another clause is as follows: "My will and desire is, that my executor sell the land whereon I now reside, after having it surveyed and divided into two or more parts, as he may think best; also a tract of land in Surry, known by the name of the Indian Island, on the north side of Black water swamp, and containing, I think, one hundred and sixty-three acres; also ten shares in the Merchants cotton factory, in the town of Petersburg, and two shares in the Petersburg and Roanoke rail road company, with all my household and kitchen furniture, all my stocks of all kind, plantation tools and implements, with every article of property belonging to me, except the wearing apparel that may be in the house at the time of my death; that I wish divided among the servants belonging to the estate."

He then directs that the people may be continued on the plantation until the money from the sale can be collected. And when

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***Wills—After-Acquired Lands—Statutes—Construction of.**—For the proposition that a testator may devise after-acquired lands under Virginia statute of 1785, but not unless an intent to do so appears from the language of his will, the principal case is cited and followed in Gibson v. Carrell, 13 Gratt. 136.

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there is money enough collected to purchase what may be necessary to fit them out for the trip, and to pay their passage there, he directs his executor to send them to Africa, after furnishing them plentifully with every thing which is necessary for their comfort and convenience. He then gives to his nephew John Barker, jr., five hundred dollars; and "the balance of" his "estate, after paying all expenses," he wished "to go to furnish the expense of carrying them away, and furnish them in a situation to live."

The jury further found that the will was altogether in the handwriting of the testator, and that the name of Henry E. Scott was originally written in the will as the executor; and that subsequently, as was indicated by the appearance of the paper and the color of the ink, that name had been erased and that of John R. Mason inserted. That the testator was on terms of great intimacy and friendship with Scott
130 up to the *time of Scott's death in 1847. That the will was made on the 15th of October 1842; and the land in controversy, about two hundred acres, was purchased in March 1849; and after the death of Barker, in January 1852, had been sold by his executor to the defendant Raines.

Upon this special verdict the court gave a judgment for the plaintiffs; and Raines obtained a supersedeas from this court.

Collier, for the appellant, endeavored to maintain that the land passed under the will, upon the evident intention that his emancipated slaves should have the whole estate except the legacy of five hundred dollars to John Barker, jr.; and upon the language of the last clause, which he insisted authorized the executor to sell the lands acquired after the date of the will.

D. May, for the appellees, after referring to the date of the will and the 22d section of ch. 122 of the Code, p. 517, to show that this will was to be construed by the law existing prior to the Code; to show that the land did not pass under the will, referred to Smith v. Edrington, 8 Cranch's R. 66; Allen v. Harrison, 3 Call 289; Kendall v. Kendall, 5 Munf. 272; Lomax on Ex'ors 2.

DANIEL, J. By the eleventh section of chapter one hundred and twenty-two of the Code of 1849, it is declared that a will shall be construed, with reference to real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. And as the will, on the construction of which the right to the land in controversy depends, was admitted to probate in 1852, some question might
131 have arisen as *to whether we should apply to the will the rules prevailing at its date, (1842,) or the statutory rule just cited, were it not for the provisions of the 22d section of the same chapter (122) declaring that the preceding sections of the hapter shall not extend to any will made before the act should be in force, but that the validity and effect of such will shall be determined by the laws in force on the day before this chapter should take effect in like manner as if those laws, so far as they relate to the subject, were therein enacted in place of such sections.

The English rule, that as to lands the testator speaks at the date of his will, and as to personals, at his death, had not been subjected here, prior to the adoption of the Code, to any legislative change other than that made by the act of 1785. That act directs, "that every person, &c., shall have power, &c., to devise all the estate, &c., which he hath, or at the time of his death shall have, of in, or to lands, &c." In the case of Allen v. Harrison, 3 Call 289, the extent of the change, in the old rule, contemplated by that act, was the subject of a very full examination; and the court were unanimous in the opinion that the act only gave a power to devise after acquired lands, leaving it to the discretion of the testator to dispose of them or not: That in order to produce that effect, there should be something indicating an intention to exercise the power; and that where there was nothing in the language of the will to show that the testator evidently contemplated a disposition of his after acquired lands, a devise of his lands should be held to refer to the lands owned by him at the date of his will. The same interpretation of the act must have also prevailed in the case of Bagwell v. Elliott, 2 Rand. 190; and was fully recognized by the Supreme court of the United States in the case of Smith v. Edrington, 8 Cranch's R. 66.

132 *It is true that in several of our sister states, where statutes have been enacted similar in their provisions to our act of 1785, a strong disposition has been manifested so to construe those statutes as to assimilate much more closely the rule in question to the rule which applies to wills of personals. Thus, in the case of Loveren v. Lamprey, 2 Foster's R. 434, (New Hamp.) where the words of the bequest on which the case turned were, "I give and bequeath to my beloved wife Ruth Loveren all the residue and remainder of my estate wherever it may be found, to her, and her heirs and assigns, &c.," it was held that it was the intention of the testator to pass to his wife all his property owned by him at the time of his decease, after paying his debts, &c., and that the premises in controversy, purchased by the testator after the making of his will, passed by it. So in the case of Cushing v. Aylwyn, 12 Metc. R. 169, like views prevailed, and the court announced the broad proposition that where a will purports to dispose of the testator's whole estate or property, the intention is to dispose of all the estate or property of which the testator may be the owner at the time of his death; and that such intent would be inferred unless something in the will should be opposed to such

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an inference. And so again a similar decision was made in the case of Willis v. Watson, 4 Scam. R. 64. In the state of Kentucky, however, where our act of 1785 has been adopted, the interpretation of the act given in the case of Allen v. Harrison has been closely adhered to. Warner's ex'ors v. Swearingen & wife, 6 Dana's R. 196; Ross v. Ross, 12 B. Monr. R. 437. In the first of these cases, the reasons for the adoption of this interpretation of the act are fully and clearly stated, and the main argument in favor of the competing construction successfully met. That argument was, that the English doctrine declaring that as to land or other real or im-
133 movable *estate, a testator speaks at the date of his will, was founded mainly on the terms of the statute of wills of Henry 8, empowering all persons having legal titles to lands held in free and common socage, to dispose of such lands by will, and all persons having such titles to lands held in chivalry, to dispose of two-thirds thereof by will, &c.; and that as now by the act of 1785 a testator has a power to dispose not only of the lands which he hath, but also those which at his death he shall have, there was no longer any sufficient legal reason left for intending that in a general devise of his lands a testator speaks only of the lands which he has at the date of his will. The chief justice (Robertson) in delivering his opinion in Warner's ex'ors v. Swearingen & wife, fully meets this view, by showing, from the English cases, that "the civil law rule of making a testator speak at his death and not at the date of his will, not only was never applied to immovable property, but never would have been applied to land or any interest therein, even had a prospective freehold, as well as leasehold interest therein, been always devisable in England; for it seems (he proceeds) not to have been applied to general bequests of chattel interests in land, even though a testator might always in England have effectually bequeathed such interest afterward to be acquired by him. And the principal reasons of this exception from the rule of the civil law are, first, that such an arbitrary rule of construction frequently operates inconsistently with a testator's intentions; and secondly, that as even a chattel interest in land is not so mutable or fugative, either in itself or in the proprietorship of it, as that kind of property which is perishable, and in fact movable, neither policy nor convenience required that a general bequest of it should be construed as speaking at the testator's death, when, in most cases, he intended to speak only when he pub-
134 lished his will." And he came *to the conclusion that under the operation of the act of 1785 the true doctrine was, "As to a general devise of lands, like that of England respecting the like testamentary dispositions of leasehold interests in land: that is, that prima facie the testator contemplated only such interests as he owned when he published his will. But that if he manifested an intention to devise whatever interests he might own at his death, then and then only his will should be understood as speaking at his death as to land as well as any other property; because then and only then such is made to appear to have been, in fact, his will, and here he has a legal right to effectuate such a will." And the court accordingly held that a devise by the testator of "the residue of his estate" did not pass lands acquired by him subsequently to the date of his will.

Though it be conceded, therefore, (as I believe it must,) that in a majority of the states whose statutes of wills are, in the particular in question, like our act of 1785, the decisions have gone far towards abolishing the old English rule, and though now, by statute, in England, (1 Vict. ch. 26,) as well as here, a devise of lands, like a bequest of personals, is made to speak as if executed immediately before the death of the testator; Yet as the authority of Allen v. Harrison has not, (so far as I have seen,) been ever questioned, but, on the contrary, stands supported by the decisions of a sister state, where our act of 1785 has been, in terms, adopted, I feel no hesitation in coming to the conclusion that the will in this case must be interpreted under the rule which holds the testator, no contrary intention appearing, as speaking in respect to his lands at the date of the will.

Applying to the will this test, I have been unable to discover, in its terms, any thing to raise a serious doubt as to the propriety of the interpretation which the Circuit court has given to it. The
135 words "every *article of property belonging to me," were used, no doubt, as suggested by the counsel of the appellees, to carry any article of personal property which the testator supposed might, perchance, be held not to be embraced in the description immediately preceding, of "household and kitchen furniture, stocks, plantation tools and implements." And the words "the balance of my estate," if held as intended to embrace lands at all, must, under the requirements of the rule by which the construction of the will is governed, be referred to the balance of the testator's lands which he owned at the date of his will.

It does not seem to me that the fact that the testator, subsequently at the date of his will, erased the name of Henry E. Scott, and substituted that of John R. Mason, as his executor, is of any value in the controversy. The date of this alteration is not fixed by the verdict; it is only found to be "subsequent to the original writing of the will." And as the verdict finds that the testator was on terms of intimacy with Scott up to the time of his (Scott's) death, which occurred in February 1847, the probability is that the change was made soon after Scott's death, and before either the adoption of the Code or the purchase of the land, which occurred in March 1849.

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I think that the judgment ought to be affirmed.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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136 *Gibson v. Carrell & als.

January Term, 1856, Richmond.

Wills—After-Acquired Land—Case at Bar.—Testatrix by her will made in 1837 when she possessed no real estate, gave two slaves to her daughter M and six to her son S, and then says, "All the balance of my property of every description, real and personal, I give and bequeath to my son S;" but if her daughter had a child or children, three of the slaves given to S should go to them. Land afterwards acquired by the testatrix does not pass by the devise to S.

This was a bill in the Circuit court of Jefferson county, by Eli H. Carrell and Margaret his wife against Samuel Gibson and others. And the only question was, whether certain real estate of which Margaret Gibson died seized, passed by her will to Samuel Gibson, or descended to her heirs, of whom Samuel Gibson and the female plaintiff were two. The will was made in October 1873, when the testatrix was possessed of no real estate. After giving two slaves to her daughter Margaret Carrell, and six to her son Samuel Gibson, she says, "All the balance of my property of every sort or description, real or personal, I give and bequeath to my said son Samuel Gibson, and his legal representatives, except that in case my said daughter should have child or children, then, and in that case, Irena, William John and Mary Jane, (three slaves she had before given to Samuel,) shall be the property of said child or children, and his, her or their legal representatives; but if no child or children should be born unto my said daughter, then the said Irena, William John and Mary Jane are to be the property of my said son.

After the making of her will, Mrs. Gibson acquired, by purchase, the real
137 estate which was the subject of *this controversy, and died in 1845, when her will was duly admitted to probat.

On the hearing of the cause, the Circuit court held that the land did not pass under the will; and made a decree for the partition thereof among the heirs of Margaret Gibson; whereupon Samuel Gibson applied to this court for an appeal, which was allowed.

J. M. Mason; for the appellant.
There was no counsel for the appellees.

DANIEL, J. It seems to me that this case must be governed by the rules and principles declared in Raines v. Barker, just decided by this court. There is nothing in the language of the will from which to infer an intention on the part of the testatrix to dispose of lands to be acquired after the date of her will. It is proved, however, that the testatrix owned no lands or real estate at the date of her will, and as by a residuary clause she gives the balance of her property "of every sort or description, real or personal," to the appellant, it is argued that the testatrix must have contemplated the future acquisition of real estate, and intended it should pass by this clause, as otherwise the word "real" is left without meaning, and superfluous: and that the court ought not to presume that the testatrix used a word of such important meaning without a purpose. The argument is not without show of force; Yet when we see that the testatrix has used no language referring in terms to any land she might thereafter acquire, but on the contrary, in the commencement of the will, declares her purpose simply of disposing of what worldly effects she then owned, and that she was ignorant and illiterate, and consequently not apt to assign exact meaning and value to the language she might
138 use, it seems *that there is no such manifestation of the purpose of the testatrix to dispose of after acquired lands, as would justify us in making this case an exception to the general rule.

I am for affirming the decree.

The other judges concurred in the opinion of Daniel, J.

Decree affirmed.

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139 *Davis v. The Commonwealth for Leon.

January Term, 1856, Richmond.

1. **Attachment Bonds—Who Can Sue upon.***—The bond authorized by the act, Code, ch. 151, § 8, p. 602, in relation to attachments, is not a general indemnifying bond; but where the attachment issues against the effects of the defendant generally, he alone can sue upon the bond; and where the attachment is issued against specific property, only the defendant or the owner of such specific property can sue upon the bond.*

*Attachment Bonds—Who Can Sue upon.—The principal case is cited and approved in Offterdinger v. Ford, 92 Va. 649, 24 S. E. Rep. 246; Mitchell v. Chancellor, 14 W. Va. 29, as to the damages covered by an attachment bond.

In Holliday v. Myers, 11 W. Va. 288, 290, the doctrine laid down in the principal case is approved, but distinguished from the case at bar.

*Code, ch. 151, § 8, p. 602. "But if the plaintiff shall, at the time of suing out such attachment, or afterwards, give bond with security approved by the clerk or justice issuing the attachment, in a penalty of at least double the amount of the claim sworn to or sued for, with condition to pay all costs and damages which may be awarded against him or sustained by any person, by reason of his suing out the attachment, the said officer shall take possession of the property specified in the attachment, or where no such property is specified, of any estate or effects of the defendant, or so much thereof as is sufficient to pay the plaintiff's claim. When such bond is given." &c.

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2. Same—Same.—When the attachment is issued against the effects of the defendant generally, and is levied upon the property of a third person, such third person has no remedy upon the attachment bond.

This was an action of debt in the Circuit court of the city of Richmond, in which the Commonwealth for the benefit of Israel Leon, was plaintiff, and William F. Davis was defendant. The action was founded on a bond executed under the attachment law found in the Code, ch. 151, § 8, p. 602, by Charles R. Hawes as principal, and Davis as his surety, upon an attachment issued against the effects of C. D. Arnsthall, a debtor of Hawes. Upon the trial of the cause various questions were made and exceptions taken by the defendant Davis to the decisions of the court; and there was a verdict and judgment for the plaintiff for the penalty of the bond to be discharged by the payment
140 *of nine hundred and twenty-seven dollars. From this judgment Davis obtained a supersedeas from this court. The only question decided by this court, was as to the right of the relator Leon to maintain an action on the bond; and upon that question the facts are stated by Judge Moncure in his opinion.

A. Johnston and Morson, for the appellant.

Randolph and Lyons, for the appellee.

MONCURE, J. This is a supersedeas to a judgment obtained in the name of the Commonwealth of Virginia, suing for the benefit and at the cost of Israel Leon, against William F. Davis, surety of Charles R. Hawes in an attachment bond executed in pursuance of the Code, p. 602, ch. 151, § 8. The case was twice argued in this court; and many questions were discussed in the argument. But in my view of the case it will be necessary to consider and decide only one of them; which is, Whether the relator Leon can maintain an action on the attachment bond?

The condition of the bond is set out in the declaration as follows: "That whereas the said Charles R. Hawes, plaintiff in a certain suit instituted in the Circuit court of the city of Richmond against C. D. Arnsthall, defendant, did, upon the affidavit of him the said plaintiff, filed in the clerk's office of the said court, obtain from the clerk of the said court an attachment against the estate of the said C. D. Arnsthall for the sum of two thousand and forty-five dollars claimed by the said plaintiff. Therefore, if the said Charles R. Hawes should pay all costs and damages which might be awarded against him, or sustained by any persons by reason of his suing out the said attachment, then the said obligation was to be void; otherwise to remain in full force."

It is then averred in the declaration
141 that the said *Hawes, as plaintiff in the said suit against Arnsthall, did thereupon sue out an attachment against the estate of the said Arnsthall, and did cause the same to be levied upon a large quantity of cigars, the property of the said Leon, the said Hawes pretending that the said cigars were the property of the said Arnsthall.

And it is then further averred that the said cigars were not the property of the said Arnsthall, but were the property of the said Leon, and that the said Leon had sustained great damage by the suing out of the said attachment, to wit, to the value of four thousand and ninety dollars.

Thus it appears that the attachment was against the defendant's estate generally; and not against specific property. And the question resolves itself simply into this, Whether, if such an attachment be levied on the property of a stranger, he can maintain an action therefor on the attachment bond?

The attachment was not levied by a seizure of the property, but by a service of a copy of the attachment on the persons in whose hands the property was, who were summoned to appear as garnishees. And it was contended, on the one hand, by the counsel of the plaintiff in error, that the bond is of no force or effect if there be no seizure of property under the attachment; and, on the other, by the counsel of the defendant in error, that the obligors in the bond are bound for all damages sustained by reason of suing out the attachment, whether it be levied in the one way or the other. Without expressing any opinion on this point, I will consider the question as if the attachment had been levied by a seizure of the property: which will present the case as strongly as possible for the defendant in error.

Then the question recurs, Can a stranger, whose property is taken under an at-
142 tachment against the *defendant's estate, maintain an action therefor on the attachment bond? I am of opinion that he cannot. Generally, a sheriff is bound to execute, according to its mandate, a writ which comes to his hands for execution from a lawful source; and he may therefore justify any act done by him in pursuance of the writ. But he can justify no act which the writ does not authorize, though it be done under color of the writ. Such an act is a trespass, for which he is liable like any other trespasser. If, therefore, he arrest the body of A under a writ against the body of B, or take the goods of A under a writ against the goods of B, he is guilty of a trespass. The plaintiff in the writ will also be involved in the trespass if he direct the act to be done; but not merely by reason of his suing out the writ. Generally, the plaintiff is not liable for any thing done in pursuance of the writ, unless it be sued out maliciously and without probable cause.

These were universal rules at common law; but they have been modified to some extent by statute; and are therefore now stated as general rules. For instance, in regard to the liability of the sheriff for levying an execution or warrant of distress

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on property, as to which a doubt may arise, whether it is liable to such levy; the statute authorizes him to require of the plaintiff an indemnifying bond; which, if given, will protect the sheriff against any action for the seizure or sale of the property, provided the security in the bond be good at the time of taking it. Code, p. 609, ch. 152, § 4, 5 and 6. And, in regard to the liability to the plaintiff for acts done in pursuance of the writ; the statute requires the plaintiff in an attachment, if he wishes the officer to take possession of the property against which the attachment issues, to give bond with security conditioned to pay all costs and damages which may be awarded against him or sustained by any person by
143 reason of his suing *out the attachment. Id. p. 602, ch. 151, § 8. If he does not wish the officer to take possession of the property, but is content with a mere lien upon it, he is not required to give any bond, and his liability remains as at common law: that is, he is not liable for damages arising from suing out the writ, unless it be sued out maliciously and without probable cause.

The statute in regard to indemnifying bonds does not embrace attachments; but is confined to executions and distress warrants. Why the legislature did not extend it to attachments may not be an easy question to answer. The most that can be said of it is, that it is a casus omissus in legislation: but a casus omissus of which the sheriff may have cause to complain, but not the adverse claimant of the property. The indemnifying bond law was made for the ease of the officer; and exonerates him, to a certain extent, from his common law liability in case of illegal seizures, and from the measures previously necessary to be resorted to, to ascertain the title to the property. But if the bond be not duly required by him, his common law liability is supposed to continue. See Stone v. Pointer, 5 Munf. 290; and Roane, J., in Cole v. Fenwick, 1 Gilm. 134. At first, the law only embraced executions, and did not protect the officer, if the obligors in the bond, though solvent when taken, should thereafter become insolvent. Afterwards, it was extended to distress warrants; and made to protect the officer, if the surety in the bond was good at the time of taking it. It has not yet, as we have seen, been extended to attachments. The adverse claimant of property seized under an attachment has ample remedies, without giving him the benefit of an indemnifying bond. Besides his summary remedy by interpleader, which is generally sufficient, he may resort for his indemnity to an action of trespass against the sheriff who makes the levy and all persons who aid in
144 *making it or direct it to be made; or to an action of debt on the official bond of the sheriff. There can be no reason, then, so far, at least, as he is concerned, for extending the law to attachments.

But it may be said that it is necessary for the protection of the officer making the levy. And it was contended by the counsel for the defendant in error that there is as much reason for requiring an indemnifying bond in the case of an attachment, as in the case of an execution or a warrant of distress; and that the legislature, having expressly provided for such a bond in the two latter cases, would have made a similar provision in the former, if it had not intended the attachment bond to effect the same object. If they had intended to extend the provisions of the indemnifying bond law to the case of attachments, they would have done so expressly, and not by obscure implication. To give the attachment bond such an effect as this would be to convert it into a general indemnifying bond, applying to all property which might thereafter be taken under color of the attachment: which would be very unreasonable. In the case of executions and distress warrants, the officer can require an indemnifying bond, only when a doubt arises whether property is liable to be levied on. And the plaintiff, when so required, can give it or not, at his discretion. But in the case of attachments, on the construction contended for, the officer might, of his own mere motion, and without the knowledge of the plaintiff, seize property plainly not liable to the attachment, and thereby render the obligors in the attachment bond liable for all damages arising from such seizure.

But the law which provides for the execution of that bond will, I think, admit of no such construction. It was enacted diverso intuitu. It was not made for the ease of the officer, and to indemnify him against the consequences of his unauthorized
145 act; but was made *for the benefit of the owner of the property against which the attachment issues, and to indemnify him against the consequence of acts which are authorized by the attachment. The indemnifying bond applies to acts outside of the writ; the attachment bond to acts inside of it, or done in pursuance thereof. These latter acts the officer is bound to perform; and they cannot be lawfully resisted, no matter what damage they may inflict. The common law liability of a plaintiff for damages arising from the suit, was not considered by the legislature sufficient indemnity against the consequences of a wrongful seizure of property in pursuance of an attachment. The execution of an attachment bond with security has, therefore, been required.

That this is the true construction of the attachment law is obvious, both from the terms of the law itself, and the circumstances under which it was enacted. As to the terms of the law; the condition of the bond as therein prescribed has already been set forth. It covers no damages for taking property which the attachment does not command to be taken. Such damages are not sustained by reason of suing out the attachment; but are sustained by reason of an unauthorized act of the officer. The undertaking of the obligors is, that the at-

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tachment is properly sued out, and the claim of the plaintiff well founded. They do not undertake that the officer will commit no trespass in its execution. They do not authorize him to levy it on any property which he may think proper, or the plaintiff may direct him to levy it on. A person may be willing to become security in an attachment bond, knowing the debt to be due, and that the debtor is a nonresident or absconding debtor, but very unwilling to become security that the officer will do no wrongful acts under color of the attachment. The bond was not intended to enlarge the attachment, but to run on all fours with it.

The attachment may be against the
146 *defendant's estate, or against specific property. If it be against the defendant's estate, the bond applies only to that estate, and enures to the benefit of the defendant only. If it be against specific property, the bond applies to the owner of that property, whoever he may be, whether the defendant or any other person, and enures only to the benefit of such owner. The attachment may be against specific property when the suit is to recover such property, (Code, p. 601, § 2,) or in certain cases, when it is against the commander or owner of any steamboat or other vessel, or the owner of any raft or river craft navigating the Ohio river or any of its tributaries within the jurisdiction of this state. (Id. p. 602, § 5.) The law prescribes but one form of attachment bond, and therefore prescribes such form as will suit both cases, as well an attachment against specific property, as an attachment against the defendant's estate generally. If the latter had been the only kind of attachment to be provided for, the bond might have been made payable to the defendant, and conditioned only for his indemnity. But it being necessary to provide for both kinds, the bond is required to be in such form as will apply to both or either. The defendant is the only person who can sustain any damage by reason of suing out an attachment against his estate; but others may sustain damage by reason of suing out an attachment against specific property. In providing for the execution of a bond conditioned to pay all damages sustained by any person by reason of suing out the attachment, both cases are provided for. If the plaintiff shall give the bond, the officer is required to "take possession of the property specified in the attachment, or when no such property is specified, of any estate or effects of the defendant, or so much thereof as is sufficient to pay the plaintiff's claim:" in other words, of the property against which

the attachment issues, and no other.
147 *Id. § 8. By giving the bond he acquires a right to have that property taken; but that only. If no bond be given; and perhaps whether a bond be given or not, he may, in writing, designate to the officer the names of persons to be summoned as garnishees. Sections 7 and 9. But this summons applies to no specific or particular estate; but only the estate generally of the defendant in the hands of the garnishees; and not to the estate of any other person in their hands. The garnishees are not authorized, by reason of the summons, to detain the estate of any other person in their hands. And therefore no other person can have any cause of action on the attachment bond for damages arising from the detention of property in the hands of garnishees. Whether the defendant can have such cause of action, is a question which it is unnecessary to decide.

As to the circumstances under which the law was enacted. Until recently, an attachment could only be issued against the estate of the defendant generally, and not against specific property. 1 Rev. Code, p. 476, § 6. The bond provided for by that section was required to be payable to the defendant; and to be conditioned for satisfying all costs which should be awarded to the defendant in case the plaintiff should be cast in his suit, and also all damages which should be recovered against the plaintiff for his suing out the attachment. There can be no doubt but that that bond enured only to the benefit of the defendant; and could not be resorted to for the indemnity of a person on whose property the officer had unlawfully levied the attachment. The damages were recoverable against the plaintiff, only "for his suing out the attachment;" and of course not for a trespass committed by the officer in levying it contrary to the mandate of the writ. This manifest construction was not altered by

the words of the statute giving a right
148 of action *on the bond to "the party entitled to such costs or damages," who could only be the defendant in the attachment or his representatives. By the act of February 24, 1827, Supp. R. C. p. 239, ch. 182, § 1, an attachment was, I believe, for the first time given against specific property. It authorized an attachmnet to be issued against a ship, steamboat or other vessel, &c., under the circumstances therein mentioned. But provided that no such attachment should issue until bond should be given, payable to the person against whom the suit was brought, conditioned to indemnify the obligee in such bond, and the owner of such ship, steamboat or other vessel against any loss which they or either of them might sustain by reason of such attachment, in case the defendant should prevail in the suit. Here we see that the bond was properly adapted to this new case, and made to provide for the indemnity, not only of the defendant, but of the owner of the property attached, who might be a different person from the defendant. It was still, however, made payable to the defendant, the plan of requiring such bonds to be payable to the commonwealth not having then been devised. This bond, certainly, did not enure to the benefit of any other person than the defendant or the owner of the property against which the attachment issued; for it was, by its terms, expressly confined to them. By the act of March 4, 1846, Sess.

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Acts, p. 73, ch. 105, an attachment was given against specific property in another case. It authorized an attachment to be issued against a steamboat, raft, or other water craft navigating the Ohio river or any of its tributaries within the jurisdiction of this state, under the circumstances therein mentioned. No bond was required by that act. But it provided, (§ 7,) that if any attachment should be sued out by virtue of the act without reasonable or proper cause, the person suing it out should be liable to the owner of the property
149 *attached for any damage sustained by reason of the seizure and detention thereof; and such owner, if he appeared to the suit, might file a special plea therein, alleging that such attachment was sued out without reasonable or proper cause, and the damages sustained by reason thereof; and if, upon the trial, the jury should find that such attachment was in fact sued out without reasonable or proper cause, such jury should assess the damages sustained by reason thereof, and judgment should be entered in favor of the party injured. These acts, giving the right of attachment against specific property, were substantially incorporated in the Code: And there was also incorporated therein a new and important right of attachment against specific property, where the suit is to recover such property: in other words, in an action of detinue. This new provision was a consequence of the abolition, by the Code, of the right to require bail. Revisor's Report, p. 838. In providing for the execution of an attachment bond to suit all the cases in which it was necessary, as well the ordinary case of a general attachment against the defendant's estate, as the cases of specific attachment before mentioned, terms were used which would suit all of them: and conditions which had been prescribed for general and specific attachments respectively by former laws, were substantially embodied into one form of condition in the Code. It was obviously not designed by the legislature to make any material change in the condition of the bond. All these bonds, as well those prescribed by former laws as that prescribed by the Code, have substantially the same condition, mutatis mutandis. The words "for suing out such attachment," in the bond, prescribed by 1 Rev. Code 477, § 7; the words "by reason of such attachment," in that prescribed by the act of February 24, 1827, Supp. R. C. p. 240, § 1, and the words "by reason of his
150 suing out of the attachment," *in the Code, p. 602, § 8, are the same in meaning and effect; and all alike apply only to damages which legitimately result from the execution of the writ in pursuance of its mandate. The revisors plainly showed that they intended to propose no change in this respect, not only by their using substantially the same language that was used in the old law, but by their taking no notice of any such intention, as they certainly would have done if they had contemplated so important a change. The changes which they did intend to propose are stated and explained at length in a note to their report, p. 756. Their chief object was to produce uniformity in the attachment laws; and among other things, in regard to attachment bonds, which had been required in some and not in other laws, without any apparent reason for the difference. They accordingly proposed to make the laws "more harmonious and consistent, by requiring security when the plaintiff thinks it necessary for his safety that the property should be taken by the officer, but to require none for any attachment when he is content with the lien on the property in the hands of home defendants." Id. p. 757–58. Security for what? For the same thing, in substance, for which security had been required by some, but not by other of the former laws. The legislature adopted this recommendation of the revisors.

It is believed that while attachment laws exist in most, if not all, of the other states of the Union, the plaintiff has, in none of them, been required to give an attachment bond in such form as to provide for indemnity against the unlawful acts of the officer under the writ. Much less has it, in any of them, been held, that a bond conditioned, in the ordinary form, for indemnity against damage sustained "by reason of suing out the attachment," or the like, has the effect of a bond of indemnity against such unlawful acts.

I have now fully expressed my views
151 of the principles *which, in my opinion, must govern this case. I would not have felt justified in saying so much, had I not thought that the novelty and importance of the question considered, and the extent and ability of the argument of counsel, required me to do so. It now only remains to apply these principles to the case; which can be done in very few words. The attachment in this case was against the defendant's estate generally. The bond strictly conformed to the directions of the Code. An action can be sustained upon it, according to what I have said, only at the relation of the defendant in the attachment. This action was brought at the relation, not of the defendant, but of a stranger, and for a cause not within the terms of the bond. The defect is not in the form, but in the foundation of the action: and is no more cured by the Code, ch. 181, § 3, than it would have been by the statute of jeofails, 1 Rev. Code of 1819, ch. 128, § 103. It follows, on the authority of Ross v. Milne & wife, 12 Leigh 204, and Boyle's adm'r v. Overby, 11 Gratt. 202, that the judgment of the Circuit court must be reversed, and judgment entered for the plaintiff in error, non obstante veredicto.

ALLEN, P., and DANIEL and LEE, Js., concurred in the opinion of Moncure, J.

SAMUELS, J., dissented.

Judgment reversed, and judgment for the appellant non obstante the verdict.

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152 *Baylor's Lessee v. Dejarnette.

January Term, 1856, Richmond.

Wills—Case at Bar.—A dies indebted to K, and by his will gives large estates to his three sons B, C and D, and directs that B shall pay one-half of his debts, and that C and D shall each pay one-fourth. B qualifies as executor of C and dies, and by his will gives an estate to E for life, and at his death to the eldest son of E living at his death, E not having a son at the death of B. K had sued B in equity to recover his debt, and after B's death and before E had a son, the suit is revived against the executor of B and against E, and after the birth of E's son there is a decree for a sale of a part of the land devised by B for the payment of B's half and C's fourth of the debt, and the land is sold and conveyed to the purchaser, the son of E not being a party to the suit. On the death of E his son brings ejectment to recover the land sold, against a party claiming under the purchaser under the decree. HELD:

1. **Same—Same—Contingent Remainder.**—The son of E took a contingent remainder in fee in the estate devised by B, dependent upon his being alive at the death of E.

2. **Chancery Practice—Virtual Representation.***—The son of E not having been in being when the suit was revived against E, and having no certain interest in the estate, was not a necessary party, but is concluded by the decree against E, the tenant for life.

3. **Same—Devise of Lands for Payment of Debts—Effect on Statute of Limitations.**†—The debt due to K not having been barred at the death of A, his will created a charge upon the lands devised to his three sons B, C and D, for the payment of his debts in the proportions named therein; and this charge would prevent the bar of the statute of limitations as to the real estate taken by the sons under the devise to them.

4. **Same—Same—Acceptance of Devises—Effect.**—By accepting the devises the devisees became personally liable in respect to the subject devised to them respectively, each for his share of the debts; and the creditors were under no obligation to look to the general estate of A before asserting their claims against the devisees and the subject devised.

5. **Same—Same—Case at Bar.**—B having received assets as executor of C and having executed a bond as executor, C's fourth of the debts of A were charged upon the real estate of B (if not otherwise) by his executorial bond.

153 *6. **Same—Collateral Attack of Decree.**‡—But if the decree was erroneous in this respect, or if it was conclusive as between the creditor and E, these subjects cannot be examined into in this collateral proceeding, but the decree is conclusive in this cause, upon the matters thereby adjudicated, and has the effect to devest the title out of E and his son claiming in remainder after him.

7. **Same—Record in Chancery Cause—Muniment of Title.**§—The record in the chancery cause is legal evidence for the defendant as a link in his chain of title, though the plaintiff was not a party to the cause.

This was an action of ejectment in the Circuit court of Caroline county by the lessee of John N. Baylor against Daniel Dejarnette in his lifetime, and on his death revived against his devisee John H. Dejarnette. The matters in controversy were submitted to the court on a case agreed, in which it was agreed that the court in giving judgment upon the case should be at liberty to draw all fair inferences which a jury might draw from the statement of facts and evidence; and a record and deed were made a part of the case to which the plaintiff excepted, and his exceptions were to be considered as a part of the case submitted to the court. The following are the material facts in the case:

John Baylor 1st, of New Market in the county of Caroline, died previous to the 14th of May 1772. By his will he gave to his son John Baylor 2d, his New Market estate as well as other property. He also gave a large property to his sons George and Robert; and after providing a fund for the payment of debts, which proved inadequate, he directed that the balance of his debts not satisfied out of the fund should be paid one-half by his son John 2d, and one-fourth each by George and Robert. John Baylor 2d and John Armistead the son in law of the testator, were appointed executors of the will, and

*Chancery Practice—Virtual Representation.—For the proposition that, upon the principle of *virtual representation*, it is in general unnecessary to make parties of persons entitled to a remainder, such as an estate tail, coming after the first estate of inheritance, and yet such parties are bound by the decree, the principal case is cited and followed in the following cases: Faulkner v. Davis, 18 Gratt. 689; Harrison v. Wallton, 95 Va. 725, 30 S. E. Rep. 372; Gray v. Smith, 76 Fed. Rep. 532, and cases cited. Hawthorne v. Beckwith, 89 Va. 790, 17 S. E. Rep. 241; McArthur v. Allen, 3 Fed. Rep. 320, and cases cited; 2 Min. Inst. (2d Ed.) 248, where the principal case is cited. See, in accord, Fitzgibbon v. Barry, 78 Va. 755.

In Williamson v. Jones, 39 W. Va. 264, 19 S. E. Rep. 444, the doctrine of virtual representation as laid down in the principal case is approved, but in that case the doctrine did not apply for the reason that, the parties' interests were vested.

†Same—Devise of Lands for Payment of Debts—Effect on Statute of Limitations.—In Johnston v. Wilson, 29 Gratt. 384, it is said: "In some of the earlier cases it was held that a devise for the payment of debts had the effect of reviving debts already barred by limitation; but this doctrine has been long since exploded, and it is now held that such a devise does not take a debt out of the operation of the statute. Burcke v. Jones, 2 Ves. & Beam. 275; 7 John. Ch. R. 298; Tazewell v. Whittle, 18 Gratt. 339; Baylor v. Dejarnette, 13 Gratt. 152; 1 Rob. Prac. 346."

‡Same—Collateral Attack of Decree.—Upon the question of collateral attack of a decree the principal case is cited in the following cases: Hall v. Hall, 12 W. Va. 13, 14; Patton v. Merchants' Bank, 12 W. Va. 607, and cases cited; McMillan v. Hickman, 35 W. Va. 718, 14 S. E. Rep. 282.

§Same—Record in Chancery Cause—Muniment of Title.—For the proposition that the record in a chancery cause is legal evidence for the defendant as a link in his chain of title, the principal case is cited in Waggoner v. Wolf, 28 W. Va. 825; Holly River Coal Co. v. Howell, 36 W. Va. 496, 15 S. E. Rep. 216.

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both of them qualified as such; though John Baylor 2d did not qualify for some time after the qualification of Armistead.

During the lifetime of John Baylor
154 1st he seems to *have dealt with the firm of Dunlops & Crosse, merchants of Scotland, who by their agent carried on a store in the town of Port Royal in the county of Caroline; and after his death, a bond prepared to be executed by both the executors, was executed by Armistead alone, to Dunlops & Crosse for the sum of five hundred and twenty-six pounds seven shillings and three pence, for the amount of their account. This bond bears date on the 24th of July 1795; and was given for the balance due on their account, which commenced in 1764 and continued down to 1773, embracing articles furnished to the estate after the death of John Baylor 1st.

John Baylor 2d died about the early part of the year 1808. The first four clauses of his will are as follows:

1st. I give to my well beloved wife Frances Baylor, for and during her natural life, the New Market mansion-house and garden, and all houses therewith conveniently connected; also one-fourth part of all the rents now arising and which may hereafter arise from that part of my estate hereinafter devised to my eldest son John; and likewise one-fourth part of all rents now arising or which may hereafter arise from that part of my estate hereinafter devised to my son George, which shall be in lieu of all dower in and claim to my estate.

2d. I lend to my eldest son John one-half of my New Market landed estate, which shall be so divided that my said son John may take and have the mansion-house and brick improvements which I had commenced, one-half of the high land and one-half of the low land, with an equal moiety of all improvements, conveniences and advantages appurtenant, and one-half of the water and mill seat. I also lend to my said son John one-half of all my farming utensils and one-half of my library, consisting of from twelve to thirteen
155 *hundred volumes; one-half of my interest in all my Loyal company lands, and one-half of all those lands, for which I have brought suit in the county of Orange, if recovered, except three hundred acres thereof, which I intend for my daughter Courtney Orange Fox.

All which estate above mentioned I lend as aforesaid to my said son John during his natural life, and after his death I give and devise the same absolutely and in fee simple to his eldest son lawfully begotten then living; but if my said son John should die leaving no male child lawfully begotten, then my will is, that my son George have and hold, during his natural life, all the said estate lent to my son John; and at the death of my son George, I give and devise the same absolutely and in fee simple to the eldest son of the said George lawfully begotten then living; and if my son John should survive my son George, and die leaving no male child, then my will is that the eldest son of the said George lawfully begotten, shall have and receive absolutely and in fee simple all the said estate at the death of my son John. And in this case it is my will and I do direct that the said George and his son, who shall take the said estate above mentioned under this devise, shall pay to the daughter or daughters of my son John, if any, an annuity of one hundred pounds current money, for her or their natural life or lives.

3dly. I lend to my son George the other half of all my New Market landed estate, including one-half of the high land and one-half of the low land, and an equal moiety of all improvements, conveniences and advantages appurtenant, (except the mansion-house and brick improvements above mentioned,) one-half of my mill, or one-half of the water and mill seat. I also lend to my said son George one-half of all my farming utensils, one-half of my
156 library, consisting of *the aforesaid number of volumes, and my gold watch; likewise one-half of all my interest in all my Loyal company lands, and one-half of all those lands for which I have brought suit in the county of Orange, except three hundred acres thereof, which I intend for my daughter Courtney Orange Fox, as before mentioned. All which estate I lend to my said son George, during his natural life, and at his death I devise and give the same in fee simple and absolutely to his eldest son lawfully begotten then living; but if my son George should die leaving no male child, then my will is that my son John have and hold all the estate (lent to my son George) during his natural life, and at the death of my son John, I devise and give the same in fee simple and absolutely to the eldest son of the said John lawfully begotten then living; and if my son George should survive my son John, and die leaving no male child, then my will is that the eldest son of the said John then living shall have and receive in fee simple and absolutely all the said estate at the death of my son George. And in this case it is my will, and I do direct that the said John and his son who shall take the said estate as above mentioned under this devise, shall pay to the daughter or daughters of the said George, if any, an annuity of one hundred pounds current money during her or their natural life or lives.

4thly. I direct that no division of my estate be made between my sons John and George until the latter attains to twenty-one years of age, when the same shall be done in such manner as they shall agree upon, or in case of their disagreement, by one or more disinterested persons, who shall be mutually chosen by them for that purpose; and the division so made shall be final and obligatory.

John Baylor 2d survived his brother
157 George Baylor *and qualified as his executor; and as such received assets

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sufficient to pay George Baylor's fourth part of his father's debts.

After the death of John Baylor 2d his sons John Baylor 3d and George D. Baylor entered upon and became possessed of the said New Market tract of land, subject to the provisions of their father's will in favor of their mother Frances Baylor; and after George D. Baylor attained the age of twenty-one years, and about the year 1814, and prior to the birth of the plaintiff, who is the son of George D. Baylor, a parol division of the New Market estate was made between the brothers John Baylor 3d and George D. Baylor, by a line adopted by them agreeably to the provisions of the will of their father; by which division the land in controversy in this suit fell to George D. Baylor; and the land continued to be held by them in severalty, according to said division, George D. Baylor holding the land in controversy as a part of his moiety until 1826, when it was sold, as will be hereinafter stated.

In 1848 George D. Baylor died, leaving the plaintiff John N. Baylor, his eldest son, who was born on the 19th of August 1816, and leaving other sons. John Baylor 3d is still alive, having one son.

In 1796, Dunlops & Crosse instituted a suit in equity in the Circuit court of the United States for the eastern district of Virginia, against John Baylor 2d as executor of his father John Baylor 1st; and in their bill they set out that John Baylor 1st was indebted to them in his lifetime in the sum of five hundred and twenty-six pounds, seven shillings and three pence; that after his death his executors John Baylor 2d and Armistead came to an account with the plaintiffs, on which accounting it was ascertained that the said sum was due; and that they, well knowing that
158 *they had assets sufficient to pay it, but wanting time, they agreed with the plaintiffs that in consideration of forbearance they would give their own bond for the amount; and accordingly a bond was prepared, and was executed by Armistead, but owing to some accidental circumstance it never was executed by John Baylor 2d. And they prayed for a discovery of assets, and for payment of their debt.

John Baylor 2d answered the bill, denying that he had ever heard of the execution of the bond. He said he was very intimate with one of the plaintiffs from 1772 to October 1775, and that no demand had been made on him for a balance due from his father's estate to the plaintiffs.

In 1801 the plaintiffs filed an amended bill, in which they allege that a certain Edmund Pendleton was present when the accounts were settled between themselves and the executors of John Baylor 1st, or one of them; and they file a copy of their account. No process seems to have issued upon this amended bill; but in 1803, on the motion of the plaintiffs, the suit was remanded to the rules; and it was ordered that one of the commissioners of the court should examine, state and settle all matters and accounts between the parties, and report to the court.

In 1805 the commissioner reported that the affidavit of Edmund Pendleton, not taken on notice, had been filed with him; and if the court should admit this testimony, the commissioner would have no account to settle between the parties; because he proved that the bond of one of the executors, which was entered into at the instance of Pendleton, then the agent for the executors, closed the mercantile account.

John Baylor 2d having died in 1807 or 1808, and Thomas R. Rootes having qualified as his administrator with the will annexed, in July 1808 a bill of revivor and supplement was filed by the plaintiffs;
159 *and Rootes, the administrator of John Baylor 2d, and his widow and two sons, John and George D. were made defendants. Rootes answered, saying he knew nothing of the transactions stated in the bill; and requiring proof. John and George D. Baylor also answered, denying strenuously the liability of their father's estate for the debt, and relying upon the statute of limitations.

In 1819 the deposition of Edmund Pendleton was taken upon proof of notice to John and George D. Baylor; and he proved the justice of the plaintiffs' debt, and that the bond had been executed by Armistead in pursuance of an agreement by which the executors promised to execute a writing to ascertain the claim of the plaintiffs upon the estate of John Baylor 1st; and why John Baylor 2d had not executed it witness could assign no reason, as he never did object to any item in the account.

On the 1st of June 1820 the cause came on to be heard by consent of the plaintiffs and of the defendants John and George D. Baylor, upon the bills, their answer and exhibits, and the deposition of a witness, and upon the admissions of these defendants, that the New Market estate in their possession was liable for the debts of John Baylor 1st, and that John Baylor 2d was liable as executor of George Baylor for his portion of these debts; that said defendants had settled with Rootes, administrator with the will annexed of John Baylor 2d; and that the estate called New Market, held by them, was liable in the first place, to pay the debts of John Baylor 1st, and those by specialty binding the heirs of John Baylor 2d, and that John Baylor 1st was indebted to the plaintiffs, as proved by the deposition of Edmund Pendleton, on the 3d of May 1772, in the sum of five hundred and sixteen pounds, three shillings and eight pence, which had not been paid; and
160 for three-fourths of which the *said land, was mediately or immediately responsible. On consideration whereof, the court, with the assent of the plaintiffs and the defendants John and George D. Baylor, decreed the said land to be charged with the payment of two thousand three hundred and seventy-one dollars and thirty-seven cents, that being three-fourths of the principal and interest of the debt due

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to the plaintiffs; and that unless the defendants John and George D. Baylor should pay that sum, with interest, at certain specified periods in 1821 and 1822, the marshal of the court should proceed, in the mode prescribed in the decree, to sell so much of the said land, from any part thereof that he might think proper, as would satisfy the decree, with the costs and expenses attending the sale.

The money not having been paid, the marshal proceeded to sell under the decree; and he reported that he had sold to John Roy one hundred and eighty-eight acres of the land at fifteen dollars per acre; and that Roy had complied with the terms of sale. In December 1826 the cause came on to be finally heard, when the sale was confirmed, and the marshal was directed to convey the land to the purchaser. This was the land in controversy, and it was taken from that part of the New Market tract which had been allotted to George D. Baylor in the division made by himself and his brother John Baylor 3d. The defendant deduced his title by regular conveyances from the marshal.

In April 1846 John and George D. Baylor executed a deed, by which they confirmed the parol division of the land made by them in 1814. This deed, after setting out the division lines, says, that they believe this to have been a just division at the time it was made, though at the time of making the deed it was unequal as to quantity, arising from the fact that the land sold to satisfy the decree aforesaid had been taken from George D. Baylor's moiety.
161 And that this was done *in consequence of George D. Baylor's having appropriated a certain debt named, due to both of them. The plaintiff objected to this deed, as also to proof of the parol division between John and George D. Baylor; and he likewise objected to the introduction of the record of the suit before mentioned as evidence.

Upon the special verdict the Circuit court rendered a judgment for the defendant; whereupon the plaintiff applied to this court for a supersedeas, which was allowed.

R. T. Daniel, for the appellant, after premising that the case turned upon the validity and effect of the decree of June 1820 in the Circuit court of the United States, insisted:

1st. That the decree was fraudulent in fact, and intended to devest the estate in remainder of the children of John and George D. Baylor: And he reviewed the facts of the case for the purpose of establishing that proposition.

2d. That the plaintiff, though he was in being at the time of the decree, was not made a party to the suit; and therefore was not bound by the decree. That this was the general rule would not be questioned. Then was this case an exception on the ground that he was a privy? That to be a privy he must be not only a privy in blood, but a privy in estate; and in this case the plaintiff claimed not under George D. Baylor, the tenant for life, but under John Baylor 2d. He referred to 2 Thom. Coke 597, 606, 717-18, note 2; 4 Comy. Dig. 338, title Fine.

He insisted further, that the doctrine of equitable representation did not extend to the case of the plaintiff. That George D. Baylor took but a life estate, with a contingent remainder in fee to his eldest son; and that as the fee was never in abeyance, it descended to the right heirs of the testator John Baylor 2d. He
162 *referred to Fearne on Cont. Remainders, ch. 6; Calvert on Parties 189, 17 Law Libr. That the cases in which the doctrine of representation was allowed, were cases of estates tail, in which the first tenant in tail was allowed to represent all the succeeding interests; but that persons entitled to an estate of inheritance must be before the court. That the furthest the courts have gone is to permit a tenant for life to represent the fee where his issue was to be entitled to the fee and had not come into existence. Calvert on Parties 48, 17 Law Libr. And he insisted that whatever was the rule in England, in Virginia under our statute the contingent remainderman was a necessary party, and his interest was to be sedulously guarded. 1 Rev. Code of 1819, p. 368-9, § 20, 21, 26, 28; Id. 462.

Morson, for the appellee, insisted:

That there was no fraud in the decree of 1820; but if there was, it could not be enquired into in this suit.

He admitted the general rule as to parties; but said there were exceptions as well established as the rule. And one of these exceptions was, that where the fee is cut up, it is sufficient to bring before the court those who make up the first fee, if they are in existence; and if they are not in existence, then the life tenant alone. Calvert on Parties 49, 189, 192, 17 Law Libr.

He insisted further, that persons having contingent interests were not proper parties, and if made parties might demur to the bill. Calvert, supra; Story's Equ. Pl. 145; Gaskell v. Gaskell, 9 Cond. Eng. Ch. R. 448.

LEE, J. As the lessor of the plaintiff exactly fills the description given of the devisee in remainder after the expiration of the life estate devised to George
163 D. *Baylor in the half of the New Market estate embracing the premises now in controversy, by the will of his father John Baylor 2d, being the oldest son of George D. Baylor and having survived his father, and as he brought his suit in a short time (less than three years) after the death of his father, he must recover unless the title which he was to take upon the death of George D. Baylor was intercepted by the decree in the case of the Dunlops against the representatives of John Baylor 2d, and was by virtue of that decree and the sale and conveyance made under it, transferred to and vested in the purchaser. Thus the decision of this cause must depend

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upon the operation and effect to be assigned to this decree in its bearing upon the estate in remainder devised to the lessor of the plaintiff, and this is resolved into the enquiry how far and to what extent he although no party was bound by it. That it was legitimate and proper evidence cannot be questioned, for a judgment or decree is always evidence of the fact that such judgment or decree was rendered and of the legal consequences of that fact, whoever were the parties to the suit in which it was rendered; and where a title is derived under a decree, it is necessary to establish its existence in order to show the legal validity of the deed made under its authority; and the admissibility of the record for that purpose as a fact introductory to a link in the chain of the title and constituting a part of the muniments of the party's estate is a matter of familiar recognition and constant practice. 1 Stark. Ev. 187, et seq.; 1 Greenl. Ev. § 538; Barr v. Gratz's heirs, 4 Wheat. R. 213. But although admissible in evidence, how far this decree serves to defeat the plaintiff's title, is a matter of different consideration, and it is insisted on his part that he ought not to be held bound by it to any extent or for any purpose whatever, because he was no party to the cause in which it was pronounced
164 and claims not under *any party but under the devise in the will of his grand father John Baylor 2d, by whom an estate for life was devised to his father with remainder to him in fee.

The general rule certainly is that none are bound by a judgment or decree except those who were parties or standing in privity with others who were. But there are exceptions to the rule of equal authority with the rule itself.

It is clear that the limitation in the will of John Baylor 2d to the eldest son of George D. Baylor, lawfully begotten, who should be living at the death of his father was neither a vested remainder nor an executory devise but must be construed to be a contingent remainder. At the time the will was made, George D. Baylor had no son, and the limitation was of a freehold for life with remainder to a person not in esse. Such a limitation is a contingent remainder. Keyes on Future Interests § 222, p. 104; 1 Lom. Dig. 411; Fearne on Cont. Rem. 9. Nor was its character changed by the subsequent birth of the lessor of the plaintiff in 1816, some eight years after the death of the testator. Whether a condition upon which a devise is made to depend is to be regarded as a precedent or subsequent condition must be determined by the apparent intent of the testator. Here it was plainly the intention that the remainderman should fill all the conditions of the devise before he could take. He must be the eldest son of George, lawfully begotten, and he must survive his father. Until all these things concurred, no estate was to vest. The language is "I devise and give the same in fee simple and absolutely to his eldest son lawfully begotten then living." Whenever the remainderman took he took an absolute, unconditional, unqualified fee simple estate. It could not be an estate vested upon his birth but liable to be defeated by his subsequent death during the lifetime of his father. If that
165 had occurred *no interest would have descended to his heirs, otherwise the ulterior limitation over to John Baylor 3d for life with remainder in fee to his oldest son would have been defeated. For there can be no such limitation over after a fee except by way of alternative or conditional limitation. And the distinction is between the cases where a fee is given to the first taker and those in which he has but a freehold. Where by a will a fee is given and afterwards an estate in fee is limited to some other person, the latter will be construed to be an executory devise provided it be limited to take effect within the time prescribed by the rules of law: but where a freehold only is given to the first taker and afterwards a fee is limited upon a contingency the subsequent devise is in the nature of a remainder and being capable of being supported by the precedent freehold estate as a contingent remainder it shall not be deemed an executory devise. For where a limitation may take effect as a contingent remainder it shall never be construed to be an executory devise. Here the estate limited to the first taker was an estate for life and the remainder over was therefore not to be construed an executory devise, but a contingent remainder which retained that character until the death of the tenant for life and which conferred upon the remainderman, no interest but a mere possibility. And these views will I think be found sufficiently supported by authority. See Keyes, § 82, p. 48; 1 Lom. Dig. 417; Fearne on Rem. 394; Plunket v. Holmes, 1 Sid. R. 47, 1 Lev. 11; Doe ex dem. Planner et ux. v. Scudamore, 2 Bos. & Pul. 288; Doe ex dem. Mussell v. Morgan, 3 T. R. 763; Purefoy v. Rogers, 2 Saund. R. 380; Carter v. Barnadiston, 1 P. Wms. 505; Luddington v. Kime, 1 Ld. Raym. 203; 3 Lom. Dig. 281; Fearne 373; Taylor and Biddall's Case, 2 Mod. R. 289.

Assuming then that the lessor of
166 the plaintiff took *a mere contingent or possible interest under the will of his grand father which would only become vested upon the death of the father, we are to enquire how far this interest was bound by the decree in the chancery suit, and whether the purchaser under it took only the interest of the tenant for life or the whole estate discharged of the limitations by way of remainder.

It would certainly be very unreasonable and unjust that a party having a charge upon an estate affecting the whole fee should be delayed or embarrassed in enforcing it by reasons of limitations by way of remainder to persons whom it might be impossible or improper to make parties to the cause. To obviate the difficulty in such cases the doctrine of virtual representation has been introduced, according to

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which certain parties before the court are regarded as representing those coming after them with contingent interests, who therefore it is not required should be made parties. Accordingly it is well settled that it is not necessary that remaindermen after the first estate of inheritance should be made parties: and where real estate is in controversy which is subject to an entail it is sufficient to make the first tenant in tail in esse in whom an estate of inheritance is vested a party with those claiming prior interests without making those parties who may claim in reversion or remainder after such estate of inheritance. And a decree against such tenant in tail will bind those in reversion or remainder although by the failure of all the previous estates, the estates in remainder or reversion might afterwards become vested. Reynoldson v. Perkins, Ambler's R. 564; Lloyd v. Johnes, 9 Ves. R. 37, 56; Cockburn v. Thompson, 16 Ves. R. 321, 326; Hopkins v. Hopkins, 1 Atk. R. 581, 590; Giffard v. Hort, 1 Scho. & Lef. 386; Finch v. Finch, 1 Ves. jr. R. 534; Mit. Pl. 140, 141; Cholmondeley v. Clinton, 2 Jac. &
167 Walk. 133. But *the courts have not stopped here; for under certain circumstances, the first tenant for life has been regarded as representing the entire fee, and the decree rendered against him been held binding upon those coming in after him in remainder. In Giffard v. Hort, ubi. sup. Lord Redesdale says, "where all the parties are brought before the court that can be brought before it and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred." And in the same case, this learned judge remarked that "courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." In Leonard v. Lord Sussex, 2 Vern. R. 527, there was a tenant for life of a trust remainder to his sons. The tenant for life before he had a son born brings a bill against the trustees and an account is decreed which is afterwards taken: Held that the account should stand and be binding upon the sons. In Allen v. Papworth, 1 Ves. sen. 163, there was a bill by husband and wife and an account taken. Lord Hardwicke said the account should be held binding on any contingent remainderman when his title should afterwards vest nor should he open it unless fraud or errors are shown therein. He said it "often happens on settlements where there is tenant for life with limitations in remainder, upon a bill for an account where none but tenant for life is in being, a child afterwards coming in esse shall only have liberty to surcharge and falsify if no fraud." In this case it appears that in point of
168 fact the son was in *being at the commencement of the proceeding and there appears to be a mistake in the report which assumes that at that time no other person was entitled. See note of the editor and Supplement, p. 92. The case of Finch v. Finch, 2 Ves. sen. 491, was a bill by tenants for life for the execution of the trust of an act of parliament and the will of Lord Nottingham; and one of the questions was whom it was necessary for the plaintiff to bring before the court. Lord Hardwicke said "it is admitted to be necessary to bring the first person entitled to the remainder and inheritance if such is in being. It is true if there is none such in whom the remainder of the inheritance is vested in being (as if none of the sons had issue male), then it is impossible to say the creditors are to remain unpaid and the trust not to be executed until a son is born. If there is no first son in being the court must take the facts as they stand. It would be a very good decree and no son born afterwards could dispute it unless he could show fraud collusion or misbehavior in the performance of these trusts: otherwise he would be bound by it." It will be observed that in this case the tenant for life was plaintiff and the remainderman who it was said should be brought before the court was one who had a vested and not a mere contingent remainder. So a bill by tenant for life with remainder to his unborn sons in tail, for partition, had been maintained and the decree held binding on the sons when in esse: and the vice chancellor said the court frequently decreed partition where the tenant for life was defendant: that the manner in which the parties were arranged could make no difference and therefore that in this case the partition might very well be carried into effect. Gaskell v. Gaskell, 6 Sim. R. 643, 9 Cond. Eng. Ch. R. 448.

Now when the original, amended and supplemental bills in this case were
169 filed, there was no son of *George D. Baylor in esse, the lessor of the plaintiff, who was the oldest son, not having been born till August 1816; it was therefore sufficient according to the rule to make George D. Baylor the tenant for life, defendant, and the decree against him would bind all contingent remaindermen coming in after him. And the only question is whether upon the birth of the lessor of the plaintiff pending the suit it was necessary in order to bind him that he should have been made a party by an amended or supplemental bill. I think not. No estate vested in him upon his birth and none could vest unless he fulfilled also the condition of surviving his father. Until then he could have no title to the inheritance, but a mere contingent interest or possibility that he would take on the death of his father, by reason of his outliving him. The only vested estate was that of the tenant for life, his father, and he was the

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proper party to bring before the court as representing the whole estate and all those who are to come in after him by way of contingent remainder. Those who might be entitled to future uncertain and contingent interests it was neither necessary nor proper to make parties although they might be in life. This is the doctrine asserted in Pelham v. Gregory, 1 Eden's R. 518; S. C. 3 Bro. P. C. 204. Lord Northington speaking of the defendants Lord Vane and Lord Darlington, said: "Now the rights of these two defendants in the condition in which this lease is at present, are legal rights and yet being contingent and future, they are not attended till they come into possession with a legal remedy. And I have no apprehension that any person can have a right to call another into this court to make him contest here by anticipation a future legal right: I have as little conception that this court when such a right is brought hither has any jurisdiction to take
170 cognizance of it." *1 Eden's R. 520.

This case was regarded by Lord Redesdale as a decisive authority and he expressed the opinion that many cases might be found where bills had been dismissed upon this ground. And he accordingly held upon a similar principle that a remainderman could not be held to litigate a title which might never be beneficial to him. Devonsher v. Newenham, 2 Sch. & Lef. 197. If it was not necessary to call in the contingent remainderman in those cases, still less would it be so where, as here, he was not born till after the suit was commenced.

In the excellent treatise of Mr. Calvert on Parties to Suits in Equity, the general principle of representation established by the cases is thus expressed: "In respect of the first estate of inheritance and of all interests depending upon it, it is sufficient to bring before the court the person entitled to that first estate: and if there be no such person then the tenant for life." Calvert, p. 52. It is stated in terms very similar or to the same effect by other learned authors. Story Eq. Pl. § 145, 792; Coop. Eq. Pl. 36, 77 to 83. Mr. Calvert however suggests that there should be a qualification as to the tenant for life and that except under very particular circumstances, the tenant for life who should be regarded as representing the whole estate must be one whose child if he have one, will become entitled to the inheritance. The idea is that there would be thus afforded a guaranty for a proper defense according to the dictum in Dayrell v. Champness, 1 Eq. Cas. Ab. 400, that the tenant for life is to take care of the inheritance for his children. He admits however there is no direct authority for the suggestion though he thinks it is countenanced by expressions to be found in several of the cases. Calvert on Parties, p. 52, 53, 192. The condition required by this suggestion is however fully met in this case as
171 *the lessor of the plaintiff who would take the remainder in fee if he survived his father is the son of the tenant for life who was made defendant.

Upon the merits of the chancery case I shall remark very briefly.

I think the debt claimed was sufficiently established by the testimony of Pendleton, and though it might have been barred by the statute of limitations in an action upon the account at law, yet I conceive that the amount for which the decree was rendered was not barred at the death of John Baylor 1st in 1772, and that by his will a charge was created upon the lands devised to his three sons John 2d, George and Robert for the payment of his debts in the proportions named in the will: and this charge would prevent the statute from running against the proceeds of the sale of the land upon the principles of Fergus' ex'ors v. Gore, 1 Sch. & Lef. 107; Burke v. Jones, 2 Ves. & Beame 275; Ault v. Goodrich, 4 Russ. R. 430, 3 Cond. Eng. Ch. R. 740; Kane v. Bloodgood, 7 John. Ch. R. 90, 129. That there was such a charge seems to be very clear. Both parties in this action claim title from John Baylor 1st as the common source. The devisees under his will took the estates devised to them upon the terms of the will which epxressly required that John should pay one-half of the debts not otherwise satisfied and George and Robert should pay the other half. By accepting the devises, the devisees became personally liable in respect of the subjects devised to them, respectively, to their shares of the debts and the creditors were under no necessity to look to the general estate of John Baylor 1st before asserting their claims against the devisees and the subjects devised. John Baylor 2d who took the New Market estate was in Europe at the date of the will and at the testator's death in 1772. When he returned to Virginia does not distinctly appear, but he states in
172 *his answer that he went back to Europe in 1775 so that he probably returned from his first visit shortly after his father's death: and there is no reason to suppose that the profits of the property during the interval were sufficient to pay the debts or that they were paid otherwise. Nor was the bond given by Armistead a discharge of the debt. It purports to be the bond of John Baylor as well as of Armistead and never having been executed by the former it may be questioned whether it was binding even on Armistead upon the principles of King v. Smith, 2 Leigh 157, and Hicks v. Goode, 12 Leigh 479, 490. But however this may be, in the absence of proof that it was intended at the time to discharge the original debt, it ought not to be deemed to have that effect. I refer to the cases of Sale v. Dishman's ex'ors, 3 Leigh 548, and Weaver v. Tapscott, 9 Leigh 424, the principles of which will apply to the question here. That the decree was for three-fourths of the debt instead of the moiety only charged on the estate of John Baylor 2d by his father's will constitutes no objection. John Baylor 2d was the executor of his brother George and doubtless gave bond as such, and having received assets, he should have paid George's fourth part. Failing to do this, this fourth was a debt from his

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estate and was charged upon his real estate (if not otherwise) by his executorial bond.

But with regard to these and the other supposed errors in the proceedings it is sufficient to say that they cannot be examined into when the decree is offered in evidence in a court of law. And so with regard to the charge of collusion. If there was any improper arrangement between those parties to subject the property to a debt with which it was not chargeable in whole or in part, or if any wrong were done in throwing the whole burden upon that part of the land held by George D. Baylor, the
173 remedy is not *to be sought in the exclusion of the decree which was the basis of the defendant's title. All these are matters purely of equitable cognizance with which the court of law has no concern. To undertake to reverse the proceedings would be to usurp the province of the court of chancery, and to do what even that court would not do in this collateral way. For that court would not without proper proceedings to present the subject directly, disregard this decree or reject it as evidence. So long as it remains unreversed it must have the force and effect of an adjudication upon the entire estate and must be considered to devest the title out of the defendant and those claiming in remainder after him. Although it is a decree in chancery and not a judgment at law, yet our courts of chancery being courts of record, their decrees may be the basis of title in a court of law, the same as a judgment of recovery in a real action. And the deed of the marshal made in conformity to its decree operates to transfer the entire title in fee simple to the purchaser and must so stand and be accepted as long as the decree on which it rests remains in force. If there be errors to the prejudice of the remainderman for which the decree is liable to be reversed he may, it would seem, make himself a party to the original suit by filing a supplemental bill to have the benefit of the proceedings for the purpose of appealing. 3 Dan. Ch. P. 1604; Giffard v. Hort, ubi sup.; Osborne v. Usher, 6 Bro. P. C. 20; Lloyd v. Johnes, 9 Ves. R. 37, 55; Calvert on Parties 193; Sto. Eq. Pl. § 144. Whether however an appeal would avail the party in this case, or whether he can maintain a bill to impeach the decree for fraud or whether he can have contribution or a new partition are questions not arising in this case and upon which I mean to express no opinion. All that I mean to say is that as the case now stands, the doctrine of equitable representation by the fa-
174 ther, tenant *for life, of his sons claiming a contingent remainder in fee, must apply; and that although the remainder might afterwards if not hindered have become a vested estate, yet that the remainderman is still bound by the decree and must so remain as long as it continues in force and unreversed.

I have not thought it necessary to examine the analogous case of a recovery at law in a real action and its effect in defeating subsequent estates in remainder: nor to consider how far that effect would be avoided by showing that the recovery was by default or collusion under the provisions of our act taken from the statute of Westm. 2. The court of law must give to this decree the same force and effect which it would have in the court of equity when brought incidentally to its consideration in another suit. In the latter it must be regarded as binding upon all those coming in by way of contingent remainder after the tenant for life, and it must therefore be regarded as binding upon the lessor of the plaintiff in this action.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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175 ***Pratt v. Wright & als.**

January Term, 1856, Richmond.

[67 Am. Dec. 767.]

(Absent, ALLEN, P.)

1. **Official Bonds—Guardians—Failure to Note Appointment—Effect.**—The official bond of a guardian is not invalidated by the omission to recite in it the fact of his appointment as guardian.

2. **Same—Same—Covenants Not Required by Statute—Effect.**—A guardian's bond contains a covenant to indemnify the justices constituting the court at the time it is taken. Although this is not required by the statute, and therefore is not obligatory, it does not avoid the bond.

3. **Same—Same—Condition of Bond Omitted—Effect.***—Although the condition in a guardian's bond is not as extensive as the statute requires, yet as it relates to a part of the duty of the guardian, the bond is not void, but binds the obligors to the extent of the condition.

4. **Same—Same—Illegal Conditions at Common Law—By Statute—Effect Where Statute Avoids.**—There is no solid distinction between bonds and other deeds containing conditions, covenants and grants not *malum in se* but illegal at the common law, and those containing conditions, covenants or grants illegal by the express prohibition of statutes. In each case the bonds or other deeds are void as to the conditions, covenants or grants that are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is where the statute has avoided the whole instrument to all intents and purposes.

5. **Same—Same.**—A condition of a guardian's bond having been in general use for many years, *Quære*, if the court would not sustain it though it was not in conformity to the statute.

***Official Bonds—Guardians—Conditions Not as Extensive as Required by Statute—Effect.**—See Gibson v. Beckham, 16 Gratt. 331, and *foot-note*, where there is a full collection of authorities.

In addition, see Barnum v. Frost, 17 Gratt. 408, 423. See also, *note* to principal case in 67 Am. Dec. 767.

See *note* on "Official Bonds" appended to Sangster v. The Com., 17 Gratt. 124.

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4. Chancery Practice—Settlement of Guardian's Accounts.—A court of equity has jurisdiction to hold a guardian to account, and his sureties with him, to the payment of any balance found due to the ward; though the guardian lives out of the state and has no property within it.

This was a suit in equity in the Circuit court of Madison county, instituted by John J. Pratt against his late guardian Uriel Wright and his sureties, for an account of his guardianship and satisfaction of the amount which might be ascertained
176 to be due. Wright *had removed from the state of Virginia, and was proceeded against as an absent defendant. One of the sureties and the representative of another demurred to the bill, and also answered, insisting that the bond executed by Wright and his sureties was void and of no effect for defects apparent on its face.

The bond in the penal part of it does not in any way recognize Wright as guardian, or indicate that it was executed by him and his sureties as a guardian's bond. The condition is as follows:

"The condition of the above obligation is such, that if the above bound Uriel Wright, his executors and administrators, shall well and truly pay and deliver or cause to be paid and delivered unto John J. Pratt and Betsy P. Pratt, infant children of Edwin G. Pratt and Frances his wife, late Frances Wright, all such estate or estates as now is or are, or hereafter shall appear to be due to the said infants when and as soon as they shall attain to lawful age, or when thereto required by the justices of the court, as also keep harmless the above named justices, their and every of their heirs, executors and administrators, from all trouble and damages that shall or may arise about the said estate, then the above obligation to be void, otherwise to remain in full force."

The cause came on to be heard in May 1853, when the court, being of opinion that the bond was null and void, dismissed the bill as to the sureties on that ground; and being of opinion that the court had no jurisdiction of the cause as to Wright the guardian, who was an absent defendant upon whom process had not been served, and who had no property within the jurisdiction of the court, the bill was also dismissed as to him. Whereupon the plaintiff applied to this court for an appeal, which was allowed.

John M. Patton, Jr., for the appel-
177 lant, referred to *Call v. Ruffin, 1 Call 333, and insisted that the bond which was sustained in that case, was in every substantial particular and almost in words, the same as the one in the case before the court. He referred to the forms which had been in use ever since the decision in Call v. Ruffin, as following the form of the bond in that case; and insisted upon the very serious consequences which must follow a decision avoiding such bonds.

Patton, for the appellee, endeavored to sustain the decree, on the ground of the want of jurisdiction in the court to call a nonresident guardian to account, or to require his sureties to settle the account. He also referred to the statements of the bill to show that no account was necessary.

DANIEL, J. The appellees Millar and Humphreys insist, respectively, in their several answers, that the bond on which the suit is founded is not binding on the securities because of faults apparent on its face. They do not, however, (either of them,) point to the particular feature or features of the bond in which the supposed faults are to be found; and the Circuit court simply responds to this ground of their defense by declaring the bond null and void. We are thus left to conjecture the reasons on which the objections to the validity of the bond were rested and sustained.

The act in force at the time of the execution of the bond, (the act of 1819,) requires that every guardian shall give bond to the justices, with sufficient security, conditioned "for the faithful execution of his office." And it will be seen that the condition of the bond in question varies from that required by the act in two particulars: Instead of requiring simply "the faithful execution of his office," it requires the guardian to pay and deliver to his wards all such estate as now is or
178 *hereafter shall appear to be due to them, when and as soon as they shall attain to lawful age or when thereto required by the justices of the said court; and also further requires, that the guardian shall keep harmless the justices from all trouble and damages that shall or may arise about the said estate. And it is in one or both of these departures from the terms of the act that the defects, if any, in the bond are supposed to reside. It must be conceded that these departures involve variances not only in form, but also to some extent in substance, from the bond which the law directs to be given; the first clause in the condition stopping short of the full requirement of the act, and the last superadding a new and independent condition, which the act does not mention. It is insisted, however, by the counsel for the appellant, that all question as to the force of these defects on the validity of the instrument, ought to be regarded here as closed by the decision of this court in the case of Call v. Ruffin, 1 Call 333, in which a judgment rendered on a bond exactly like this was affirmed, and by the fact that the bond here has strictly pursued the form prescribed in the books of forms which have been and still are usually consulted by the justices and clerks as guides in taking such bonds.

The decision in Call v. Ruffin does not seem to me to be entitled to all the weight which is claimed for it as an authority applicable to this case. The bond in that case (as will be seen from the statement of Judge Pendleton in delivering the opinion of the court) was dated in 1779, at which period the act of 1748 was still in force. And by said last mentioned act the direction to the

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courts in respect to the bonds of guardians, was that they should "take good security of all guardians by them appointed for the estates of the orphans to them respectively committed." Hen. St. ch. 4, § 4, p. 450.

179 *The first clause of the condition of the bond, therefore, in that case, was almost in exact conformity with the very words of the act under which it was taken.

Still, as the justices, most probably not adverting to the alteration in the condition of the bond first required in the act of 1785 and since followed in the act of 1819, have continued to use the old form, a declaration of the invalidity of bonds on the score of such defects as are alleged against the one under consideration, could not fail to be productive of most serious evils. And even if I entertained the opinion that a free and untrammeled consideration of the question as an open one, would probably result in a conclusion unfavorable to the validity of such bonds, I would, in view of the consequences likely to ensue from such a decision, feel strongly inclined, if not indeed constrained to defer to the usage.

I am, however, satisfied that a reference to the authorities will result in showing that the defects in the bond under consideration do not affect its efficacy to bind the parties, to the extent of their undertaking.

The effect on the validity of the bond of a public officer, of superadding a condition not required in the act directing the bond to be taken, is very fully considered by Judge Story in delivering the opinion of the Supreme court of the United States in the case of United States v. Bradley, 10 Peters' R. 343. The English cases are there reviewed, and the doctrine is deduced from them, as well as from previous decisions of the Supreme court, that there is no solid distinction in cases of this sort between bonds and other deeds containing conditions, covenants or grants not malum in se but illegal at the common law, and those containing conditions, covenants or grants illegal by the express prohibition of statutes. In each case the bonds or other deeds are void as to the conditions, covenants or grants that are illegal, and

180 are good as *to all others which are legal and unexceptionable in their purport. The only exception is where the statute has not confined its prohibitions to the illegal conditions, covenants or grants, but has expressly or by necessary implication avoided the whole instrument to all intents and purposes. The judge proceeded further to declare, that inasmuch as the act merely prescribed the form and purport of the bond to be taken, and did not declare that all other bonds not taken in the prescribed form should be utterly void, it would be a mischievous interpretation of the act to hold that under such circumstances it was the intendment of the act that the bond should be void. And that it was a sufficient compliance with the policy of the act, and in consonance with the dictates of the common law and of common sense, to hold the bond void, as to any condition imposed beyond what the law required, and good, so far as it was in conformity to the act.

The cases of Central Bank v. Kendrack, Dudley (Geo. R.) 67; Speck v. The Commonwealth, 3 Watts & Serj. 324; Commonwealth for &c. v. Pearce, 7 Monr. R. 317; Walker v. Chapman, 22 Alab. R. 116, are all to the same effect. See also 2 Rob. Pr. 35, 36.

Even, therefore, if the condition in respect to indemnifying the justices imposed upon the guardian some new and onerous duty, wholly foreign to the nature of his office, we should be well justified in refusing to "call in aid a distinct condition which might be illegal to vitiate that which is clearly legal." Collins v. Gwynne, 20 Eng. C. L. R. 189.

That the want of conformity, in the first clause of the condition, to the terms of the act does not vitiate the bond, would seem to be still more obvious. It would seem to be absurd to hold the parties not responsible for a failure of the guardian to perform one of his duties, and that the main duty of his office, simply because the condition of the bond, falling

181 *short of the comprehensive language of the act, has failed to stipulate in terms for the performance of all the duties of his office. It is enough that the condition is co-extensive in its stipulations with the breach or breaches alleged.

The suggestion of insufficiency in the bond because of the failure in the condition to recite the appointment of Wright as guardian, is fully met by the decision in Call v. Ruffin, before cited. The same objection to the bond was there taken; and indeed that was the only objection to the sufficiency of the bond, to which the attention of the court was in that case specially directed in the assignment of errors. The objection was, as has been seen, of no avail. And no ground is laid in subsequent legislation on the subject, from which to infer the necessity of such a recital now.

I do not see on what ground any doubt can be raised as to the jurisdiction of the Circuit court. The bill calls for an account of the guardianship; and if the Circuit court had not been of the opinion that the bond was null and void, and consequently, that there was no foundation for relief against the surviving surety and the representatives of the sureties that are dead, I apprehend it would have found no obstacle, arising out of the nonresidence of the guardian, to prevent its taking jurisdiction of the cause, as well as to him as to the other defendants. It is true, that in Call v. Ruffin it was held that the ascertainment, by previous suit against the guardian, of the demand against him, was not in all cases essential (as it was in a suit upon an executor's bond) to the maintenance of a suit at law on the bond; but that case has never been understood by the courts as settling that the right so to proceed at law on the bond was in exclusion

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of the jurisdiction of chancery to hold the guardian to an account, and his se-
182 curities with him, to the *payment of any balance found due to his ward. If the guardian in this case was within the jurisdiction of the court, neither he or his sureties could be heard to object that the proceeding ought to have been by suit at law instead of by bill in equity. His absence does not oust the court of chancery of its jurisdiction. His sureties or their representatives are within the jurisdiction of the court, and no reason is perceived why the suit may not proceed, as in other cases where some of the defendants are within and others without the jurisdiction of the court. His absence may be the occasion of inconvenience and trouble in making up the account, but it presents no legal bar to the relief sought.

It seems to me that the decree ought to be reversed, and the cause remanded for further proceedings in accordance with the principles herein declared.

MONCURE and SAMUELS, Js., concurred in the opinion of Daniel, J.

LEE, J., concurred in the opinion, except that he was not disposed to give as much weight to the practice as to the forms of the bonds as was attached to it in the opinion.

Decree reversed.

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183 *Taylor & als. v. Yarbrough & Wife.

(Absent, ALLEN, P.)

January Term, 1856, Richmond.

1. **Gift to Wife—Slaves—Case at Bar.**—T lends to his daughter D, a married woman, three negro women during her life, and they go into the possession of the husband; and by deed he gives her the future increase of the three women. D survives her husband and keeps possession of the three women as belonging to her, and whilst so in her possession they have a number of children. HELD:
   1. **Same—Same—Interest of Husband.***—The women not having been expressed to be given for the separate use of D and not having been conveyed to a trustee, they were the property of the husband for the life of the wife.
   2. **Same—Same—Future Increase.**—The gift of the future increase of the women was a valid gift.
   3. **Same—Same—Same.**—The wife having survived her husband, the increase of the three women born after the death of the husband belong to the wife.
2. **Res Judicata.**†—A bill in equity having been dismissed generally without a reservation of any right of the plaintiff to sue thereafter, is conclusive between the parties and those claiming under them upon all the issues made up in the cause.

By deed bearing date the 17th of July 1823, Robert Taylor, for divers good causes and considerations, but more especially for and in consideration of natural love and affection, conveyed to his daughter Patty Deshazor four certain young negroes named Daphney, Cassandra, Wiley and Armstead, children of Nelly, and Rachel and Jenny, together with all the future increase of the said three women from and after the date of the deed. And the deed recites that he had lent the three women Nelly, Rachel and Jenny to Mrs. Deshazor for her life.
184 *At the time of the execution of this deed John Deshazor, the husband of Mrs. Patty Deshazor, was alive, and the slaves went into his possession, and so continued until his death in March 1825.

In November 1825 a suit was instituted in the County court of Powhatan by Mrs. Deshazor against George Taylor as the administrator of John Deshazor deceased and Ann Elizabeth an infant daughter by a former marriage, and the only child of John Deshazor, for a settlement of the administration account and a distribution of the estate. At the same term the administrator and guardian ad litem filed their answers, and there was a decree appointing commissioners to settle the account, and divide the slaves and other personal estate, the one-third to the widow and the other two-thirds to the daughter; the widow's third of the slaves for her life.

These commissioners reported their division of the slaves, which omitted all mention of the three women given to Mrs. Deshazor for life; and the cause coming on to be finally heard on the 17th of May 1827 the report was confirmed, and the widow and daughter were each decreed to hold the slaves allotted to them respectively, the first for life and the latter in fee.

Some time after this decree, but whilst she was still an infant, Ann Elizabeth Deshazor married William W. Yarbrough; and they in February 1843 filed their bill in the Circuit court of Powhatan county against George Taylor as administrator of John Deshazor and Patty Deshazor, in which they set out the deed of Robert Taylor, the fact that the seven negroes came into the possession of John Deshazor, and his death leaving a widow and the female plaintiff his only child then an infant. They state that soon thereafter George Taylor qualified as administrator, and made in the fall of the same year 1825, a partial division of the said slaves as the
185 property of his intestate, giving *to the widow one-third of the four young negroes during her life, and the remaining two-thirds thereof to the female plaintiff, and leaving undivided and in the possession

*Gift to Wife—Slaves—Interest of Husband.—See principal case cited in Hutchinson v. Parkersburg, 25 W. Va. 240.

See generally, monographic *note* on "Gifts."

†Res Judicata.—For the proposition that, a bill in equity having been dismissed generally without a reservation of any right of the plaintiff to sue thereafter, is conclusive between the parties and those claiming under them upon all the issues made up in the cause, the principal case is cited and followed in the following cases: Carberry v. West Va., etc., R. R. Co., 44 W. Va. 265, 28 S. E. Rep. 695; Watson v. Watson, 45 W. Va. 295, 31 S. E. Rep. 940.

See, in accord, Van Dorn v. Lewis County Court, 38 W. Va. 267, 18 S. E. Rep. 579.

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of the widow, the three women aforesaid, where they and their numerous increase born since the date of the deed, had ever since remained, except Nelly who was dead.

They claimed that John Deshazor became absolutely entitled in his lifetime and so continued until his death, to all the said seven slaves, and their increase born after the date of the deed, the three women for life of his wife, but their increase absolutely. That at his death the same property passed to the female plaintiff subject to the widow's third for life, and ought to have been so held and distributed by the administrator. They state that the increase of the slaves has been considerable since the death of John Deshazor; and that they are advised they are entitled to have a distribution in manner aforesaid. And they ask for such a distribution, and an account of profits.

George Taylor, the administrator of Deshazor, answered the bill, referring to the decree in the County court of Powhatan, and relying upon it as a bar to the claim of the complainants. He said that under that decree the property was delivered to the parties. That it was probable the County court erred in its decision upon the right of John Deshazor's estate to the negro women Nelly, Rachel and Jenny; and if so, he had no objection to the correction of the decree, if the plaintiffs are not barred by the length of time during which Mrs. Deshazor has held the said negroes adversely. But he insists that the increase of the women born since the death of John Deshazor are no part of his estate, but survived to Mrs. Deshazor. He gives the names of the children born since John Deshazor's death.

Mrs. Deshazor also answered, taking
186 the same *grounds; and insisting, that if she is to be deprived of the slaves, she should be allowed for raising them. She also relied upon the statute of limitations.

This cause came on to be finally heard on the 10th of November 1845, when there was a decree in general terms, dismissing the bill with costs. And from this decree the plaintiffs obtained an appeal, which was afterwards dismissed for their failure to perfect the appeal in the time prescribed by law. See 7 Gratt. 374.

In April 1851 the same plaintiffs instituted this suit in the Circuit court of Powhatan county. They again set out the facts as to the deed of Robert Taylor, the death of Deshazor, and the partial division of the slaves between Mrs. Deshazor and the female plaintiff, and the leaving the three women in the hands of Mrs. Deshazor. They insist that John Deshazor was entitled to the three women for the life of his wife, and to their increase born during that time absolutely. They say that Mrs. Deshazor was entitled to one-third of them for her life, and the complainants were entitled to the other two-thirds, with the reversion in the third to which the widow was entitled for life. That it is probable they have lost their right to the two-thirds which would have been allotted to them in the first instance by the lapse of time; but that as to the other third they had only an interest in remainder which had lately become vested by the death of Mrs. Deshazor. That they could not sue for that third during the lifetime of Mrs. Deshazor, and therefore could not be barred by the lapse of time. And making the administrator of John Deshazor and the executor and legatees of Mrs. Deshazor parties defendants, they asked for a decree in their favor for one-third of the increase of the said three women between the date of the deed and the death of Mrs. Deshazor.

187 *All the defendants answered at great length. They relied on the decrees in the suits in the County and Circuit courts hereinbefore mentioned as a bar to the claim of the complainants. They denied that Mrs. Deshazor held the one-third of the increase of said three women as a part of her dower slaves; and insisted that she held all of said slaves, claiming them as her own, and that she had so held and claimed them from the time of the division of the slaves in 1825 until her death in 1850. They said that at that division the right of Mrs. Deshazor to the three women was acquiesced in before the commissioners by the guardian of the female plaintiff: And they relied on the statute of limitations in bar of the plaintiffs' claim.

The cause came on to be heard on the 8th day of February 1854, when the court held that under the deed of Robert Taylor to Mrs. Deshazor, her husband John Deshazor took an estate for her life in the three women, and that their increase born during that period constituted a part of his estate; and that the plaintiffs were not barred by either of the before mentioned suits, of their recovery of the third thereof to which Mrs. Deshazor was entitled as for her dower or thirds in her husband's estate. And a decree was made against the legatees of Mrs. Deshazor who had received the slaves under her will, accordingly. Whereupon they applied to this court for an appeal, which was allowed.

Patton, for the appellants, insisted:

1st. That the deed of Robert Taylor vested an estate in Mrs. Deshazor for her separate use; and therefore that her husband took no interest in the slaves.

2d. That the plaintiffs were barred by the decree in the former suit. That Mrs. Deshazor held and claimed all the slaves as her own, and that she set up this title
188 *in that suit. That the decree in that suit passed upon her title and concluded the question.

Dance, for the appellees, insisted:

1st. That the deed of Taylor conveyed the slaves directly to Mrs. Deshazor, without in any way creating a separate estate in her; and that the slaves vested absolutely in her husband John Deshazor, and on his death passed as a part of his estate.

2d. That these slaves were not divided by

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the commissioners in 1825, but went into the possession of Mrs. Deshazor; to one-third of which she was entitled for life. That the question in the former suit was different from the present: There the plaintiffs claimed the two-thirds of the slaves, which claim was defeated by the plea of the statute of limitations; and the decree, therefore, only barred the plaintiffs to the extent that the plea covered the claim. Saunders v. Marshall, 4 Hen. & Munf. 455; Lane v. Harrison, 6 Munf. 573; Northwestern Bank v. Nelson, 1 Gratt. 108. And that the statute could not apply to the one-third of the saves held by the widow as her dower slaves, to which she was entitled for life; and for which the plaintiffs had no title to sue until her death in 1850.

LEE, J. The interest granted to Mrs. Deshazor in the negroes Nelly, Rachel and Jenny by her father's deed being for her life only, of course whatever right John Deshazor acquired in them terminated upon her death, and accordingly Rachel and Jenny were surrendered to her father, the other, Nelly, having died some time previously. And as the appellees admit that as to two-thirds of the increase born after the death of John Deshazor they have lost their right by lapse of time and as those born previously have been heretofore divided, the only subject of controversy here is the undivided third part of the increase
189 of the *three slaves named born after the death of John Deshazor, the whole having been held by Mrs. Deshazor during her life.

That the deed from Taylor conveying to his daughter Mrs. Deshazor the future increase of the three slaves was effectual to pass such increase cannot be successfully questioned. True, it may be said that as they were not in existence, property in them could not be in the grantor and non det qui non habet. Still being the absolute owner of the reversion of these slaves after the determination of the life estate granted to his daughter, their capabilities of increase also belonged to him and he might grant such increase just as well as the principal subject. Thus it is said a man may grant the wool of a flock of sheep for years. Noy's Max. 83. And it is common to grant the future rents and profits of real estate. The grant of the future increase of a female slave would of course confer but a contingent and uncertain interest: but as the children were born they would vest in the donee and the title become complete. It has even been held that the owner of a female slave may give her to one child and her future increase to another. Banks' adm'r v. Marksberry, 3 Littell's R. 275. In one case decided in the old General court in 1736, a bequest of the future increase of slaves to others than those to whom the slaves were given, was held to be void. Stone's adm'r v. Pope, Jeff. R. 43. In a subsequent case decided by Chancellor Wythe in 1791, such a bequest was sustained. Dandridge v. Lyon, Wythe's R. 123. The last case would I apprehend furnish the rule at this day. That the increase of the slaves during Mrs. Deshazor's life estate would belong to her father (but for his grant) may be regarded as settled by the authorities. Ellison v. Woody, 6 Munf. 368; Maria v. Surbaugh, 2 Rand. 228.

In the deed to Mrs. Deshazor, no
190 trustee was named *to intercept the marital rights of her husband, nor was the deed even expressed to be for her special or sole or separate use. So that the property in the slaves born during the lifetime of John Deshazor vested in him. But as to those born after his death a different question is presented.

Marriage is said to be an absolute gift to the husband of the goods and personal chattels of which the wife was actually and beneficially possessed in her own right at the time of the marriage and of such others as come to her during the coverture. Coke Litt. 300 a, 351 b; 2 Bac. Abr. "Baron and Feme," C. 3, p. 21. But of property coming under the description of choses in action, such as debts due the wife, legacies, residuary personal estate, money invested in public securities and the like, marriage is only a qualified gift upon condition that the husband get possession during its continuance; for if he die before the wife without having gained such possession, she and not his personal representative will be entitled. Coke Litt. 351; Scawen v. Blunt, 7 Ves. R. 294; Langham v. Nenny, 3 Ves. R. 467; Legg v. Legg, 8 Mass. R. 99. In 2 Black. Comm. 433, the doctrine is stated in general terms that "in chattel interests the sole and absolute property vests in the hubsand to be disposed of at his pleasure if he chooses to take possession of them: for unless he reduces them to possession by exercising some act of ownership upon them, no property vests in him but they shall remain to the wife or representatives after the coverture is determined." This learned and accurate writer makes no discrimination in this regard between personal chattels and choses in action: as to both the reductio in possessionem is required to vest the property in the husband. And Judge Tucker tells us that chattels personal and choses in action "are all upon the same footing, whether they be debts, bonds
191 or *contracts (which are properly called choses in action) or slaves, horses or other cattle or goods, all of which come under the general denomination of chattels. For unless reduced by the husband into possession at some time during the coverture they will survive to the wife if she survives." 1 Tuck. Comm. Lib. 2, ch. 24, p. 329. Thus if the property of the wife be a bond or a slave or horse of which another person has possession adverse to the wife the husband must sue for and recover the money or property in the wife's lifetime or the property will not be his. Ibid. The learned commentator would seem to restrict the necessity of a reduction to possession to the cases in which the possession was held by a third person adversely. But the doctrine is carried further for it

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is held to apply strictly in cases in which the possession is not adverse to the wife but perfectly consistent with her title, but in which the husband did not, because from the nature of the case, he could not, recover the possession during his life. Thus where a wife is entitled to slaves in remainder or reversion expectant upon a previous life estate and the husband die before the termination of the life estate, the wife him surviving, she, and not the estate of the husband, is entitled to the property; and any disposition of it by his will, will be ineffectual. Upshaw v. Upshaw, 2 Hen. & Munf. 381. So where there was a deed of gift of slaves from a father to his daughter, the use and possession of which was reserved to the father during life: the daughter married and the father afterwards died, and then the husband died without taking actual possession: held that the right to the slaves survived to the wife. Bohn v. Headly, 7 Harris & John. 257. Where the husband survives the wife but both die during the life estate, the right passes to the wife's administrator. Neale's adm'r v. Haddock, Cam. & Norw. R. 75.

192 *As to reversionary interests in personal property of a wife expectant on a previous life estate in another, if the tenant for life and the wife both outlive the husband, it is the settled rule that the wife takes the property by survivorship even although the husband may have assigned it during his life to another. Hornsby v. Lee, 2 Madd. R. 16; Purdew v. Jackson, 1 Russ. R. 1; Honner v. Morton, 3 Russ. R. 65, 3 Cond. Eng. Ch. R. 298; Browning v. Headly, 2 Rob. R. 340. In these cases the husband could not reduce the property to possession because of the life estate and his assignment of the reversionary interest was not deemed to be equivalent; and so upon his death, the wife took the property. But a similar rule would seem to have prevailed in certain cases in which the chose might have been immediately reduced into possession but from neglect or other causes had been left outstanding by the assignee. Elwin v. Williams, 13 Sim. R. 309, 36 Eng. Ch. R. 308; Ashby v. Ashby, 1 Coll. R. 553, 28 Eng. Ch. R. 549. See also Hutchings v. Smith, 9 Sim. R. 137, 16 Eng. Ch. R. 138; 1 Bright on Husb. & Wife 86. And even where possession did come to the husband but not clearly and distinctly in his character of husband, such possession was held not to defeat the wife's right of survivorship. Thus in a well considered case in which a father by his will gave slaves to his married daughter and appointed her husband executor who qualified as such: the husband afterwards died before any division of the estate of the father was made, having by his will bequeathed the slaves to his daughter and sons: held that his possession was to be considered as in his character of executor and not that of husband, and that the right to the slaves survived to the wife. Wallace v. Taliaferro, 2 Call 447. So where a widow entitled to an interest in the slaves of her deceased husband marries a second time and a suit is brought by her

193 *second husband and herself for a division of the slaves which is made by commissioners appointed by the court, but their report was never returned nor therefore confirmed: the slaves remain on the plantation in possession of husband and wife and in this state of things the husband dies: held (though by a divided court) that the husband acquired no right to the slaves. Gregory's adm'r v. Mark's adm'r, 1 Rand. 355. Thus it appears the law favors the wife's right of survivorship and is not disposed to surrender it unless the husband shall take possession, nor will it permit a doubtful or constructive possession to defeat it. For where there is a possession in the husband which may be referred to his character of executor or to that of husband, it will, as we have seen, to protect the wife's right rather refer it to the former than the latter. And so where the possession might have been as trustee or as executor and trustee. Wall v. Tomlinson, 16 Ves. R. 413; Baker v. Hall, 12 Ves. R. 496. See also Smith v. Scudder, 11 Serg. & Rawle 325; Blakey v. Newby's adm'r, 6 Munf. 64.

Now in the present case the interest of the wife is not a reversion expectant upon a life estate but it is a future interest far more uncertain and contingent. It is a right to slaves thereafter to be born and which only came in esse after the death of her husband. It was therefore a subject which from its character was not susceptible of any thing in the nature of a possession by John Deshazor in his lifetime nor did he assign it or exercise ownership or do any other act in regard to it which by the most liberal construction could be regarded as a substitute for or as equivalent to a reduction into possession. Every reason which would save to the wife her right of survivorship in the case of a reversionary interest would seem to apply in full or stronger force: and I am therefore of opinion that the increase of the three

194 slaves named born after the *death of John Deshazor did not belong to his estate but were the property of Mrs. Deshazor, and that the appellees can maintain no claim to them whatever.

But if this were otherwise, there is another ground upon which as it seems to me, the appellees must fail. Their bill filed in 1843 sets up this identical claim to the increase of the three women born after the death of John Deshazor which of course included the reversion of the third after the death of Mrs. Deshazor and prayed distribution to be made between them and Mrs. Deshazor (upon the concession that she was entitled to a life estate in a third) and an account of hires and profits. Mrs. Deshazor in her answer pleads the statute of limitations and relies upon the decree of partition of the County court in 1826 as a bar to the claim. But she also directly denies the right of the appellees to any of the slaves born after the death of John De-

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shazor and insists that they were her property and not the property of his estate. Upon these issues the case was heard in 1845 and a decree pronounced in general terms dismissing the bill with costs. No grounds are specified as those on which the decree was based nor is there any reservation of the right to sue at a future period for the third conceded to be properly held by Mrs. Deshazor for her life: and in the absence of any specification of the grounds on which it was based and of such a reservation, the decree must be taken to rest upon each and all of the issues presented by the pleadings and must be regarded as a final adjudication of the entire right, as well that to the two-thirds then claimed as to the remaining third now sought to be recovered.

I am of opinion to reverse the decree and dismiss the bill.

The other judges concurred in the opinion of Lee, J.

Decree reversed.

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195 *Daniel & als. v. Leitch.

January Term, 1856, Richmond.

(Absent, ALLEN, P., and DANIEL, J.)

1. **Purchase of Land Subject to Deed of Trust—Primary Fund for Payment of Debts—Case at Bar.***—D purchases a tract of land on which there is a deed of trust to secure a debt which the creditor may enforce by a sale of the land whenever he may direct, and D retains the amount of the debt out of the purchase money for the purpose of paying it. D dies largely indebted, to a much greater amount than can be paid out of his personal estate. The land is the primary fund for the payment of the debt: and the widow of D is not entitled to have it discharged out of his personal estate.

2. **Same—Suit by Widow to Have Land Sold.**†—In such a case the widow may institute a suit in equity to have the land sold and the debt paid, and to have her dower out of the residue of the purchase money.

3. **Same—Same—Case at Bar.**—In her bill the widow states that the personal estate will not be sufficient to pay the debts, and that it will be necessary to sell the land for this purpose, and that it will be greatly for the interest of the heirs of D, who are infants, to have the land sold, and after paying the debts, to invest the balance of the purchase money in some of the slaves of her husband's estate which are of peculiar value to them; and she asks for a sale of the land, the payment of the debt secured on the land, and the investment of the proceeds of sale after payment of debts in these slaves. She also prays that if the trust creditor will consent to it, that the land may be sold subject to the trust: but this the creditor declines.—The addition of this prayer does not vitiate the proceedings as against the infant heirs; but the decree directing a sale of the lands and the payment of the trust debt, a purchaser under the decree may obtain a valid title to the land sold, and will be compelled to complete his purchase.

4. **Sale of Infants' Lands—Sale Confirmed—Reasonable Time to Perfect Title.**‡—A sale of a part of the land having been made under a decree in the suit by the widow, and that sale having been confirmed by the court, even if the proceeding was irregular as to the infant heirs, yet the purchaser will not be discharged from his purchase if the title can be perfected within a reasonable time: And the guardian of the infants having filed his bill according to the statute, in which he asks to have the sale confirmed as very beneficial to the infants, the court may in that case confirm the sale, and thus assure to the purchaser a good title against the infant heirs; and compel him to complete his purchase.

196 *5. **Same—Same—Same.**—After a sale of infants land has been confirmed by the court although the proceeding has been irregular, yet if the title of the purchaser can be made good, and it is for the interest of the infants to confirm the sale, the purchaser will not be released from his purchase; but if the interest of the infants is injured by the sale it will be set aside.

***Purchase of Land Subject to Deed of Trust—Primary Funds for Payment of Debts.**—In Gayle v. Wilson, 30 Gratt. 173, it is said: "As between the vendor and the purchaser of the equity of redemption, the land is the primary fund for the liquidation of the incumbrance. See *Daniel v. Leitch, 13 Gratt. 195, 206;* Jumel v. Jumel, 7 Paige R. 591, 11 Paige 28; Stebbins v. Hall, 29 Barb. R. 524; Jones on Mortgages, §§ 736, 740-8-9, 756."

See also, Osborne v. Cabell, 77 Va. 467, where the principal case is cited.

†**Same—Suit by Widow to Have Land Sold.**—In Morris v. Peyton, 10 W. Va. 8, the court said: "There can be no more doubt in this case, than there was in the case of Daniel v. Leitch, 13 Gratt. 195, that at the death of Peyton, his widow had a right of dower in the said tract of land, subject to the vendor's lien. She had a clear right to relieve the land from that incumbrance, in order to make her claim to dower available. 'She was entitled to go into equity to have the land sold, the incumbrance discharged, and her right of dower in the surplus secured to her.' (*Id.*) If, then, she could be complainant, *a fortiori* she should be made a defendant to a suit like this."

In Hull v. Hull, 26 W. Va. 2, it is said, distinguishing the principal case, "A widow cannot bring a suit in chancery to have all the lands of her husband sold, and out of the proceeds of such sale to have the value of her dower paid, and the residue paid to the creditors of her husband, and if any surplus remains, to have it divided among her children, the sole heirs of her husband."

‡**Sale of Infants' Lands—Sale Confirmed—Reasonable Time to Perfect Title.**—The principal case is cited and followed in the following cases: Thomas v. Davidson, 76 Va. 343; Berlin v. Melhorn, 75 Va. 642; Watson v. Hoy, 28 Gratt. 710; Robinson v. Shacklett, 29 Gratt. 108; Long v. Weller, 29 Gratt. 351; Zirkle v. McCue, 26 Gratt. 530; Brock v. Rice, 27 Gratt. 816; Crawford v. Weller, 23 Gratt. 850; Jones v. Tatum, 19 Gratt. 737, and *note*; Cooper v. Hepburn, 15 Gratt. 568; Hurt v. Miller, 95 Va. 42, 27 S. E. Rep. 831; Carr v. Carr, 88 Va. 789, 14 S. E. Rep. 368; Terry v. Coles, 80 Va. 703; Hyman v. Smith, 13 W. Va. 772; Holden v. Boggess, 20 W. Va. 88; Todd v. Gallego Mills Mfg. Co., 84 Va. 590, 5 S. E. Rep. 676; Dunfee v. Childs, 45 W. Va. 165, 30 S. E. Rep. 106.

See monographic *note* on "Infants' Lands"; also, monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

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6. Judicial Sales—Discretion of Court in Giving Time to Perfect Title.—Courts of equity have at least as large a discretion in giving time to perfect the title in cases of sales under their decrees, as in cases of purchases by private contract.

In the year 1823 the late Judge William Daniel borrowed of the president, masters and professors of William and Mary College the sum of five thousand dollars, for which he executed to them his bond with sureties payable on demand, with interest to be paid semiannually until the principal was demanded, and he at the same time executed a deed by which he conveyed to Edmund Christian, the bursar of the college, a tract of land called Broomfield, of some fifteen hundred acres, lying on both sides of Willis' creek in the county of Cumberland, in trust to secure the same; in which it was provided that upon the failure of said Daniel to pay the said semiannual interest as it fell due, or the principal sum when demanded, the trustee should sell the said tract of land for cash, and out of the proceeds of sale should pay the debt. This land was devised by Judge Daniel to his three daughters, two of whom were married; and the husbands and daughters in June 1841 sold and conveyed the same to John Daniel. Up to this time the interest on the debt to the college had been paid; and the vendors paid to John Daniel out of the purchase money five thousand dollars to discharge the lien of the college upon the land. The balance of the purchase money was paid.

In 1850 John Daniel died, leaving a widow, Mary Ann Daniel, and two infant children; and Archibald C. Page qualified as his administrator. At this time the debt to the college had not been paid; and John Daniel was largely indebted, to much more than the value of his whole personal estate.

197 *In February 1851 Mrs. Mary Ann Daniel filed her bill in the Circuit court of the county of Cumberland, in which she set out the foregoing facts. She stated that the whole estate left by her husband both real and personal was estimated at about thirty thousand dollars, of which the said tract of land was estimated at twelve thousand dollars; and that his debts would probably exceed twenty-three thousand dollars. That if the whole personal estate including the negroes were applied to the payment of the debts in the ordinary course of administration, the land would still be required to satisfy the demands of the creditors, and the real estate remaining would be unprofitable to herself and her infant children, as they would have no means of cultivating it; and if rented out, it would deteriorate in value: And from what she had learned, she apprehended the college were unwilling longer to continue the loan of five thousand dollars, which they were entitled to recall at pleasure.

She further stated, that among the slaves belonging to the estate, there were some family servants who were very valuable, and from their good qualities and long association and early attachments, were of peculiar value to herself and her children: And that if the property left to them after the payment of the debts should be in slaves instead of land, it would be more agreeable to their feelings and more conducive to their pecuniary interests. And having made parties defendants to the bill the administrator of John Daniel, and his infant children, the trustee Christian and the College and the executor of Judge Daniel, she prayed for a settlement of the administrator's accounts, and for an account of the unadministered estate of John Daniel real and personal, and also of debts due which had been paid by the administrator, and the character of those debts. That the court would decree a sale of the said tract of land, subject to the trust in

198 *favor of the college, if the college and the executor of Judge Daniel were willing to continue the loan of the five thousand dollars with the provisions in the deed of trust specified; but if they were not willing to continue the loan, then that the land should be sold and the said debt paid out of the proceeds of sale, and that the residue of said proceeds should be applied to the payment of the debts due from John Daniel deceased. That if any of the property could be saved for herself and the children, the administrator should be directed to reserve such of the slaves as would be most profitable to them; and that the said slaves, or a certain number of them equal in value to the residue of the proceeds of the sale of the land after the payment of the debt to the college, be held by herself and her children, subject to the laws of descent which are applicable to such estate.

The president, masters and professors of William and Mary college and the trustee Christian and the executor of Judge Daniel answered, declining to permit the land to be sold subject to the trust of 1823, but expressing themselves willing that it should be sold and the debt be paid. The administrator Page also answered, stating that the estate was very much involved in debt, and expressing his belief that the personal estate was not sufficient to discharge the indebtedness, and that the real estate would have to be applied to that purpose. He stated that he had just settled an account of his administration before one of the commissioners of the court, the report of which, with a statement of the outstanding debts, and the amount of assets real and personal, he filed with his answer, which he believed was a true exhibit of the condition of his intestate's estate. The infants answered by guardian ad litem.

The report filed by the administrator showed that there were in his hands

199 proceeds of sales of personal *estate not then due, of one thousand four hundred and two dollars and forty-eight cents; that the slaves and other personal estate in his hands were estimated at nine thousand five hundred dollars; and that the ascertained outstanding debts amounted to twenty thousand one hundred and forty-

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three dollars and fifty cents; showing a deficiency of personal assets to pay the debts, of eight thousand eight hundred and thirty-three dollars and sixty-three cents. The real estate consisted of the tract of land before mentioned of fifteen hundred and seventy-six acres, estimated by the commissioner at eight dollars and fifty cents per acre, or thirteen thousand three hundred and ninety-six dollars.

The cause came on to be heard on the 26th of March 1851, when the court, reciting that it appeared the college desired the payment of the debt of five thousand dollars secured by the deed of trust on the land in the bill and proceedings mentioned; that the personal estate of John Daniel deceased was to a considerable extent insufficient to discharge his debts, and that his real estate was chargeable with the same, decreed that the said tract should be sold on the premises at public auction on a credit, altogether or in separate parcels, as might be considered most likely to secure the best price; five thousand dollars of the purchase money to be paid in one year from the day of sale, and the balance in two equal annual instalments thereafter; that bonds and good security were to be executed by the purchaser and the title retained as additional security. And two commissioners were appointed to execute the decree, one of whom was the counsel of the plaintiff.

In August 1851 the commissioners returned their report. They say that on the 30th of July, the time specified in the advertisements and notices, and the day succeeding, there was cloudy weather and rain.
200 *The following day, the first of August, was fair and a considerable number of persons attended the sale; and that the land lying on the east of Willis' river, amounting according to a survey made some years before by which they sold it, to six hundred and twenty-four and one-half acres, was knocked out to William Leitch at sixteen dollars per acre, making the sum of nine thousand nine hundred and ninety-two dollars.

The cause came on again to be heard on the 29th of August, when the court confirmed the sale, and the commissioners were authorized to retain the purchaser's bonds and collect the same as they fell due. And it being suggested that the purchaser would probably prefer paying the whole or a portion of the purchase money before it fell due, the commissioners were authorized to receive any such payment, discounting the same at the rate of six per centum per annum for the time for which the payment was anticipated: And they were directed after paying the expenses of the sale, to pay off the debt due to the college, and to pay over the residue to the administrator of John Daniel, to be applied by him in payment of the debts due from the estate of his intestate.

And the commissioners were further authorized to sell that portion of the said tract of land lying west of Willis' river, either at public or private sale, upon terms stated in the decree. And the death of the defendant Christian was suggested.

In March 1852 the commissioners reported that Leitch the purchaser of the land had paid, on the 2d of October 1851, six thousand two hundred and ninety-eight dollars and thirty cents, paying off two of his bonds, and giving him a credit of one hundred and twenty-five dollars on his bond last due. That after paying the expenses of the sale they had paid to William and Mary college their debt, amounting
201 to *five thousand and sixty-nine dollars and sixteen cents; and that they had paid over the balance in their hands, amounting to one thousand and forty-one dollars and one cent, to the administrator of John Daniel. And they reported that they had obtained from the president, masters and professors of William and Mary college a deed releasing the trust given by Judge Daniel to secure the debt, and that the bond had been delivered to them: And the deed and bond were returned with the report.

At the same March term of the court William Leitch, the purchaser of the land aforesaid, presented his petition to be made a party defendant in the cause and to have the sale of the land set aside. After setting out all the proceedings in the cause down to the last report of the commissioners, he says, Of the proceedings in the said cause he had no knowledge until within a few days past. He saw the advertisement made by the commissioners in the newspapers, and spoke of becoming a bidder. He then heard it suggested that the proceedings had in the case were perhaps not exactly regular, but the suggestion made no impression on his mind; and supposing that all things had been rightly done in the cause, he attended the sale and was a bidder as aforesaid. Afterwards and before paying a cent of the purchase money, he out of abundant caution sought a conversation with one of the commissioners, who was the lawyer who had conducted all the proceedings in the suit. That the said commissioner assured him that all things had been rightly done, and that in that suit a good title would be made to him for the land he had purchased; and he therefore paid to the commissioners the sum of six thousand two hundred and ninety-eight dollars and twenty cents.

He further stated that he had been advised that the sale made in the suit
202 was absolutely null and void. *That the widow not being a creditor of the estate, had no right to bring a suit for the sale of her deceased husband's real estate; and that the real estate of infants can be sold under the decree of a Circuit court only where the decree is made in a suit brought by the guardian of the infants, and prosecuted according to the mode prescribed by the statute regulating the manner in which the real estate of infants may be sold. He charged that his purchase was made and money paid under decrees that were void, and that a good title could not be

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made to him in the suit; and he prayed that he might be made a party in the cause; that he might be restored to the position he occupied before his purchase; that the money he had paid might be returned to him, and that his bond for the balance of the purchase money might be delivered up to him; and that the court would make all other orders and decrees that might be necessary to protect his just rights and to remedy the injury which had been done to him.

In July 1852 Archibald C. Page was appointed by the County court of Cumberland guardian of the two infant children of John Daniel deceased; and in August he as their guardian filed his bill in the Circuit court of Cumberland for the purpose of having a confirmation of the sale to Leitch, and a sale of the remainder of the tract. To this bill the infants, and the person who would be their heir if they died during infancy, their mother and Leitch were parties defendants. The proceedings in the former suit were set out, and it was alleged that the sale of the land was made at a high price, and that it would be very injurious to the infants to set it aside; and he prays that it may be sustained, and that the purchaser may be quieted in his title.

The bill further set out the other property of the estate of John Daniel deceased;
203 which consisted of *slaves and the remainder of the tract of land before mentioned. It alleged that there was a large amount of debt yet due, and that it was very much for the interest of the infants that the remaining lands should be sold and applied to the payment of the debts; and that the slaves should be retained.

The heir of the infants and their guardian ad litem answered, occurring in the opinion that the confirmation of the sale to Leitch and the sale of the other land would be beneficial to the infants. Leitch answered, denying that the proceedings in Mrs. Daniel's suit were valid, or that he was bound to abide by his purchase when every party was at perfect liberty to repudiate it. He insisted that in this suit the land of the infants could only be passed from them by a sale, and to such a sale he had no objection; but he positively objected to be bound where no other person concerned was bound. And he asked that the sale made in the other suit might be declared null and void.

The bill and proceedings in this suit seem to have been in strict conformity to the statute in relation to the sale of infants' lands, if the application to confirm the sale already made was proper.

In January 1853 another bill was filed in the same court by Thomas M. Powers, a creditor of John Daniel, in behalf of himself and of all the other creditors, in which he sought to enforce the sale of the land to Leitch. To this bill Leitch set up the same objections to the validity and confirmation of the sale as in the previous suit by the guardian, and in his petition.

On the 9th of March 1853 the three causes came on to be heard together, the first upon the papers formerly read and the petition of Leitch, when the court held that Mary Ann Daniel, the plaintiff in the first suit, had no right to institute that
204 suit, and that neither the *infant heirs or any guardian that might be appointed for them were bound by the decree rendered therein; and that Leitch could not have obtained a good title to the land purchased by him under that decree. And as he could not have obtained a good title under that decree, he was entitled to be discharged from his purchase, notwithstanding the now guardians of the infants, and the creditors of John Daniel, at the time of the hearing of the causes, expressed their willingness to ratify the sale as set forth in the bills in the second and third of said causes. And the court further held that as the debt due to the college was a primary charge upon the land, and that debt had been paid out of the money received from Leitch, he was entitled to be substituted to the rights of the creditor, and to have the land sold to reimburse him; and commissioners were appointed to examine and report what part of said land would be sufficient to discharge said debt, and could be sold with least inconvenience to the heirs and widow of John Daniel; and whether the land could be sold most advantageously altogether or in parcels. And it was decreed that Page should pay to Leitch the sum of one thousand and forty-one dollars and one cent, paid to him under the former decree by the commissioners, with interest from the date of its receipt; and that the decree directing the commissioners to collect the balance remaining unpaid on Leitch's third bond be set aside, and that they should return the bond to the clerk of the court.

In the third cause the court decreed accounts of the debts due from the estate of John Daniel, and that the administrator settle his accounts before a commissioner of the court. And the same commissioner was directed to report the gross value of the whole tract of land, and separately the value of the part lying on the east and west of Willis' river, as also the annual
205 values of *the whole and the separate parts; and also the personal assets remaining in the hands of the administrator, and their value.

The report of the commissioner showed that after charging the administrator with the sum of one thousand and forty-one dollars and one cent, received as before stated, he was in advance to the estate on the 1st of July 1853, four hundred and forty-eight dollars and seventy-six cents. That he had paid debts binding the heirs, eleven thousand five hundred and twenty-four dollars and forty-one cents; debts by simple contract, two thousand and twelve dollars and two cents. That the whole tract of land was of the value of twelve thousand five hundred and twelve dollars; the land on the east side of Willis' river was of the value of six thousand two hundred and forty-five

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dollars, and that on the west of the river, of six thousand five hundred and seventy-six dollars and fifty cents; the annual value of the whole was four hundred and fifty dollars; that on the east of the river was two hundred and fifty dollars, and that on the west was one hundred and fifty dollars; and the rents due from Leitch, five hundred dollars. The personal assets in the hands of the administrator consisting, except as to five hundred dollars, wholly of slaves, were valued at thirteen thousand five hundred dollars; the debts still due binding the heirs amounted to fourteen thousand six hundred and sixty-two dollars and seventy-two cents, and by simple contract, to four thousand seven hundred and ten dollars and thirty-two cents. There were other liabilities reported, amounting to two thousand one hundred and sixty-three dollars and thirty-three cents; thus making the whole assets, real and personal, twenty-six thousand five hundred and twelve dollars; and the whole debts, twenty-one thousand five hundred and thirty-six dollars and thirty-three cents.

On the 8th of August 1853 the
206 causes came on *again to be heard, when the court confirmed the report to which there was no exception; and it appearing that the payment of the debts would exhaust the whole personal estate and would require for their payment the sale of the greater portion of the real estate of John Daniel; and the court being of opinion that it was clearly shown, independent of the admissions in the answer, that the interest of the infants would be promoted and that the rights of no person would be violated by a sale of the real estate, and by investing the proceeds of sale, so far as the same might not be required in aid of the personalty, for the payment of debts, in the slaves left by the said John Daniel, it was decreed that Archibald C. Page, who was appointed a commissioner for the purpose, should sell the land lying east of Willis' river at public auction upon a credit of one and two years; and that he should sell the land on the west side of the river either at public or private sale altogether or in parcels, upon the like credit, &c. From the decrees of the 9th of March and 8th of August 1853, the widow and infant children of John Daniel applied to this court for an appeal, which was allowed.

The Attorney General and Patton, for the appellants.

Morson and Robinson, for the appellee.

MONCURE, J. The tract of land called Broomfield, and not the personal estate of John Daniel, was the primary fund for the payment of the debt of five thousand dollars due to the president and masters or professors of William and Mary college, and secured by deed of trust on the land. When land is sold subject to a mortgage as part of the consideration money, the grantee, as between himself and the grantor, is bound to pay, and is liable to an action on the part of the grantor for breach of con-
207 tract in not paying the *debt; but the grantee does not become personally liable to the mortgagee without some promise made to him; and even a promise made to him, does not always change the primary liability from the mortgaged land to the personal estate of the grantee. It must be made with intention to have that effect. For the authorities on this subject, see 1 Leading Cases in Equity 415–440, 65 Law Libr. 432–456. Though the land in question was conveyed by the devisees of Judge Daniel to John Daniel, with covenant of general warranty, it was in effect conveyed subject to the incumbrance of the deed of trust; the debt secured by which was part of the consideration money. The latter undertook with the former, and was bound to them, to discharge the incumbrance; but he had no communication, and made no contract for that purpose with the creditor.

At the death of John Daniel, his widow the appellant Mary Ann Daniel, had a right of dower in the said tract of land subject to the said deed of trust; in other words, in equity of redemption. Heth v. Cocke & wife, 1 Rand. 344. The land being the primary fund for the payment of the debt secured by the deed of trust, she had no right to have it paid out of the personal estate, even if that had not been, as it was, required for the payment of his other debts, to which it was wholly inadequate. She had a clear right to redeem the land and disengage it from the incumbrance, in order to make her own cliam beneficial or available. 2 Story's Eq. Jur. § 1023. She was entitled to go into a court of equity to have the land sold, the incumbrance discharged, and her right of dower in the surplus secured to her. The creditor was unwilling to wait longer for the debt, and a sale of the land for its payment was necessary. The trustee in the deed might have sold it without any decree for the purpose.
208 He might have sold the *whole tract, as the deed provided for a sale of the whole; and in that case the surplus would have been subject to the rights of the widow and heirs to be adjusted and secured by the decree of a court of equity. The trustee was in declining health, and probably was not able to execute the trust. He died pending the suit, and shortly after it was brought. The creditor might have come into a court of equity in consequence of the death of the trustee or his inability to act, and had the land sold, the debt paid, and the surplus disposed of, as before mentioned, under a decree of the court. Or the widow and heirs or any or either of them might have brought a suit for the same purpose. It was not material by which of these parties the suit was brought, so that it was brought for that purpose, and the necessary parties were made.

The suit brought by the appellant Mary Ann Daniel was substantially, I think, a suit of that kind. Her bill set forth all the necessary facts, and made all proper parties. She expressed her fears, from information

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received, that the president and masters or professors of William and Mary college were unwilling longer to continue the loan, which under the deed they had a right to recall at their pleasure. And she prayed, in effect, that if they were unwilling to do so, the land should be sold with a clear title to the purchaser, and out of the proceeds of sale, after paying the expenses thereof, the debt of five thousand dollars with any interest which might be then due thereon should be paid, and that the surplus should be invested in the purchase of such of the slaves of her husband (some of whom were represented as of peculiar value) as would likely be most profitable to her and her children, to be held by them subject to the laws of descent which are applicable to real estate.

If this had been the whole frame of
209 the bill, there could have been no *objection to it in form or substance. I see no impropriety in the prayer that the residue of the proceeds of sale of the land after paying off the incumbrance should be invested in the purchase of slaves to be held as real estate. Though the court could not have converted land into slaves in such a suit merely because the interest of the widow and heirs required it; yet having properly converted the land into money for the purpose of discharging the incumbrance, it might properly invest the surplus in any subject which the interest of the widow and heirs might require, provided the subject retained the character of realty. At all events, it could not be contended that a prayer for such an investment would invalidate the sale of the land.

But the bill prays for other and alternative relief, which it is supposed rendered the sale null and void. It prays for a sale of the land subject to the incumbrance, if the president and masters or professors of William and Mary college and the executor of Judge Daniel were willing to continue the loan. There would seem to be little substantial difference between a sale of the land and payment of the debt out of the proceeds, and a sale of the land subject to the payment of the debt. In either case the amount of the debt would, in effect, be a part of the price of the land. In the one case, it would be paid immediately; in the other, it would be assumed by the purchaser and paid by him afterwards. The chief difference would seem to consist in the accommodation which the latter mode would afford to the purchaser, and the enhancement of the sale which it would probably occasion. In either mode, the widow and heirs would realize the value of the equity of redemption, to be disposed of for their benefit and according to their respective

rights. But let it be conceded that in
210 this *suit there could properly have been no sale of the land subject to the incumbrance; and that the prayer for such a sale was an improper prayer. Would its insertion in the bill affect the sale? I think not. At most it would be mere surplusage, there being enough in the bill to sustain the propriety of the decree which was made. The president and masters or professors of William and Mary college and the executor of Judge Daniel were unwilling to continue the loan. This rendered the prayer for a sale of the land subject to the incumbrance ineffectual; and made it necessary to proceed on the alternative prayer for a sale of the land and payment of the incumbrance out of the proceeds. The decree was such a one as might well have been made if the bill had been properly framed, and had contained no superfluous allegation or prayer. And the sale was made according to the decree. It is the business of a purchaser at a judicial sale to see that all the persons who are necessary to convey the title are before the court, and that the sale is made according to the decree. But he "will not be affected by error in the decree, such as not giving an infant a day to show cause, in cases in which a day ought to be given; or decreeing a sale of lands to satisfy judgment debts without an account of personal estate." 2 Daniel's Ch. Pr. 1456; Bennett v. Hamill, 2 Sch. & Lef. 566; Lloyd v. Johnes, 9 Ves. R. 37. A fortiori he will not be affected by any imperfection in the frame of the bill, if it contain sufficient matter to show the propriety of the decree. No more of the estate was sold in this case than was proper for the purpose of paying off the incumbrance: And that portion of it was sold which the convenience of the owner required. This is shown by the fact, that after the sale was set aside the Circuit court decreed a resale of the very same portion for the

purpose of refunding to the purchaser
211 *the amount of the incumbrance which had been discharged out of the purchase money paid by him. But if more of the estate had been sold than was necessary to discharge the incumbrance, the purchaser could make no objection to it, "the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole." 1 Sugd. on Vend. 68. (In fact, the deed of trust in this case provided for a sale of the whole.) Nor is he answerable for any disposition which the court may make of the purchase money. Brown v. Wallace, 4 Gill & John. 479. Nor for any error which the court may afterwards commit in decreeing a sale of the residue of the land. According to these views there was no defect in the title of the purchaser under the decree in this case.

But if there had been such defect I am of opinion that it was not incurable; and that it might, and ought to have been cured by a decree of confirmation in one or both of the other suits which were brought for that purpose. The highest bidder at a judicial sale is not considered as the purchaser until the report of sale is confirmed. Until then, according to the English practice, he has no right to resell at a profit, except for the benefit of the owner of the estate. He is not liable to any loss by fire or otherwise, which may happen to the estate. Nor is he entitled to the benefit of any material appreciation of the estate by the accidental

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falling in of lives or by other means. Heywood v. Covington's heirs, 4 Leigh 373; Taylor v. Cooper, 10 Leigh 317. As the chief aim of the court is to obtain as great a price for the estate as possible, it is in the habit, under certain regulations, of opening the biddings. 1 Sugd. on Vend. 84. It is unnecessary to enquire how far the English practice in these respects has been departed from in Virginia. Our courts certainly exercise a large discretion in
212 refusing to confirm *a report of sale, and in ordering a resale of property sold under a decree. They will not confirm a report of sale and compel a purchaser to complete his purchase when there is any defect of title of which he had no knowledge when the sale was made. Nor will they confirm it when the directions of the decree in regard to the sale have not been pursued, if either party object to such confirmation. Accordingly, in Talley &c. v. Starke's adm'r, 6 Gratt. 339, in which the land was not sold on the premises as directed by the decree, and the confirmation of the report was opposed by two of the purchasers on that ground; this court, for that and other reasons, reversed the decree of confirmation; saying that inasmuch as the purchasers could not have enforced their contracts, if resisted by the parties in the cause, they ought not to be compelled to perfect them. If therefore there was any defect in the title which the purchaser could acquire under the decree in this case, the court on his motion would have refused to confirm the report of sale, and discharged him from his purchase.

But after confirmation of a report of sale, without any objection on the part of the purchaser, his rights and obligations are very different. His inchoate contract is then perfected, and the court has a right to compel him to complete his purchase. He has still a right, according to the English practice, to have an order to enquire whether a good title can be made to him. But he may waive that enquiry; and if he pay the purchase money and enter into possession of the property, he will generally be considered as having waived the enquiry and accepted the title. 1 Sugd. on Vend. 73. In Virginia it would seem that the proper time for making objections to the title, and for having an enquiry, if one is desired, is before the confirmation of the report. Threl-
keld v. Campbell, 2 Gratt. 198;
213 *Young's adm'r v. McClung, 9 Gratt. 336. There are certainly some defects to which objection may be made by a purchaser even after confirmation, here as well as in England: such, for example, as a defect arising from a want of jurisdiction, or want of parties, which would prevent a purchaser from getting the title intended to be sold and conveyed to him. But there is this difference between such an objection made before and after confirmation; that in the former case, if the objection be well founded, the purchaser will be discharged peremptorily; whereas, in the latter, he will be discharged only if the defect be incurable, or be not cured in a reasonable time. A complete contract having, in the latter case, been made between the court and the purchaser, the court has the same right which any other vendor has to cure defects and perfect the title, provided it be done in a reasonable time, so as to occasion no injury to the purchaser. On a reference as to title in a suit for specific performance the enquiry generally is, Whether the vendor can, not whether he could make a title at the time of entering into the agreement? If a good title can be shown at any time before the master's report, and even after the report, if the vendor can satisfy the court that he can make a good title by clearing up the objections reported by the master, the court will generally make a decree in his favor. See 2 Daniel's Ch. Pr. 1195, and notes; Seton v. Slade, 3 Leading Cases in Equity 392, 72 Law Libr. 14. "Where (says Lord Eldon) the master's report is that the vendor getting in a term or getting administration, &c. will have a title, the court will put him under terms to procure that speedily." Coffin v. Cooper, 14 Ves. R. 205. In which case it was held that the purchaser could not insist on being discharged from the contract, the
vendor having procured a good title by
214 means of an act of parliament, *although upwards of a month after the master's report. It is true that in a case where there was error in the decree under which the estate was sold the purchaser was discharged, upon motion, from his purchase, although the parties were proceeding to rectify it: Lord Eldon, who decided the case, saying that he would not extend the rule which the court had adopted, of compelling a purchaser to take the estate when a title is not made till after the contract, to any case to which it had not already been applied. Lechmere v. Brasier, 2 Jac. & Walk. 287. I have no doubt of the correctness of the decision of that case, in which it seems a good title could not have been made until an infant heir became of age. But I cannot see why the same rule which applies to ordinary cases, should not apply to a judicial sale in this respect. The court considers itself to have greater power over the contract of sale when it is made under a decree, than when it is made between party and party. 2 Daniel's Ch. Pr. 1465. And it may therefore exercise at least as much discretion in affording parties an opportunity of perfecting the title in the former as in the latter case. In the subsequent case of Chamberlain v. Lee, 10 Sim. R. 444, 16 Eng. Ch. R. 445, the case of Lechmere v. Brasier was not considered as making a judicial sale an exception to the general rule; but it being discovered after the sale of an estate under a decree, and after the confirmation of the report of sale, that a small portion of the estate was the property of another person, the court would not discharge the purchaser from his contract, without giving the vendor an opportunity of acquiring a title to that portion. In the case of Crawle v. Meem, 8 Gratt. 496, land

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in which infants were interested was sold under a decree prematurely made, and the report of sale was confirmed: it was
215 held that although *it was competent for the court, the proceedings being interlocutory, to set them aside in the further progress of the cause, upon its appearing that they were prejudicial to the interests of the infants; yet, on the other hand, it appearing to be beneficial to them, there could be no good reason for disturbing them in behalf of any other party. This court was of opinion that the sale should be established or set aside, according as the Circuit court should consider it to be advantageous to the infant heirs. I can see little or no difference, in principle, between that case and this. There, as here, infants were interested in the land decreed to be sold, and the report of sale was confirmed before any objection was made by the purchaser. There, as here, the purchaser contended that he was not bound because the infants were not bound. But the court in that case held, as I think it ought in this, that as the ground of objection to the title might be removed by a further decree of the court, the sale should be established and the purchaser compelled to complete his purchase if the interest of the infants required it.

Whatever defect or irregularity there may have been in the proceedings in this case, it is not pretended that there was any fraud or unfairness on the part of those by whom or for whose benefit they were conducted. They bona fide believed that the proceedings were all right and legal, and that a good title could and would be conveyed to the purchaser. This gives them a strong claim on the consideration of the court in the exercise of its discretion to compel the purchaser to complete his purchase. On the other hand, the purchaser, while it cannot be said that he has been guilty of any bad faith or unfairness, has certainly no just claim on the court to interpose in his favor and discharge him from his purchase.
216 He did not file his *petition until after the sale had been confirmed, the possession of the land delivered to him, the greater part of the purchase money paid by him, the amount so paid applied to the discharge of the incumbrance, and otherwise according to the direction of the court, and the land released from the lien of the deed of trust; nor until nine months after the sale. The excuse assigned in his petition for not filing it sooner, was that he had no knowledge of the proceedings in the cause until within a few days past. Though he admits that when he saw the advertisement of the sale in the newspapers and spoke of becoming a bidder, he heard it suggested that the proceedings had in the case were perhaps not exactly regular, but says the suggestion made no impression on his mind, and supposing that all things had been rightly done in the cause, he attended the sale and became a bidder. Notwithstanding the admonition he had thus early received, he took no step, either before or after the sale, until a few days before the filing of his petition, to inform himself of the correctness of the proceedings, or to obtain the advice of counsel in regard to the title; but chose to rely on a conversation, which he says he sought and had before he paid one cent of the money, with one of the commissioners, who was the lawyer that conducted all the proceedings; and who, he says, in that conversation assured him that all things had been rightly done in the suit, and that a good title would therein be made to him. This assurance being fairly given, it is not perceived in what manner it can help the purchaser. Under these circumstances, he had no right to demand an absolute discharge from his purchase, even if the title was defective; but the utmost extent of the belief to which he was entitled was to be discharged if the defect could not, or in a reasonable time should not, be cured. The defect, if
217 any, *was curable; and in a reasonable time could have been cured, by a decree in one or both of the suits brought for that purpose, as soon as convenient after the petition was filed. There was no unnecessary delay in the prosecution of those suits, which was not occasioned by the petitioner himself. He was the only reluctant party; against him alone the suits had to be regularly matured. All the other parties were anxious to confirm the sale. And at the first term after a guardian was appointed to the infants, his suit might have been matured, and a decree of confirmation made therein. Even as it was, both suits were soon matured for a decree, and on the 9th of March 1853 all three of the causes came on to be heard together, when the purchaser was discharged from his purchase. Instead of that, the court should have confirmed the sale, and held him to his purchase. For it then clearly appeared from the proceedings in each and all of the suits, that the interest of all parties concerned required a confirmation of the sale, except perhaps the purchaser, who certainly had no right to complain of it. In a suit brought by a guardian for the sale of the real estate of his ward, under chap. 128 of the Code, p. 535, the court may confirm a sale already made, if the interest of the ward require it. Garland v. Loving, 1 Rand. 396. In that case it was held to be competent for the court to confirm a sale already made, provided the purchaser was willing to abide thereby. And it was argued by the counsel for the appellee in this case, that the court cannot confirm such a sale without the consent of the purchaser. Even if such consent be necessary in ordinary cases, (as to which I express no opinion,) it certainly cannot be in this case. All that the purchaser here can require is a good title; and he cannot prevent the court from giving it to him by withholding his consent to a decree of confirma-
218 tion. *See also Hughes & wife v. Johnston, 12 Gratt. 479.

I am therefore of opinion, that so much of the decree appealed from as discharged the

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appellee from his purchase, and directed the purchase money paid by him, or any part of it, to be refunded, and the land purchased by him to be resold, is erroneous, and ought to be reversed; that the sale made to him ought to be established and confirmed, and he compelled to complete his purchase; and that the cause should be remanded, to be further proceeded in according to the principles before expressed.

LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

Decree reversed.

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219 *Hepburn & als. v. Dundas & als.

(Absent, ALLEN, P.)

January Term, 1856, Richmond.

1. **Emancipation of Slaves—Condition—Payment of Certain Sum—Case at Bar.**—A deed of emancipation sets the slave free upon the payment of a certain sum, and the interest thereon, and provides that a receipt in full for the payment shall be taken as complete testimony of such discharge. The payment of the money may be inferred from circumstances; and it is not essential to produce the receipt.

2. **Slaves—Emancipated—Heirs of.***—There are three negroes, children of the same mother, born slaves, and the mother and children are afterwards emancipated. One of the three dies, having acquired real estate, intestate and without children. The mother is dead. The other two take the estate as heirs of the deceased sister.

3. **Ejectment—Interest Allowed on Profits—Effect—Statute.**†—Prior to the act, Code, ch. 177, § 14, p. 673, interest could not be allowed by a jury in an ejectment upon the profits; and the jury having allowed such interest it is mere surplusage, and the judgment will be for the principal sum and interest from the date of the verdict.‡

This was an action of ejectment in the Circuit court of Alexandria county, instituted in April 1848, by the lessee of Moses Hepburn and Arthur Waring and Julianna his wife, persons of color, against James H. Dundas and others claiming as heirs at law of William Hepburn deceased, to recover a tenement in the city of Alexandria. The plaintiffs Moses and Julianna
220 *claimed as the brother and sister of Letty, a woman of color, and as such her heirs at law, to whom the property was devised by William Hepburn. The facts are stated by Judge Samuels in his opinion. The defendants demurred to the evidence; and the court below rendered a judgment upon the demurrer in favor of the defendants. And thereupon the plaintiffs applied to this court for a supersedeas, which was allowed.

The case was elaborately argued by Wellford and Morson, for the appellants, and H. Winter Davis, for the appellees.

SAMUELS, J. This is an action of ejectment, brought before the Code of 1849 was enacted. It is therefore incumbent on the plaintiff to sustain his action by proving a right of entry in his lessors at the time the action was brought. The only evidence offered on the trial was that of the plaintiff; and to this the defendant demurred. We must, therefore, regard as fact every thing which was directly proved by the testimony, or which the jury might have fairly inferred from it.

It must, therefore, be taken as true, that the property sued for by the plaintiff and that held by the defendants is the same property. That William Hepburn had title in fee to the premises, and that he held possession, claiming such title from the year 1796, at least, until his death in the year 1817. That by his will he devised the same to Letty, sometimes called Letitia Hepburn, a woman of color, and a bastard. That Letty, by her guardian, or by her husband, had possession of the property from Hepburn's death until her own death in 1823 or 1824, 'after having had living issue, which died in her lifetime. That Letty's mother being dead, Moses and
221 Julianna, lessors of the *plaintiff, are the bastard brother and sister of Letty, and the only surviving issue of Letty's mother. That Grymes, the husband of Letty, held the property as tenant by the curtesy until his death in 1834. The question of capacity in Letty, Moses and Julianna respectively, to take or transmit

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*Slaves—Emancipated—Heirs of.—In Blair v. Adams, 59 Fed. Rep. 245, it is said: "Under the statute of Virginia, which provides that, 'bastards also shall be capable of inheriting or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother,' the courts of that state have uniformly so held as to confer upon the bastard the capacity to inherit estates, real and personal, from the mother and any of her kindred, lineal and collateral, and transmit to the mother and such kindred in like manner as if he had been lawfully begotten of the mother. He is thus given a mother, uterine brothers and sisters, and other kindred on the part of the mother, but quoad the father he is regarded as *quasi nullius filius*. Garland v. Harrison, 8 Leigh 368 *et seq.*; *Hepburn v. Dundas, 13 Gratt. 219*; Bennett v. Toler, 15 Gratt. 588."

But the court in the above case distinguished the principal case and held that under the Texas statute a bastard did not transmit his estate through his deceased mother to her surviving brothers and sisters.

†Judgments—Interest—Statutes.—The principal case is cited in Lewis v. Arnold, 13 Gratt. 461.

‡Code, ch. 177, § 14, p. 673. "The jury in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence. And in any action for a cause arising hereafter, whether from contract or from *tort*, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the said interest shall commence. If a verdict be rendered hereafter which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose heretofore, or shall arise hereafter, and judgment shall be entered accordingly."

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the inheritance, turns upon the same facts. It appears that they were the children of Esther, a slave, the property of William Hepburn, and were thus born slaves. That Hepburn, on the 1st of February 1816, conveyed Esther and her said children to Hannah Jackson, a woman of color, the sister of Esther; (a question is made, to be considered hereafter, whether Hannah Jackson had capacity to acquire title to these slaves, or to emancipate them.) That Hannah Jackson executed a deed of emancipation, dated February 12, 1816, in due form of law, whereby she set free Esther and her children, if she had capacity in law to acquire and manumit slaves. In regard to this question of capacity, it appears that Hannah Jackson had been the slave of one John Harper. That Harper, on the 23d of October 1810, in consideration of one hundred and ninety-six dollars, sold and by deed conveyed Hannah to one William Goddard for the term of ten years, and no more; and at the end of that time, set her free; and also set free any child or children of Hannah, born during her servitude. This deed was executed in form to operate as a deed of prospective emancipation. On the 24th of October 1810, Goddard executed a deed of emancipation, setting Hannah free whenever payment of the said sum of one hundred and ninety-six dollars, and the interest thereon, should be made: and providing that the receipt in full for the payment should be taken and admitted as complete testimony of such discharge. These deeds were duly recorded December 2d, 1811. It is shown by the evidence that Hannah
222 Jackson acted as a free woman in *buying and holding property. The evidence is not clear as to the precise time at which she began so to act; but from the fact that the deeds of emancipation from Harper and Goddard respectively, were withheld from the record from October 1810 to December 1811, and then recorded, and that Hepburn, on the 1st February 1816, sold Esther and her children to Hannah, and that no question has been made by those interested to make one about the status of Hannah or of Esther and her children, it may be inferred that every thing was rightly done in regard to them on the 1st February 1816. There is no force, I conceive, in the objection that the payment of the hundred and ninety-six dollars and its interest could be proved only by Goddard's receipt. The deeds of emancipation and registry thereof, and the fact of payment, completed the manumission; and the payment is sufficiently shown by the circumstances above stated, which occurred soon after the date of Goddard's deed. The provision in regard to the receipt was intended for the benefit of the freed woman; to give it a weight and force beyond that usually given to a mere receipt; to make it complete testimony. I am of opinion that Hannah Jackson was a free woman on the 1st of February 1816; that Hepburn's conveyance of that date passed to her his title to Esther and her children; and that her deed of the 12th February 1816 was effectual to emancipate them.

Holding then that Letty had capacity to take and transmit the inheritance by descent, that Moses and Julianna were of capacity to take the inheritance if the law cast it upon them, the bastard brother and sister of Letty, the question is presented whether the law of descents did so cast the inheritance?

If the estate in controversy had been within the jurisdiction of Virginia, and subject to her laws at the time of Letty's death, there would have been
223 no *reason to doubt the right of Moses and Julianna, the bastard brother and sister, to succeed to her estate. The statute of October 1785, 12 Hen. Stat. p. 138, prescribes the course for descents of real estate. Section 16 enacts that "bastards also shall be capable of inheriting or transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother." The statute of October 1785 has been repeatedly re-enacted in Virginia with some modifications; the clause above cited, however, has always been re-enacted without change, and is now the law of Virginia. 1 Rev. Code of 1819, p. 357, § 18; p. 523, § 5. This court long since decided under this statute, that bastards might transmit inheritance collaterally on the part of the mother. Garland v. Harrison, 8 Leigh 368. This construction of the statute may now be regarded as the settled law of Virginia. It is said, however, and said truly, that at the time of Letty's death this property was beyond the jurisdiction of the state of Virginia, and that the law of that part of the district of Columbia in which it lay regulated the descent. Conceding this, it becomes necessary to ascertain what was the law in that locality. The congress of the United States was the legislature for the district of Columbia, having authority and charged with the duty to provide laws therein. It was accordingly enacted by the statute February 27, 1801, 2 Statutes at Large, p. — § 1, "that the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the district of Columbia which was ceded by the said state to the United States, and by them accepted for the permanent seat of government," &c. The statute of October 1785, as modified and re-enacted by the act of December 8, 1792, thus became the law of that part of the district of Columbia which is now the county of Alexandria, and
224 which includes *the property in controversy. Section 18 of the act of 1792 is the same as section 16 of the act of 1785 in regard to descents to or from bastards. Thus it is shown that the case of Garland v. Harrison, above cited, should rule this case, unless something is made to appear requiring a different ruling.

It is said that the Supreme court, in Stevenson's heirs v. Sullivant, 5 Wheat. R. 207, placed a different construction upon this clause of the statute of descents, hold-

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ing that it prescribed transmission of inheritance lineally but not collaterally on the part of the mother of a bastard: that the Supreme court at the time of this descent cast was the court of the highest authority having jurisdiction over the locality in which the property was; and that the decisions of that court must have the same conclusive effect in settling the law within their local jurisdiction that the decisions of this court have in settling the law of Virginia. It must be conceded that all rights of property in Alexandria county, vested according to law whilst that territory was under the jurisdiction of the United States government, must be respected. This is required as well by natural justice as by the terms of the acts of congress and of the general assembly retroceding that territory to Virginia. We should give to any adjudication by a court of competent jurisdiction therein the same binding force upon the parties to a suit, which their laws at the time imparted to such adjudications. We should generally allow to decisions of the Supreme court on questions of law arising in Alexandria county, whilst that tribunal was the local tribunal of the last resort therein, the same authoritative right in settling the law therein that we ascribe to decisions of this court in settling the law of Virginia. In fine, conceding every thing which can be claimed as giving obligatory force to decisions of the Supreme court on questions of law arising in
225 *Alexandria county, yet it is impossible to hold the decision in Stevenson's heirs v. Sullivant, 5 Wheat. R. 207, a decision upon the law of Alexandria county. Stevenson the intestate lived in Kentucky, and died in 1796. The land descended lay in the Nothwestern territory, now the state of Ohio. The suit was brought in Ohio. The state of Virginia, on the first of March 1784, by her deed of that date, ceded her territory lying north and west of the Ohio river to the United States; 11 Hen. Stat. 571; and from that time, by the express terms of the deed, her jurisdiction ceased in that quarter. The statute of October 1785 was not enacted until more than a year after the cession, and thus at no time was in force in the ceded territory. On the 13th of July 1787 the congress of the United States passed an ordinance for the government of the territory. This was before the death of Stevenson the intestate. By the second section of that ordinance a course of descents is prescribed, which excludes bastards from collateral succession to an inheritance. From this it is plain that neither the law of descents of Alexandria county or of Virginia was involved in the case before the Supreme court; that court obviously held that the law of Ohio governed the case; and as the law of Ohio was supposed to be not more favorable to the bastards than the law of Virginia, they placed a construction of the law of Virginia as showing the law of Ohio. The court decided nothing more than this, that by the law of Ohio collateral descents amongst bastards are not permitted. The reference to the Virginia law was by way of argument or illustration. There is no enactment by congress, nor any authoritative exposition of the law of descents by the Supreme court, to prevent the courts of Virginia for putting our own construction of this clause of the statute of descents in Alexandria whilst under the jurisdiction of the general government. In
226 *Virginia a single decision of this court on a question in the law of property long acquiesced in, or successive uniform decisions on such question, are regarded as settling the law; as establishing a canon of property. So after a construction has been put upon a statute, if the legislature re-enact such statute, the construction is regarded as having received, in some sort, a legislative sanction; as having correctly expounded the meaning of the law makers. The case of Garland v. Harrison was long since decided, and has never since been drawn in question until now; and the law thereby expounded has been re-enacted and a reference to the case placed upon the statute book. Thus stability has been imparted to the law as thereby declared, in all the forms in which it may be done. Regarding the decision of the court therein as now beyond question, I may yet be permitted to add that it rests upon a foundation so just, reasonable and consistent with the letter and spirit of the statute, that it should not be disturbed. I am therefore of opinion that Moses and Julianna succeeded to the estate of Letty.

It remains to be considered whether the right of entry has been barred by the statute of limitations. Up to the time of Grymes' death in 1834, the possession was held by tenants paying rent to him as tenant by the curtesy; that is, it was held in privity with, and not adversely to, the title to which Moses and Julianna succeeded. However little I might be disposed, on the evidence in the case, to regard the possession of the tenants after Grymes' death as adverse to the lessors of the plaintiff, yet it is not material to decide whether it was so or not, because, even if adverse, it did not continue so long as to bar the right of entry.

The plaintiff filed with his declaration a statement claiming damages for rents and profits up to March 10, 1848, with interest from the end of each year for
227 the *rent of such year. Whether the plaintiff, under the statute, Code, p. 562, § 30, might have filed an additional statement claiming further rents and profits accruing after March 10, 1848, and up to the time of the trial, with such interest as the law allows, is not material to enquire, as no such additional rents and profits, with interest, were claimed by the plaintiff, or assessed by the jury. The damages claimed and allowed are for a tort, for the trespass and ejectment alleged, prior to the 1st of July 1850, when the Code of 1849 became the law. The statute, ch. 177, § 14, p. 673, permits a jury to give interest on

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damages for tort arising after that law took effect; but leaves damages for tort theretofore committed as they formerly were; that is, bearing no interest. The usual and proper course for juries in cases of this kind has been to consider the amount of interest, and allow it as damages, but not as interest. Regarding the allowance of interest made by the jury in this case as mere surplusage, the case is left under the operation of the second clause of § 14, which requires judgment to be given for interest for money recovered in all cases from the date of the verdict, if no other proper time be fixed. The judgment in this case must, therefore, be for interest on the damages assessed from the 18th May 1853, the date of the verdict.

The other judges concurred in the opinion of Samuels, J.

Judgment reversed.

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228 *McDaniel v. Baskervill.

January Term, 1856, Richmond.

(Absent, ALLEN, P.)

Deeds of Trust—Case at Bar.—By deed of marriage settlement the feme conveys several slaves to D in trust, among others, that if she should die in the lifetime of her husband, the trustee should deliver the property to her legatees. During the coverture D sold one of the slaves to B, and the wife by her next friend filed a bill against D and B to recover the said slave and for an account of profits; and there was a decree for the slave and for an account. Pending the suit the wife died having made a will, by which she gave all the trust property to her husband M. M then filed his bill against B and the administrator of his wife, in which he set out the proceedings in the previous suit, the death of his wife, and her will; and he prayed that the suit might stand in his name in that condition to enable him to recover the slave sold to B, and that B should be compelled to deliver the slave to him; or if the slave could not be had, that B should be made to account for his value and also for his hires. B demurred to the bill. HELD:

1. **Chancery Practice—Original Bill.**—M might have brought a new and independent suit in equity against D and B and his wife's administrator for the purpose of recovering the said slave or his value, and so much of his hires as had not been paid to the wife in her lifetime.
2. **Same—Bill of Review.***—But M might file a bill setting out the proceedings in the previous suit, and ask to have the benefit of said proceedings: and the prayer of the bill though informal, is substantially that prayer.
3. **Same—Parties.**†—That D the trustee is a necessary party.

In March 1850 Daniel W. McDaniel filed his bill in the Circuit court of Mecklenburg, in which he stated, that in the year 1843 a suit was instituted in the same court in the name of himself and his wife Diannah, the latter by her next friend, against Alexander Dortch and William Baskervill, the object of which was to recover of Dortch the hires of a negro boy named Asa, and to recover of Baskervill the boy Asa,
229 and also his *hires for the time Baskervill had him. That Diannah McDaniel had, with his consent, previous to the marriage, executed a deed by which she conveyed to the said Dortch the negro Asa, a girl Chaina and other property, in trust for her exclusive use and benefit; and in said deed it was provided that Dortch should reconvey and deliver over all the property and the interest and profits thereof which might not have been paid over to her order during the coverture, to the said Diannah, if she should survive the said Daniel McDaniel; and if she should die during the coverture, then that the said Dortch should deliver over the said property according to her will. But if she should die without having made a will, that he should deliver the property over to her heirs. That the said bill charged the trustee with having received large sums of money for which he had not accounted; and that the sale of the boy Asa by Dortch to Baskervill was without authority and void. That the court in that case decided that the sale of the boy Asa was without authority, and that Baskervill had no title to the boy, but that he belonged to the said Diannah, and that a commissioner of the court was directed to settle the account of the trustee.

The bill further stated that during the pendency of that suit Diannah McDaniel died, having first made her will, by which she bequeathed to the plaintiff her husband, the said boy Asa, the girl Chaina and her increase and all the other property she had. And it prayed that the suit might stand in his name in that plight and condition to enable him to recover the said boy Asa. And it prayed that the court would decree that Baskervill should deliver up the boy Asa to him, or if he could not be had, that then Baskervill should be made to account to the plaintiff for the full value of him, and also for his hires. The only de-

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***Chancery Practice—Bill of Review.**—The principal case is cited and approved in Reid v. Stuart, 20 W. Va. 392.

†**Chancery Practice—Parties.**—In Simon v. Ellison, 90 Va. 158, 17 S. E. Rep. 836, it is said: "Mr. Barton says in his Chancery Practice, vol. 1, sec. 85: 'It is a general rule in equity that all persons interested in the subject-matter of the bill, and which is involved in and to be affected by the proceedings and result of the suit, should be made parties, however numerous they may be.' Citing numerous authorities, the decisions in this State are in an unbroken line; and upon plain principles he whose rights are to be affected by any proceeding should be before the court, and have an opportunity to be heard. Otherwise he is not bound by the decree. Clark v. Long, 4 Rand. 452; Richardson v. Davis and Wife, 21 Gratt. 709; Armentrout's Ex'or v. Gibbons, 25 Gratt. 375; Barton's Ch. Pr. p. 219, vol. 1, sec. 74; Collins v. Lofftus & Co., 10 Leigh 5; Commonwealth v. Ricks, 1 Gratt. 416; *McDaniel v. Baskervill, 13 Gratt. 228;* Story's Eq. Pl. §§ 207, 210; Fitzgibbon v. Barry, 78 Va. 755; Stovall v. Border Grange Bank, 78 Va. 188."

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fendant made in this suit was Baskervill.

230 *Before the defendant appeared the plaintiff amended his bill, and after repeating what he had before said, he stated that the will of Diannah McDaniel had been accidentally destroyed by fire; but that its purport and contents had been set up and established as her true last will by the County court of Mecklenburg. And he exhibited with his bill a copy of the order of the County court establishing the will and stating its contents. The prayers of the bill are the same as in the former; and Baskervill and John F. Finch the sheriff of Mecklenburg and as such the administrator with the will annexed of Diannah McDaniel are made parties defendants.

Baskervill appeared and demurred to the bill, on the grounds, first, that the plaintiff's title to the boy Asa, if any he had, was acquired after the filing of the original bill, and had no connection or dependence upon the title of Diannah McDaniel the plaintiff in the original bill. Second, that the plaintiff had a clear remedy at law, and a court of equity had no jurisdiction of the case.

Beside the will of Diannah McDaniel which gave all her property including the boy Asa, to the plaintiff, the deed of marriage settlement was filed, by which the property was settled to her separate use with the provision stated in the bill.

The cause came on to be heard on the 20th of September 1852, when the court sustained the demurrer and dismissed the bill with costs. Whereupon the plaintiff applied to this court for an appeal, which was allowed.

Bouldin, for the appellant:

This is not a bill of revivor, but an original bill in the nature of a supplemental bill. But if the bill sets out a ground of relief, the court will consider it just of such a nature as the case may require. And

231 to *show the liberality of the court as to pleadings in equity, I refer to Kyle v. Kyle, 1 Gratt. 516. That the interest of the plaintiff is so connected with the interest involved in the original bill as to entitle his plaintiff to file an original bill in the nature of a supplemental bill, see Story's Equ. Pl. §§ 346, 349, 350, and note to this last section; 3 Daniel's Ch. Pr. 1718 to 1723.

As to the jurisdiction, clearly the plaintiff in the first suit was properly in equity. In that suit there was a decree for an account and a decree affirming the title under which plaintiff here claims. Even if the plaintiff held the legal title, he is entitled, under the circumstances, to the aid of a court of equity to enforce his rights. But the legal title is in the trustee, whose duty it is to deliver over the property, and he refuses; then surely we may come into equity to compel him. The case is much stronger for the interposition of a court of equity and the privity of the titles more perfect than in the case of Robinson v. Day, 5 Gratt. 56, in which the bill was sustained and relief was given.

In this case there are strong reasons why the plaintiff should be allowed the benefit of the previous proceedings. The statute of limitations might bar the recovery of the profits if the plaintiff is put to commence an original proceeding, though in the first suit there has been a decree for an account.

Joynes, for the appellee:

The court will find that it requires not only great liberality but some charity of construction to make anything out of this bill. The only thing stated is that the plaintiff is the owner of a slave in the possession of Baskervill, and asks that it may be delivered up to him. He claims

232 nothing by virtue of the previous *proceedings, and does not exhibit the papers. And states no difficulty in proceeding at law.

The title set up in the bill is purely legal. The title of the trustee is commensurate with the trusts. If the purposes of the trust are exhausted with the life or coverture of the cestui que trust, the estate of the trustee then terminates, though an estate of inheritance is granted to him. Hill on Trustees 239. Dortch's estate, then, was only commensurate with the objects of the trust, and they continued only during coverture. If the party named in the will had been named in the deed, he would have taken a legal estate in remainder after the estate for life. So though not named in the deed, yet the power exercised in his favor made him a remainderman in the deed, and gave him the legal title. Then where was the difficulty in suing at law.

In order to show the nature of the class of bills into which the counsel on the other side would introduce this bill, the court is referred to the authorities cited by the counsel, and to Daniel's Ch. Pr. 1666. In a supplemental bill the old proceedings become a part of the new cause, and the papers are incorporated with it. These authorities imply that the plaintiff must have ground of his own on which to stand in court. He is not entitled to the benefit of what is done in the first cause. There may be a new defense; there must be other evidence; and even if there is a decree in the first cause, it can only be relied on as inducement, not as binding the rights of the parties. Then, in this case, the prayer for the benefit of the previous proceedings is improper; and the plaintiff is not entitled to the benefit of that suit.

DANIEL, J., delivered the opinion of the court:

It seems to the court, that as by the

233 terms of the *deed of marriage settlement of the 9th of November 1831, it is made the duty of the trustee Dortch, in case of the death of Mrs. McDaniel occurring before that of the appellant, to pay and deliver over all of the property in said deed embraced, according to her last will and testament; and as by her last will and

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testament she has bequeathed to the appellant the negro man Asa and all the other property to which she was entitled, it was competent for the appellant, upon the state of facts alleged in his bill, to have brought a new and independent suit in equity for the purpose of recovering the said negro or his value, and so much of his hires as had not been received by Mrs. McDaniel in her lifetime, making the appellee Baskervill, the trustee Dortch, and the legal representative of Mrs. McDaniel, all parties to his bill.

It seems, however, further to the court, that as Mrs. McDaniel had in her lifetime instituted her suit in equity against the appellee and the said trustee, for the purpose of recovering said slave or his value, and of having a settlement of the account of trustee, it was not necessary for the appellant, in order to obtain the relief sought by him, to bring a suit wholly independent of the suit so commenced by Mrs. McDaniel; but that it was competent for him, in a bill setting forth his case and the previous proceedings had at the instance of Mrs. McDaniel, to ask to have the benefit of said proceedings.

And it seems further to the court, that the prayer in the bill of the appellant in respect to the proceedings had in Mrs. McDaniel's suit, though informal, is still a substantial prayer to be allowed to have the benefit of said proceedings.

The court is therefore of opinion, that the appellant has in his bill and amendment thereto stated a case entitling him to the aid of a court of equity, and that
234 *the decree of the Circuit court sustaining the demurrer and dismissing the bill is erroneous.

And it seems also to the court, that it would be premature in this court to express any opinion as to whether the appellant is entitled to have the benefit of the proceedings in Mrs. McDaniel's suit, absolutely, under the rules which ordinarily govern in cases of bills simply supplemental, or on such terms as are usually imposed in cases of original bills in the nature of supplemental bills. In either aspect, however, it seems to the court proper that the appellant should make the trustee Dortch a party to his bill.

The court doth therefore adjudge, order and decree, that the decree of the Circuit court be reversed with costs, &c. And the cause is remanded, with liberty to the appellant to amend his bill and make new parties; and for further proceedings in accordance with the principles above declared.

Decree reversed.

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235 *Armstrong's Adm'r & als. v. Pitts & als.

January Term, 1856, Richmond.

(Absent, ALLEN, P.)

1. **Wills—Devise in Trust for Use of Son and Family—Right of Creditors to Sue before Acquiring Lien.***—Testator devises land and negroes to trustees for the use and benefit of his son A during his life, with the privilege that he may reside on said farm and have the use of said negroes so far as may be necessary for his support and maintenance, and for the support and maintenance of his family: and at his death the property to be equally divided among his children. And he directs that the property shall not be liable for any debt which his son A might then or thereafter owe. Creditors of A not having recovered a judgment against him cannot come into equity to subject the trust property, though the debts were contracted for necessaries for the support of the family.

2. **Chancery Practice—Interlocutory Decrees—Errors—Correction in Lower Court.**†—A cause is heard upon the report of a commissioner which had not been returned for the legal period. The decree being merely interlocutory, the error should have been corrected by application to the court below; and it is not ground for an appeal unless, upon application, the court below refuses to correct it.

In the year 1840 Ellis Armstrong of the county of Essex departed this life, having made his will, which was duly admitted to probate in the County court of Essex. By the first clause of his will he gave to John Armstrong and George Wright the farm on which he lived and nine slaves, upon the following trust; "for the use and benefit of my son Joseph N. Armstrong during his life, with the privilege that he may reside on said farm and have the use of said negroes, so far as may be necessary for his support and maintenance, and for the support and maintenance of his family; and at his death, should his wife Susan survive him, then the said Susan may reside on said farm and have the use of said negroes, so far as may be necessary for the support and maintenance of herself and such
236 children *as she may have by my said son Joseph N. during her widowhood, and no longer; and at the death of my said son Joseph N. and at the death or

*Devise in Trust for Use of Son and Family—Right of Creditors to Sue before Acquiring Lien.—In the principal case it is held that creditors of the *cestui que trust* not having recovered judgment against him cannot come into equity to subject the trust property, though the debts were contracted for necessaries for the support of the family.

This ruling is approved in the case of Salamone v. Keiley, 80 Va. 99, but that case is distinguished on the ground, that the trustee in improving the trust property, created a liability on the property, and thereby involved it in a controversy properly cognizable in equity.

That equity does not have jurisdiction in all cases simply because a trustee is a party, see Markham v. Guerrant, 4 Leigh 279; Sheppards v. Turpin, 3 Gratt. 373.

†Chancery Practice—Jurisdiction of Court—Where the Objection Can Be Made.—In Slack v. Jacob, 8 W. Va. 655, the ruling of the principal case on p. 243 is quoted and approved, that is, that where the court of equity has no jurisdiction, the bill should be dismissed by the appellate court and that even though there was no exception made in the court below. And to sustain the proposition the court cites the following authorities including the principal case: Hudson v. Kline, 9 Gratt. 379; Jones v. Bradshaw, 16 Gratt. 355; Green & Suttle v. Massie, 21 Gratt. 358.

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marriage of the said Susan his wife, if she should survive him as herein before provided for, to be equally divided among the children of my son Joseph N. and their lawful issue. The issue of such as may be dead to take such part or portion only as his, her or their ancestor or ancestors would take if living."

By the fifth clause of the will it was declared that the property and estate given in the first clause should be in no way liable for any debt or liability which his son Joseph N. might thereafter or at that time owe.

The executors and trustees refused to qualify or take upon them the burden of the trusts of the will, and the estate was committed to the sheriff of Essex.

In January 1853 B. D. Pitts & Co. and Robert B. Rennolds filed their bill in the Circuit court of Essex county, against the administrator of Ellis Armstrong, John N. Armstrong and wife and their children, in which they set out the trust in favor of John N. Armstrong and his wife and children. They stated that Armstrong had become indebted to D. B. Pitts & Co. for goods, which were necessaries of the family suited to their condition and estate, and that he had become indebted to Rennolds for attendance upon his family as a physician. And they insisted that under the trust of the will and the principles of equity they were entitled to have their debts satisfied out of the trust property: And such was the prayer of the bill, &c.

The bill was taken for confessed as to Armstrong and wife, and the husbands of two of the children and their wives, and there were answers by the administrator and the guardian ad litem of the infant children.

In April 1853 there was a decree for an account of the debts of the complainants and of the trust property. The commissioner filed his report on the 25th
237 *of October 1853, in which he stated the debt due to D. B. Pitts & Co. at two hundred and fifty-nine dollars and five cents, and the debt due to Rennolds at two hundred and ninety-five dollars; both bearing interest; and the trust slaves were valued at four thousand two hundred and seventy-five dollars.

The cause came on again to be heard on the report of the commissioner on the 12th of November 1853, when the court made a decree in favor of the plaintiffs for the sums reported to be due to them respectively, with interest, and also for their costs. From this decree the administrator of Ellis Armstrong and the adult children of Joseph N. Armstrong with their husbands applied to this court for an appeal, which was allowed.

Griswold & Claiborne, for the appellants.
Patton, for the appellees.

MONCURE, J. This case was first submitted to the court on a preliminary question, the decision of which in favor of the appellants, it was supposed, would render it unnecessary to consider the case upon the merits. That question was raised by the third assignment of error, which is, that "it was irregular to hear the cause upon the commissioner's report until thirty days after the same had been returned to the court." Code, p. 659, ch. 175, § 9. In Gray v. Dickenson's adm'rs, 4 Gratt. 87, referred to in the petition, this court, on a similar ground, reversed with costs the decree of the court below, without considering the other errors assigned. We would have to take the same course in this case, if it were like that in all respects: but it is not. In that case the decree appealed from was final. The defendant had not appeared and answered; and there was nothing in the record from which it could be inferred
238 that the cause *was heard by consent, or that the objection to acting upon the report returned to the court so recently before the cause was heard, had been waived. The only remedy for the correction of the error was by an appeal. In this case, the decree appealed from is interlocutory: and though the bill was taken for confessed as to some of the parties, who cannot be considered as having consented to the hearing of the cause within thirty days after the return of the commissioner's report, or as having waived any objection thereto; yet they had an opportunity of having the error corrected by motion to the Circuit court; and if there had been no other error in the proceedings, ought to have pursued that course, rather than subject the appellees to the expense and delay of an appeal. The right of appeal from an interlocutory order or decree was not given for the correction of such an error as this; but is limited to "a decree or order dissolving an injunction or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of the cause;" and was intended to test the merits of the decree or order. If that be right upon the merits, and the only apparent error in the proceedings consists in the fact that the decree or order was prematurely made, the petition for an appeal therefrom may be rejected upon the ground that it is most proper that the case "should be proceeded in further in the court below, before an appeal is allowed therein." In other words, the petitioner should have the error corrected in the court below if he can. If his application for relief to that court be overruled, he will then be entitled to come to this court and have the decree or order reversed with costs. But if he come to this court without having first unsuccessfully applied for relief to the court below, though he will be entitled to have the decree or order reversed on account of that error; yet the question of costs will
239 depend upon *the question, whether the decree or order be correct in principle, upon the case as it stands; and if it be so, the appellee will recover costs as the party substantially prevailing. This is the principle of the decision of this court in Cunningham v. Patteson, 3 Rand. 66; in

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which the court said that the appellant not having made his objections in the court below, "shall not lie by and take advantage of them in the appellate court, to throw on the opposite party the costs of an appeal, which the law never intended to allow for the correction of such defects."

The court having announced that, whatever might be its opinion upon the preliminary question submitted, it would be necessary to consider the question, whether the decree be correct in principle; the case was then fully submitted for its decision.

In considering the case upon its merits, the first question which presents itself is, Whether the appellees are entitled to any relief in the case as it now stands? In other words, Whether a court of equity has any jurisdiction of the case?

The appellees have obtained no judgments upon their claims. They are creditors at large of Joseph N. Armstrong. They do not come into court under chap. 179, § 2, p. 677 of the Code, "to avoid a gift, conveyance, assignment or transfer of, or charge upon, the estate" of their debtor. They do not claim to be beneficiaries under, or privies to, the trust created for their debtor by the will of his father. Nor do they set any claim to a lien on the trust subject under any contract with the trustee, or even with their debtor. They claim only as general creditors of Joseph N. Armstrong, and upon the ground that their claims are for necessaries furnished for the use, maintenance and support of the said Armstrong, his wife and family; and that they are therefore, as they insist, "entitled to be paid out of the property given by the
240 *will aforesaid to the said Joseph N. not only in accordance with the principles of equity, but according to the express provisions of said will." The claim of a creditor against his debtor is generally in personam only. He can acquire a lien upon specific property, only in some mode prescribed by law, or under some contract made for that purpose, or some trust created for his benefit. If his debtor be a feme covert entitled to separate estate, he can have no claim against her personally, because she is incapable in law of making a contract, to bind herself personally; and can only bind her separate estate; as to which she is regarded in equity as a feme sole. All the contracts which she is authorized to make under the settlement, are considered as contracts made in reference to, and as binding upon her separate estate. Her creditors therefore cannot sue her at law, but must go into equity in pursuit of that estate. But if the debtor be sui juris, the creditor cannot go into a court of equity merely because a trust has been created for the benefit of the debtor. He has no more specific lien or claim upon the trust subject than he has upon any other property of his debtor. That he looked to that subject for the satisfaction of the debt when it was created, can give him no such lien or claim. He no doubt then looked to all the property of the debtor for that purpose. In this case the will gave no separate estate to the wife of Joseph N. Armstrong: and not she, but he is the debtor. The trust subject is therefore not bound in equity for these claims, unless bound for them by the provisions of the will, as the bill insists. Now the express object of the trust was to prevent the subject from being bound for the debts of Joseph N. Armstrong; it being by the fifth clause of the will expressly declared that the property given in the first clause (which creates the trust) shall be in no way liable for any debt which the
241 said Joseph N. might *then or thereafter owe or be bound for. Whatever may be the effect of this clause in securing to Joseph N. Armstrong and his family the enjoyment of the trust subject against the claims of his creditors, it certainly excludes all idea of any right on the part of those creditors to come in as beneficiaries under the trust. Their claim upon the subject, if any, must be against, and not under, the terms of the trust. It must be founded on some contract with the trustee or the cestui que trust, which they or either may have a right to make. It is not pretended that any contract at all was made with the trustee; nor any contract for a lien, with the cestui que trust. The claim is solely based upon a general contract with the cestui que trust, and the principles of equity and the provisions of the will. That these are not sufficient to create a lien and give the appellees a right to come into equity, has already been sufficiently shown. That no contract with a cestui que trust in such a case could give his creditors a lien on the trust subject, and a right to come into equity to subject it to the payment of their claims, is conclusively shown by the case of Markham v. Guerrant & Watkins, 4 Leigh 279, which in most of its features is very much like this. Of all the cases referred to on either side, that is the only one in which the creditors came into a court of equity to charge the trust subject with their debts, without first having obtained judgments for them at law. In the other cases the creditors had obtained judgments and were seeking to enforce them against the trust subject at law when they were enjoined at the suit of parties claiming under the trust. In that case the creditors came into equity on the alleged grounds that relying on the credit of the trust estate they had furnished sundry necessary supplies to John Markham and his family, that Fleming the trustee had assumed the payment of the debt out of the trust estate by
242 a *letter which was exhibited, and that Markham had lately died leaving no property but the trust estate. The bill was dismissed without prejudice to any other remedy to which the appellees might be advised to resort. "It behooves every one (said the court in that case) who deals on the credit of a fund like this, to look to the deed and see how much can be disbursed; and to make his bargain beforehand with the trustee. In this case then I do not think that the appellees by their

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dealings with the family, acquired any right to charge the trust fund: if they did, every other person who chose to let the cestuis que trust have goods or property would have the same right; and thus the check interposed by the deed would be destroyed, and one year's extravagance swallow up the revenue of years to come, and leave the wife and children to starve." The court strongly inclined to the opinion that even the trustee could not bind the fund by anticipation, and thus absorb the support of future years; and intimated that the proper course to be pursued by persons furnishing necessaries to a family in such a case is, to apply to the trustee to know how far they may go in trusting the cestuis que trust: in which case he will be personally liable to the extent of the dealings he may have authorized, and may indemnify himself out of any of the trust funds which may come to his hands and be properly applicable to that purpose. That case was more favorable to the claims of the creditors than this is. In that case, by the terms of the trust, all the profits of the trust subject were applicable to the support of the family; whereas, in this case, while the trust subject is given for the use and benefit of Joseph N. Armstrong during his life, it is "with the privilege that he may reside on the farm and have the use of the negroes, so far as may be necessary for his support and maintenance, and for the support
243 and maintenance *of his family."

If the bill was properly dismissed in that case, so it ought to be in this. That case is a binding authority in itself, and has been recognized and followed in subsequent cases in this court. Nickell v. Handly, 10 Gratt. 336; Johnston v. Zane's trustees, 11 Id. 552.

It would be premature, and is not intended to intimate any opinion in this case, whether, and to what extent, the trust subject or its profits may ultimately be made liable to the claims of the appellees; the court being of opinion, that whether so liable or not, and to whatever extent liable, they can have no right to come into equity to enforce any such liability until they shall first have obtained judgments at law. And then, if there be a liability which cannot be enforced at law, they may come into equity to enforce it. Upon the question of liability, whenever it may properly arise, the cases cited by the counsel, in addition to that of Markham v. Guerrant & Watkins, may have an important bearing. Those cases are Scott v. Gibbon, 5 Munf. 86; Scott v. Loraine, 6 Munf. 117; Galt v. Carter, Id. 245; Rankin v. Bradford, 1 Leigh 163; Roanes v. Archer, 4 Leigh, 550; Butler v. McCann, Id. 631; Nichell v. Handley, 10 Gratt. 336; Johnston v. Zane's trustees, 11 Id. 552. See also Hughes v. Pledge, 1 Leigh 443; Wallace & wife v. Dold's ex'ors, 3 Id. 258; Stinson, ex'or v. Day & wife, 1 Rob. R. 435; Perkins, trustee v. Dickinson, 3 Gratt. 335; which may have some bearing on the question.

That the bill, not showing on its face proper matter for the jurisdiction of the court, may be dismissed for want of jurisdiction, notwithstanding no exception on that ground was taken in the court below, is shown by the case of Hudson v. Kline, 9 Gratt. 379.

The court is therefore of opinion that both the decree of the 25th day of
244 April 1853 and the decree of *the 12th day of November 1853 are erroneous, and ought to be reversed with costs, and the bill dismissed with costs, but without prejudice to any other remedy to which the appellees may be advised to resort.

The other judges concurred in the opinion of Moncure, J.

Decree reversed.

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245 *Hooe & als. v. Hooe.

January Term, 1856, Richmond.

(Absent, ALLEN, P., and MONCURE, J.)

Wills—Construction of.*—Testator says, "I give the use and profits of all my estate, real and personal, to my daughters who may remain single. Should they all marry, or when they die, then it is my will that my property shall be equally divided among my surviving children. My land in the county of King George, called Dissington and Freidland, I give to my son G. I do this in consideration of the attention and kindness that he has paid, and will continue to pay, to his sisters." Testator had three sons who had means to support themselves, and six daughters, five of whom were, at the time, unmarried. He lived on the land mentioned as given to G, and it was all the land he owned, and he had about thirty slaves.

HELD:

1. **Same—Same.**—By the first clause of the will an estate for life was given to his daughters in the property therein described; determinable as to each upon her marriage.
2. **Same—Same.**—That the devise of the land to G, in the third clause of the will, is not an exception out of the general devise to the daughters, nor a revocation of said devise *pro tanto* upon the ground of repugnancy thereto.
3. **Same—Same.**—That the daughters did not take a mere equitable right to the use and profits of

*__Wills—Construction of.__—In Hatcher v. Hatcher, 80 Va. 171, it is said: "And in order the better to comprehend the scheme which the testator had in his mind for the disposition of his estate, the judicial expositor is permitted to place himself, figuratively speaking, in the very shoes of the person, whose will he is called on to construe, and with the aid of such extrinsic evidence as is admissible for the purpose, possess himself of the condition of the testator and his family and of such surrounding facts and circumstances as may be reasonably supposed to have influenced him in the disposition of his property. Wootton v. Redd, 12 Gratt. 205; *Hooe v. Hooe, 13 Gratt. 245;* Williamson v. Coalter, 14 Gratt. 398." The principal case is also cited and approved in Lazier v. Lazier, 35 W. Va. 574, 14 S. E. Rep. 150. Further upon the construction of Wills, see 2 Min. Inst. (4th Ed.) 1050 *et seq.* See also, *foot-note* to Midlothian, etc., Co. v. Finney, 18 Gratt. 304.

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the property devised, dependent, as to the land, upon a legal estate vested in possession in G; but took such a legal estate in the use and profits of the testator's whole estate including the land, as entitled them to retain the possession thereof until they should marry or die; and the estate given to G will not vest in possession until that time.

This was an action of ejectment in the Circuit court of King George county, brought by the infant children of George Mason Hooe, by their next friend, against George Anna S. Hooe, to recover two tracts of land, called Dissington and Freidland.

The plaintiffs claimed under a devise
246 to their father from his *father, Alexander S. Hooe. The defendant was the only remaining unmarried daughter of the testator.

Alexander S. Hooe died in October 1835, having made his will in the previous August; which contained a single devise, as follows:

"I give the use and profits of all my estate, real and personal, to my daughters who may remain single. Should they all marry, or when they die, then it is my will that my property shall be equally divided among my surviving children. My land in the county of King George, called Dissington and Freidland, I give to my son, George Mason Hooe. I do this in consideration of the attention and kindness that he has paid, and that he will continue to pay, to his sisters." George Mason Hooe and the defendant George Anna S. Hooe were appointed executor and executrix of the will.

The condition of the testator's estate and family and the circumstances by which he was surrounded at the time of making his will, and at his death, are stated by Judge Lee in his opinion.

The parties submitted the case to the court upon a case agreed, and there was a judgment for the defendant. Whereupon the plaintiffs obtained a supersedeas to this court.

Welford and Morson, for the appellants.
Patton, for the appellee.

LEE, J. This case turns upon the construction of the will of the late Alexander S. Hooe of King George.

For the plaintiffs it is contended that the devise of the lands called "Dissington" and "Freidland" to the testator's son George M. Hooe, operates to except them out of the estate the uses and profits of which had in the first clause of the will, been devised to the daughters who might

remain unmarried. Or, if this
247 *be not so, that there is an incurable repugnancy between the devise to the daughters and that to George M. Hooe the effect of which is that the latter operates as a revocation pro tanto of the former. And if neither of these views can be sustained, it is insisted that the interest taken by the daughters in "Dissington" and "Freidland" was a mere equitable right to the use and profits dependent upon the legal estate vested in George M. Hooe by the terms of the will and thus that the plaintiffs having the legal title must recover in this action whatever may be the rights of the defendant elsewhere.

There are certainly no express terms of exception used in the will nor are any such to be supplied unless rendered necessary by the clear and plain intention of the testator. Indeed had there been express terms of exception no room would have been left for controversy. The argument is however that from the terms and succession of the several devises to the daughters and George M. Hooe, the subject of the latter is by necessary implication withdrawn and excepted from the former, because George M. Hooe was to take Dissington and Freidland immediately and no inferest was intended to be given in them to the daughters. Thus the question is resolved into an enquiry as to what was the true meaning and intention of the testator, and this is to be ascertained by weighing the terms of the will themselves and by placing ourselves in the situation of the testator and considering the language he has used in the light reflected upon it by the circumstances surrounding him at the time his will was made, and the relative situation of the different parties. Kennon v. McRobert et ux., 1 Wash. 96; Wootton v. Redd's ex'ors, 12 Gratt. 196.

The testator by the first clause of his will gives the use and profits of all his estate real and personal to his daughters who

may remain single. By the next
248 *clause, he declares that should the daughters all marry or when they died, his property was to be equally divided among his surviving children. Thus an estate for life in the use and profits of the whole estate was plainly given to the daughters determinable as to each, upon her marriage. Then follows the devise to George M. Hooe of Dissington and Freidland, which is declared to be in consideration of the attention and kindness that he had paid and would continue to pay to his sisters. Now if we look to the context and general tenor of the instrument, it seems apparent that the testator's first object was to provide for the support of his unmarried daughters, and to this end he devotes the profits of his whole estate. Upon their marriage when he assumed that the necessity for such provision would cease, or at their death, he directs a division of his property among his surviving children. But it occurs to him that his son George M. Hooe for the reasons which he assigns is entitled to some special manifestation of gratitude and regard, and he accordingly gives to him his lands called "Dissington" and "Freidland." The devise to the daughters is of the use and profits: that to the surviving children and that to George M. Hooe are of the absolute title and estate. If therefore the devise to George M. Hooe constitutes an exception out of any previous devise it would seem to be rather out of that to the surviving children than that to

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the daughters. The division of the property among the surviving children was to take place upon the death or marriage of the daughters, and it is not an unreasonable interpretation of the will that the devise to the son should take effect at the same period.

This view of the testator's intention as deduced from the general scope and context of the will is greatly strengthened when we come to consider the circumstances by which he was surrounded at the

249 *time it was made. It appears that the only real estate which he owned were these lands called Dissington and Freidland and certain ground rents in Alexandria of the annual value of one hundred and thirty-five dollars: that these two tracts lay in the county of King George and were separated from each other by the main road leading from Fredericksburg to King George court-house, but had always been cultivated together and treated as one plantation by the testator: that his residence with his family for many years and up to the time of his death was upon Freidland on which was a mansion-house with servants' houses, barns and other out-houses, while upon Dissington there was no dwelling or other house whatsoever: that Dissington contained about six hundred and twenty-six acres and was assessed in 1835 (the year of the testator's death) at the sum of five thousand eight hundred and thirty-four dollars and thirty-two cents: that Freidland contained about one hundred and forty-nine acres and was assessed in the same year at two thousand two hundred and ninety dollars and thirteen cents: that the testator owned slaves, thirty-one in number and valued at the aggregate sum of ten thousand two hundred and ninety-five dollars, and other personal estate of the value (as by appraisement) of one thousand five hundred and thirty-one dollars: and that he owed very few debts and those of very inconsiderable amount. It further appears that at the making of his will the testator had nine children, three sons and six daughters: that of the sons, the eldest Alexander S. was a captain in the United States army and had recently married the daughter of a very wealthy man: that the other two sons were unmarried and were lieutenants in the navy: that of the daughters one only was married, and the youngest was of the age of ten years only.

Now it is most probable that the

250 testator regarded *any provision for the immediate support of his sons unnecessary, thinking the pay which they received as army and navy officers adequate for that purpose whilst he did deem it necessary and proper to make such provision for his daughters. And it cannot be doubted that it was his intention they should continue to reside until they might happen to marry upon the property on which he had for many years resided with his family and should be supported by cultivating both tracts just as he had himself done with the slaves. It is impossible to suppose he could have intended to give the daughters thirty-one slaves and yet take from them the lands on which they had their home and which would be necessary for the profitable employment of the slaves and for their support as well as that of the daughters. It cannot be supposed that he intended the slaves to be hired out and their hires applied after providing for the support of children and any who might be infirm or disabled, to the maintenance of the daughters. Nor is there any thing in the motives by which the testator is prompted to make the devise to George M. Hooe which at all evinces any intention to diminish the extent of the previous devise to the daughters. On the contrary those which he assigns grow out of his affection for his daughters and looked to their benefit and advantage. The gift of Dissington and Freidland to George M. Hooe was in consideration of the attention and kindness which he should continue to pay to his sisters as well as of that which he had previously shown; and when those fraternal offices should be no longer required by the condition of his sisters, he was to be rewarded by the enjoyment of the property given to him by his father in consideration of his affection and dutiful conduct towards those whom the father regarded as most needing protection and provision and who were plainly the first objects of his bounty and paternal care.

251 *Nor is there any such inconsistency between the devise to the daughters and that to George M. Hooe that the latter should be regarded as a revocation of the former to the extent of the subject which it embraces. The rules on this subject of an implied revocation of a previous devise by a subsequent inconsistent one, are well settled. It is the duty of the judicial expounder of a will to give effect to every word without alteration or diminution, if an effect can be given to it not inconsistent with the general intent of the whole will taken together; and the former of several apparently contradictory devises is never to be sacrificed but on the failure of every attempt to give to the whole such a construction as will render every part of it effective: and in the attainment of this object, the mere local order of the several devises will be disregarded if by their transposition a consistent disposition may be deduced from the entire will. 2 Jarman on Wills 415; Gray v. Minnethorpe, 3 Ves. R. 103; Constantine v. Constantine, 6 Ves. R. 100; Doe ex dem. Baldwin et ux. v. Rawling, 2 Barn. & Ald. 448, 449, 452; Shelton's ex'ors v. Shelton, 1 Wash. 53. Thus the rule which assigns to a subsequent devise in a will the effect of revoking a previous one as being the latest manifestation of the testator's intention is never applied except where the two provisions are totally irreconcilable and where the real intention of the testator cannot be ascertained. Covenhoven v. Shuler, 2 Paige's R. 122; Homer v. Shelton, 2 Metc. R. 194, 202. Nor is it ever suffered to clash or interfere with the doctrine which enjoins upon the expositor

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to look for the intention of the testator in the general tenor and context of the instrument and to qualify or even reject any clause or phrase that may be found incompatible with it; and though first expressed, this general intent shall overrule the particular intent afterwards disclosed. 1 Jarman on Wills 420; 2 Wms. Ex. 710, et seq.;
252 Doe ex *dem. Bosnall v. Harvey, 4 Barn. & Cress. 610, 10 Eng. C. L. R. 419; Jesson v. Wright, 2 Bligh. Par. Cas. 1, 56; Boon v. Cornforth, 2 Ves. R. 277; Coryton v. Helyar, 2 Cox's Cas. 340; Lunn v. Osborne, 7 Sim. R. 56, 9 Cond. Eng. Ch. R. 476; Bartlett v. King, 12 Mass. R. 537; Cook v. Holmes, 11 Mass. R. 528. And the courts have ever betrayed an anxiety in the interpretation of wills to adopt such a construction as will give effect to every part of an instrument and thus avoid declaring any provision which it contains to be repugnant to others. Thus where a testator in different parts of his will gives the same identical lands to different persons in fee; this would appear to be a case of direct and insuperable repugnancy in which the earlier devise in the will would according to the rule be deemed to be revoked by the later. But the difficulty has been overcome by the modern construction which would seem to have prevailed in opposition to the early writers, according to which the devisees take concurrently. Sherratt v. Bentley, 2 Myl. & Keene 149, 7 Cond. Eng. Ch. R. 305; Ridout v. Pain, 3 Atk. R. 486; Constantine v. Constantine, 6 Ves. R. 100; 1 Jarman on Wills 417. So where there are apparent inconsistent limitations on an estate in fee, the conflict has been reconciled by assuming that the latter disposition was intended as a substituted devise in case of lapse and applied exclusively to the event of the prior devisee dying in the lifetime of the testator. Clayton v. Lowe, 5 Barn. & Ald. 636, 7 Eng. C. L. R. 218. Other illustrations of the astuteness of the courts to reconcile apparent repugnance between the devises of a will will be found in the cases. Holdfast ex dem. Hitchcock v. Pardoe, 2 Black. R. 975; Coryton v. Heylar, 2 Cox's Cas. 340; Bettison v. Richards, 7 Taunt. R. 105, 2 Eng. C. L. R. 40.

In this case I think there is no difficulty in reconciling the seemingly incon-
253 sistent devises. The devise *to the daughters is as we have seen, of a life etsate determinable as to each upon her happening to marry. This is followed by a devise in fee of the lands to George M. Hooe. The plain and natural import of such a disposition would seem to be that the former devise should have its full effect and the latter take effect in remainder after the determination of the previous estate upon the marriage or death of the daughters. Such I think we must see was the intention of the testator whether we look to the general tenor and context of the will alone or view it as illustrated and explained by surrounding circumstances. There is therefore no room for this doctrine of repugnancy and implied revocation. The case resembles that put of a devise of land in fee to A and a subsequent devise of the same lands to B for life. In the construction of law both devises shall stand and the will shall be read as if the devise had been first to B for life with remainder to A in fee. Per Anderson, C. J. Anon. Cro. Eliz. 9.

This construction will be found strongly supported by a decision of the Supreme court of North Carolina in a very similar case. The testator by his will gave to his wife a life estate in the land and plantation whereon he lived. After some other provisions, the will proceeded as follows: "To my son Aaron I give a horse, &c., my land and plantation that I have before mentioned in this will with all the farming utensils &c." It was contended that the devise of the estate for life to the wife was revoked by the subsequent devise to the son or at least was so far modified that the son became entitled to an immediate estate in the premises on the death of the testator and to a joint possession with the wife. But the court held otherwise and that the wife was entitled to an exclusive life estate. Ruffin, C. J., said "that no contradiction was to be allowed of unless the several provi-
254 sions are *absolutely irreconcilable." "That the natural import of" (such a devise) "is that the latter takes in remainder and therefore that the first gift remains in force. In that way there is nothing incongruous in the two dispositions but each operates in its natural order." Crissman v. Crissman, 5 Ired. Law R. 498.

In our case the devise to the daughters is of a life estate determinable as to each upon her previous marriage, and there is the additional circumstance evincive of the testator's intention that there should be no interference between it and the devise to George M. Hooe, that the former is in terms of the use and profits of the estate, the latter is of the lands by the names which had been given to them.

The remaining ground upon which the right to recover in this action has been sought to be maintained that the devise to George M. Hooe passes the legal title at least subject to accountability in equity to the daughters for the rents and profits, is I think equally unsustainable. It is in vain to enquire what might be the technical import of the language used, or the nature of the limitations which it might create if employed in a deed. It is the language of a nonprofessional gentleman in the country framing for himself the testamentary disposition of his estate. There is no room here for the application of technical rules or the niceties of conveyancing. The first and great rule in the exposition of wills, to which all other rules must bend, as said by Chief Justice Marshall, is that the intention of the testator shall prevail provided it be consistent with the rules of law. It is the polar star to guide us in the construction of wills. Smith v. Bell, 6 Peters' R. 68, 75, 84. If the intention be apparent, no strict legal construction nor technical sense of any words whatever, shall prevail against

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it. 2 Wms. Ex. 710; Hodgson v. Ambrose, 1 Doug. R. 337, 342; Homer v. Shelton, 2 Metc. R. 195; Kennon v.
255 *McRobert et ux., 1 Wash. 96. Here the plain and unmistakable intention of the testator was that the daughters should have the use and profits of the whole estate for their support and education until the necessity for such a provision should cease by reason of their marriage or death: and this right to cultivate the lands for their own benefit with the slaves, carries with it as a necessary incident the absolute right to the possession untrammeled by any notion of mere trust. Or if it be regarded in the terms of its creation, as a devise in trust to permit the daughters to receive the rents and profits, it is an executed use carrying the legal title upon which the daughters may successfully rest their defense to any action by George M. Hooe or his heirs before their estate is determined as provided in the will, upon the principle established in Doe ex dem. Leicester, 2 Taunt. R. 109. Either way, the will should in effect be read as giving a life estate to the daughters determinable as to each by marriage with remainder in fee to George M. Hooe.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

The judgment was as follows:

The court is of opinion, that by the first clause of the will of the said Alexander S. Hooe deceased, an estate for life was given to his daughters in the property therein described, determinable as to each, upon her marriage.

And the court is further of opinion that the devise of the lands called "Dissington" and "Freidland" to the testator's son George Mason Hooe, by the third clause of the will, is not to be regarded as an exception out of the general devise in the
256 first clause to the *daughters, nor as a revocation of said devise pro tanto upon the ground of repugnancy thereto.

And the court is further of opinion upon the true construction of said will that the daughters did not take a mere equitable right to the use and profits of the property devised dependent as to the lands called Dissington and Freidland upon a legal estate vested in possession in the said George Mason Hooe, but took such a legal estate in the use and profits of the testator's whole estate including Dissington and Freidland as entitled them to retain the possession thereof until they should be married or die, and that the estate given to George Mason Hooe in Dissington and Freidland will not become vested in possession as long as either of said daughters shall remain in life and unmarried.

And the court is therefore of opinion that as the defendant is one of the daughters of the said Alexander S. Hooe and is still unmarried, the plaintiffs are not entitled to recover in this action.

And so it seemeth to the court here that there is no error in the judgment aforesaid.

Therefore it is considered by the court that the said judgment be affirmed and that the defendant in error recover against the said Elizabeth M. A. G. Hooe, prochein ami of the plaintiffs thirty dollars damages according to law for retarding the execution of the said judgment, together with her costs by her in the defense of said writ in this court expended. Which is ordered to be certified to the said Circuit court.

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257 *Franklin's Adm'r v. P. Depriest.

January Term, 1856, Richmond.

(Absent, ALLEN, P.)

1. **Official Bonds—Recital—Estoppel.***—The official bond of an executor is made payable to four justices, one of whom was not a member of the court at the time. HELD:
   1. **Same—Same—Same.**—That the surety having executed the bond he is estopped from pleading that it is not his bond because so executed.
   2. **Same—Same—Same.**—That by the act, Code, ch. 168, § 3, p. 640, the suit may be maintained upon the bond, though it is made payable to a justice who was not sitting in the court at the time of its execution.†
2. **Same—Same—Sureties—Statute of Limitations.**‡—Testator dies intestate as to one slave who is sold by the executor and purchased by himself. Afterwards the executor having failed to settle his accounts, a suit in equity is brought against him, in which there is a claim for the slave and his hires, and for a settlement of his accounts; and in this suit the sale to the executor is set aside, and he is re-

*Official Bonds—Recitals—Estoppel.—For the proposition that parties to a bond are estopped to deny the truth of recitals contained therein although it is in direct contradiction to the record, the principal case is cited and followed in Caskie v. Harrison, 76 Va. 95; Blankenship v. Ely, 98 Va. 363, 36 S. E. Rep. 484; Monteith v. Com., 15 Gratt. 187; Findley v. Findley, 42 W. Va. 381, 26 S. E. Rep. 436; B. & O. R. R. Co. v. Vanderwarker, 19 W. Va. 270; Gibson v. Beckham, 16 Gratt. 334, and *note*. See, in accord, Chapman v. Com., 25 Gratt. 721; Pannill v. Calloway, 78 Va. 394; Shelton v. Jones, 26 Gratt. 898; Andrews v. Avory, 14 Gratt. 229; Lancaster v. Wilson, 27 Gratt. 624.

See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124. See monographic *note* on "Estoppel" appended to Bower v. McCormick, 23 Gratt. 310.

†Code, ch. 168, § 3, p. 640. "Upon an official bond, executed before this act is in force, suit may be maintained (for the benefit of any person injured by the breach of the condition thereof) in the names of the judges, justices or other person to whom such bond is payable, whether any of the obligees be alive or not; and although any justice to whom the bond is made payable, was not sitting in the court at the time of its execution, or although any other justice was sitting at the time."

‡Same—Sureties—Statute of Limitations.—For the proposition that the statute of limitations bars an action on a fiduciary bond only after 10 years from the time the cause of action accrued, the principal case is cited and followed in Morrison v. Lavell, 81

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quired to account for the hires of the slave: and in 1850 there is a decree against the executor in favor of the parties interested in the estate for their respective shares of these hires. In an action against a surety of the executor founded on this decree. Held: The statute of limitations in favor of the sureties of fiduciaries, Code, ch. 149, § 5 and 6, p. 591, did not begin to run in favor of the surety until the decree of 1850: And this though the surety was not a party to the suit in equity.§

3. **Decrees—De Bonis Testatoris—De Bonis Propriis.**—That the decree against the executor was *de bonis testatoris*, when it should have been *de bonis propriis*, is an error of which the plaintiff might have complained, but it is not an error which can avail the surety.

4. **Same—Erroneous—Binding until Reversed.**|—If the decree was erroneous as to the surety, this
258 would not render *it a nullity. So long as it remains unreversed full force and effect must be given to it as well against the surety as the executor; and it cannot be questioned by the surety in an action upon the official bond of the executor.

This was an action in the Circuit court of Campbell county, brought in January 1851, by Williston Talbott, John Organ, Anselm Lynch and Adam Clement, justices of said county, at the relation of Patsey Depriest, against Lewis Franklin, and upon his death revived against his administrator. The action was founded on the official bond of John Rosser, as executor of Henry Wood, and was against Franklin as one of his sureties. The declaration, after setting out the execution of the bond and the qualification of Rosser as executor of Wood, set out the proceedings in a suit in chancery instituted in December 1834, by Patsey Depriest and others against the said executor, which resulted in a decree made in October 1850, in favor of the plaintiffs, for various sums, and among others for the sum of eight hundred and twenty-one dollars and twenty cents, with interest on four hundred and ninety dollars, a part thereof, from the 31st of December 1847 till paid: this being the share of Patsey Depriest of the hires of a slave named Squire, for which the executor was held responsible.

Franklin appeared and pleaded "covenants performed," and the statute of limitations, on which issues were made up. He also tendered a further special plea of non est factum, that the official bond of the executor was not made payable to the justices of the County court of Campbell at the time it was executed; and that Adam Clement, one of the persons to whom it is made payable, was not one of the justices sitting in said court at the time of the execution of said bond, as would appear by the records of that court. This plea was objected to by the plaintiff, and excluded by the court; and the defendant excepted.

259 *On the trial the defendant demurred to the evidence; and the jury having found a verdict for the plaintiff for eight hundred and twenty-one dollars and twenty cents, with interest on four hundred and ninety-dollars, a part thereof, from the 31st of December 1847 till paid, subject to the opinion of the court on the demurrer to evidence; the court at the same term rendered a judgment thereon in favor of the plaintiff: Whereupon Franklin's administrator applied to this court for a supersedeas, which was awarded. The evidence is sufficiently stated in the opinion of Judge Lee.

Garland, for the appellant:

1. The first question presented is, Whether the court erred in refusing to receive the plea, stating that the bond was not taken in conformity with the act of assembly? The plea alleges, and verifies it by the record, that Adam Clement, one of the justices to whom said bond is payable, was not sitting in said court at the time said bond was executed. The record would show that but three justices were sitting when said bond was taken, and it was therefore not taken in conformity with the act of assembly. These bonds are statutory bonds, and the requisites of the statute must be therefore complied with.

2. The next question is, Did the court err in refusing to receive the plea of the statute of limitations upon executor's bonds? We insist that it did. The bond bears date the 8th of December 1823. The suit in this case (which is the first proceeding of which the court can notice upon the executor's bond) was instituted on the 10th of January 1851, twenty-eight years after the execution of the bond. By the various reports in the chancery suit, it will be seen that the indebtedness to the appellee Patsey Depriest was entirely on account of the negro
260 Squire and his hires, except *sixty dollars and sixty-two cents as of December 31st, 1833, and its interest, which was properly in the hands of said John Rosser, who was at that time her trustee. Upon inspection of the decree, it will be found that there was no general balance upon account due to the several plaintiffs who have brought these suits, except to Patsey Depriest, as above stated; and that the whole sums decreed in their favor to be due arose out of the proceeds of a sale and the hires of the negro Squire.

Of course the securities were not bound for any misappropriation of the trust fund of Patsey Depriest, held by said Rosser, as

Va. 519; Ashby v. Bell, 80 Va. 811, 817. See, in accord, McCormick v. Wright, 79 Va. 524; Sharpe v. Rockwood, 78 Va. 24; Lavell v. Gold, 25 Gratt. 473; Leake v. Leake, 75 Va. 792.

See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

§See the opinion of JUDGE LEE for the statute.

|**Decrees—Erroneous—Binding until Reversed.**—For the proposition that an erroneous decree so long as it remains unreversed is as obligatory and effective as any other decree, the principal case is cited and followed in Gilmer v. Baker, 24 W. Va. 89; Findley v. Findley, 42 W. Va. 381, 26 S. E. Rep. 436; Gibson v. Beckham, 16 Gratt. 334, and *note*, where there is a large collection of the authorities upon the above point.

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her trustee. The conditions of an executorial bond could not cover such a liability. Jones v. Hobson, 2 Rand. 483.

It is insisted that the right of action to set aside the sale of the negro man Squire accrued from the time when said sale was made. The injury to the legatees was the sale; and thereupon the condition of the bond was broken, and a right of action accrued. Spotswood v. Dandridge, 4 Munf. 289. The plaintiffs, aware of this state of things, made the securities defendants by the amended bill. Two securities appeared and answered, relying upon the act of limitations. The plaintiffs, seeing that the statute would apply, and in order to avoid it, (Rosser not having relied upon it,) dismissed their suit as to the securities and took this extraordinary decree in this case, that the actual indebtedness of the executor to the estate should be paid out of the assets of the estate.

3. The last question is, Did the court err in overruling the defendant's demurrer to evidence and giving judgments for the plaintiff? We think it did.

Because the decree, in "Depriest v. Wood's adm'r," given in evidence, was both a fraud upon the securities and a nullity.

1. Was it not a fraud? In using this expression, we do not mean to attribute
261 any intentional fraudulent *design, but insist that it was a legal fraud. The securities had been dismissed from the case and placed in a situation, in which they could not protect their rights. The decree is such as the plaintiffs had no right to have, and such as no court should have rendered. It is the first instance in the history of our judicial proceedings in which a decree in favor of distributees against an executor for distribution, after a balance found due in his hands, has been rendered payable out of the assets of the estate in his hands to be administered, and not out of his own personal estate.

Whoever heard that legatees were to be treated as creditors of an estate? And yet such is this decree. The legatees could only be entitled to the residue of the estate, after the payment of debts; and for such residue they were entitled to a direct decree against the executor. In this case they could not make the assets of the estate pay the amount of Squire's sale and hires, when the executor alone was in default. This decree, being against all rules and precedents, could have no other object, therefore, than to avoid the statute of limitations which had applied in favor of the securities; and as they had been dismissed from the case and could not protect their rights, it was in law a fraud upon their rights.

This decree should have been against John Rosser's private estate. Moore's ex'x v. Ferguson, 2 Munf. 421; Sheppard's ex'or v. Starke, 3 Munf. 29; 2 Rob. Pr. 392, old ed.

2. We insist, also, that this decree is a nullity.

This suit was on behalf of legatees. It has been found, upon a settlement of the executorial account, that there are certain balances in the hands of the executor due to them as legatees. For these balances, instead of taking decrees directly against the executor, they have taken decrees against the assets of the estate in his hands to be administered. The record, made
262 *evidence in the case at bar, shows that the whole estate of the testator is in the hands of the legatees themselves, except these balances. The decree, then, is substantially against the legatees themselves.

We insist, therefore, that the judgment upon the demurrer to evidence is erroneous and ought to be reversed.

Mosby, for the appellee:

The counsel for the appellee submits that two questions only are presented by these records to the Court of appeals. Did the court err:

1. In rejecting the third plea offered by the defendants severally?

2. In overruling the defendant's demurrer to the evidence and giving judgments for the plaintiff?

As to the first: The gist of this plea is, that the bond sued on "is not payable to the parties sitting in the said County court of Campbell at the time it was executed."

I submit that the bond, on its face, declaring that the obligors are bound to four persons, "gentlemen justices of the county of Campbell, now sitting," they are, upon general principles, estopped (even if the fact were otherwise, as it really was not in this case), from denying that averment was true. It is not necessary, however, to fortify this position by argument or authority, since the question presented is settled definitely by the 3d section of chapter 168 of the Code, p. 640.

This section provides, that "upon any official bond, executed before this act is in force, suit may be maintained (for the benefit of any person injured by the breach of the condition thereof), in the names of the judges, justices or other person, to whom such bond is payable, whether any of the obligees be alive or not, and although any justice to whom the bond is payable,
263 *was not sitting in court at the time of its execution, or although any other justice was sitting at that time."

As to the second question: The printed argument of the appellant's counsel takes the ground that the decree of 12th of October 1850 was "a fraud on the securities and a nullity."

As to this latter ground, it may be remarked, at the least, it is most gratuitous. How could the decree of the 12th of October 1850 be a fraud upon or injuriously affect the rights of the sureties? It simply carried out the mandate of the Court of appeals, directing the executor John Rosser to be charged with Squire and his hires, which could not have been resisted either by him or the sureties. It did not bind the sureties, unless they were bound independ-

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ently of it. It did not and could not possibly affect the operation of the act of limitations, if that act was otherwise a protection to them. It left them exactly where they were, if they had not been made parties by the amended bill of 1850. When sued in the action at law, the forum merely was changed, and they had then and there every right of defense that could at any time or under any circumstances have been made by them.

Equally powerless is the idea that the decree is a nullity, because it directs the executor, out of the assets of his testator in his hands, to pay the plaintiff's demand. It is true, that so far as Mrs. Depriest is concerned, the decree may be regarded as erroneous, because it limits the recovery of the sum decreed her, to the assets in the executor's hands; and for this cause she might reverse it, if her interests should make it necessary to do so. This is the principle referred to in 2 Rob. Pr. p. 392, and sanctioned by the Court of appeals in 2 Munf. 421, and 3 Munf. 29.

But the case is wholly different so far as the executor and his sureties are con-
264 cerned. They cannot object *to the decree because of its limited character. This is beneficial to them, and especially to the sureties. It is admitted the executor had in his hands the hires of Squire. By the terms of the executorial bond he was bound to pay them over to the rightful owner, and his sureties stood responsible for that appropriation. It is not perceived how they were or could be injured by a decree which (though it restricted the appellee's proper remedy) did, in effect, but order the executor to pay these very hires over to her. Following the decree, she attempts to collect them by execution. The return shows an inability to do so, and the verdict finds that the executor has wasted and converted them to his own use. What more can be necessary to fix the liability of the sureties? It is submitted that that liability was perfect and must now be enforced unless the act of limitations is a bar. And this brings up the only point really relied on by the appellants in the court below, viz:

Did the act of limitations bar the plaintiff's action?

The facts are, that the sale of Squire was in May 1825, and the suit of Depriest v. Rosser was commenced the 23d of December 1834, so that, on the ground taken by the appellant himself, his defense fails.

But it is submitted that the appellant's counsel misapprehends the true period at which the act of limitations relied on could apply to the bond in question. The act was passed on the 8th of March 1826, and went into effect on that day. See Supp. R. C. p. 260.

By the 4th section it is provided, "that in computing the time within which rights of entry and of action now existing will be barred by the provision of this act, this computation shall commence from the date of the passage of this act and not before, so that such entries may be made and such actions brought within the same time, as if the right or title thereto had ac-
265 crued *at the time of passing this act." The 8th day of March 1826 being then the earliest day at which the sureties could begin to rely on this act, and the suit of Depriest v. Rosser having been commenced on the 23d December 1834, there seems to be an end of the question, unless indeed the fact that they were not made parties in the suit thus brought against the executor will discharge them. The appellant's counsel, either in the petition nor printed argument, has contended for such a proposition.

The court is referred to the case of Roberts v. Colvin, 3 Gratt. 358. That was a case much stronger for the surety than this. A ward, soon after coming of age, filed a bill against the administrator of her guardian for an account. After twenty-four years a decree was rendered in the ward's favor. Unable to make it out of the guardian's estate, she then filed a bill against his sureties, and this court held "that the lapse of time during which the ward was prosecuting the claim against the administrator of the guardian furnishes no ground for the exoneration of the surety; and that the statute of limitations does not apply to the case."

LEE, J. I am of opinion that the third plea offered by the plaintiffs in error that Clement one of the persons to whom the bond sued on was made payable, was not one of the justices sitting in the court at the time the bond was executed, was naught and was properly rejected by the court. By the bond itself the parties who executed it acknowledged and declared that the four persons to whom it was made payable were justices of the county, then sitting, and it was acknowledged by them in open court and ordered to be recorded. They are therefore estopped now from averring the contrary upon the general principles of estoppels. But if there were any
266 doubt about this, *the question is put at rest by a provision of the Code which declares that upon any official bond executed before that act was in force suit may be maintained in the names of the judges, justices or other persons to whom such bond is payable, whether any of the obligees be alive or not, and although any justice to whom the bond is made payable was not sitting in the court at the time of its execution or although any other justice was sitting at that time. Code of Virginia, ch. 168, § 3, p. 640.

The defendant in error having given in evidence the bond of Rosser and his sureties, the decree of the 12th of October 1850, the execution sued out upon that decree and the return "no effects" showed herself prima facie entitled to recover in this action unless her right was barred by the statute of limitations; and this is resolved into the enquiry when the cause of action accrued.

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By the fifth section of chapter 149 of the Code, p. 591, it is provided that every action upon a bond of an executor, administrator, &c., shall be brought within ten years next after the right to bring the same shall have first accrued; and by the sixth section it is declared that the right of action of a person obtaining execution against any personal representative of a decedent or to whom payment or delivery of estate in the hands of such representative shall be ordered by a court acting upon his account, upon the official bond of such representative, shall be deemed to have first accrued from the return day of such execution or from the time of the right to require payment or delivery upon such order. If this provision is to furnish the rule of decision here there is an end of the case; for the decree in favor of Mrs. Depriest was rendered on the 12th of October 1850; the execution sued out thereon and returned "no effects" was dated 21st of November 1850 and was returnable on the first Monday in January 1851, and the suit was brought
267 on the *16th of January 1851. But the argument of the appellant's counsel has assumed that this provision does not apply, for he insists that the wrong to the parties interested was the sale of the slave Squire in 1825 by which the condition of the bond was broken and that the right of action accrued at that time. And to make the argument complete it must be assumed that as the right of action was thus barred by the operation of the act of March 30, 1826, the provision in the Code above cited could not serve to restore it nor could it prescribe any other or different period from which the bar of the statute which its enacts should be computed in a suit brought after it took effect to enforce any right growing out of this original supposed cause of action.

Waiving any enquiry into the correctness of this last proposition, let us briefly consider when the cause of action upon this bond for the matter in controversy should be said to have accrued independently of the provision of the statute.

The subject sought to be recovered was the share of Mrs. Depriest in the hires of a slave named Squire as to which the testator appears to have died intestate; for which hires she claimed that the executor was liable to account. Rosser the executor had sold this slave in 1825 and purchased him, himself, and he claimed to hold him afterwards as his own property; whilst Mrs. Depriest insisted that he was to be considered as a part of the estate of the testator notwithstanding the sale, and so that the executor should account for the hires for all the time the slave was held by him. The executor had not settled his accounts, and there was therefore nothing to show the balance in his hands by which a foundation could be laid for the present demand. A suit in chancery became necessary to set aside the alleged sale, restore the slave to the estate and hold the executor to an
268 account of the hires. *This was accomplished by the decree in the chancery cause of the 27th of April 1841; for although the bill did not charge the fact of the sale of Squire, it charged that a negro man whose name was left in blank, not named in the will, came to the hands of the executor, and called for a discovery in relation to him and to the manner in which he had been disposed of: Rosser in his answer stated that he had sold Squire for six hundred dollars, having previously held him about a year or sixteen months, and expressed his willingness to account for the amount of the sale and a reasonable hire while the slave was thus in his possession. The court however by its decree adjudged the sale invalid and set it aside, and declared that Rosser should account for the hires from the time he qualified as executor until the slave should be sold as therein after directed. And this decree was affirmed by the Court of appeals on the 17th of October 1848, that court declaring that the accountability of Rosser for the sale was just the same as if such sale had not been made no title having been thereby acquired by him. Thus after a controversy of nearly fourteen years, it was finally adjudged that the executor was to be regarded as having held the slave as the property of the estate of his testator during all that time and as then liable for the whole amount of the hires. And an account having been taken on the principles of the decree of the Court of appeals, the court on the 12th of October 1850 rendered a decree against the executor for the amount of the hires.

Now upon this simple statement of the case it would seem impossible to say that this cause of action upon the executorial bond accrued at such a period that it was barred in January 1851 when this suit was brought. The case was simply that of an executor who in 1850 was found to have in his hands assets of the estate of his testator which he was required by the
269 *decree of the court to pay to a distributee but failed so to do. Concede that the executor violated his duty and the condition of his bond by making an illegal sale of the slave instead of making distribution or by failing to settle his accounts, it does not follow that the period of the limitation for the present demand is to be computed from the time of such delinquency. It is not always that the right of action upon a bond with condition shall be deemed to have accrued from the time the condition is broken. Thus in an action upon a marshal's bond, the breach of the condition alleged was that by the order of the District court of the United States for the district of Louisiana, in an admiralty case, the marshal was directed to sell the schooner Estrella and her cargo and to hold the proceeds subject to the order of the court; that the sale was made and the money received by the marshal; that the court by its final decree directed the vessel and cargo or the proceeds thereof to be restored to the libellants, and that the marshal had failed to pay over a part of the proceeds. By law it

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was made the duty of the marshal to bring the proceeds of sale into court to be deposited in bank in the name and to the credit of the court. This he had failed to do and this violation of his duty took place more than six years before the suit on the bond was commenced. The act of congress of 1806 in relation to suits on marshals' bonds enacts that suits thereon for cause of action thereafter to accrue, shall be commenced within six years after the right of action shall have accrued and not afterwards, and this statute was relied on as a bar to the action. The court held however that its mandate was not fully performed till the proceeds were brought into court or paid over to the libellants and that if the condition of the bond was broken by the failure to bring the money into court,
270 yet that the *plaintiffs' right of action should not be deemed to have accrued until the order directing the proceeds to be paid over to them, nor (an appeal having been taken) until its affirmance: and this affirmance being within six years before the institution of the suit, that the action was not barred. Montgomery v. Hernandez, 12 Wheat. R. 129. So in an action brought in October 1845 against the sureties of a constable upon his official bond in North Carolina, it appeared that certain claims against persons who were good had been placed in the constable's hands for collection in February 1842 and the statutory limitation of three years was set up as a bar to the recovery: and the argument was that if the officer could have collected the claims between February and October 1842, his failure to do so was a breach of the condition of his bond for which a right of action at once accrued and so the sureties were protected by the statute. But the court held otherwise. "The omission to collect, (said Pearson, J.) was a breach of a continuous nature. Admit there was a breach by a failure to collect before October 1842, non constat that there was not a breach for a failure to collect after October 1842 to which latter breach the statute was no bar." State v. Patton, 13 Ired. R. 421. From these cases it may be deduced that although there may be a right of action upon the first breach of the condition of a bond with a penalty, and the whole penalty may be recovered to stand as a security for such other sums as may be afterwards assessed on scire facias, yet the plaintiff is under no necessity to bring his action at once. He may waive the first breach and when a subsequent breach occurs, he may bring his suit and assign the latter; and the right of action as to it will not be deemed to have accrued until the time at which it occurred. And this result is supported by other cases. Sanders
271 v. Coward, *15 Mees. & Welsb. 48; Blair v. Ormond, 7 Eng. Law & Eq. 318; Arnott v. Holden, 16 Eng. Law & Eq. 142; Austin v. Moore, 7 Metc. R. 116.

Whether therefore, Rosser the executor committed a breach of the condition of his bond by the illegal sale of the slave, or by failing to settle his account, or (if the sale be treated as a nullity) by failing to pay over the value of the slave and his hires to those entitled at an earlier period, it seems clear that after the amount of those hires was ascertained in the chancery suit and declared to be a part of the assets of the estate of his testator with which he was chargeable and when he was required by the decree of October 1850 to pay over the same to those entitled and execution in favor of Mrs. Depriest for her share was returned "no assets," there was a clear right of action in her favor upon the executorial bond to which the statute of limitations could have no application. See Beale's adm'r v. Botetourt Justices, 10 Gratt. 278, (opinion of Moncure, J.) which commenced some years before the Code of 1849 took effect.

Whether therefore the period, at which the cause of action upon the executorial bond for the matter in controversy here, shall be said to have accrued, be determined by the provision in the Code already referred to, or upon general principles, the result is the same. In neither case has the statute of limitations any application. The provision of the Code is in effect but declaratory of what the law would have been without it in this precise case.

That the securities might have been made parties in the chancery cause and in fact were at one time made parties but the bill was afterwards dismissed as to them will not impair the present right of action on the bond. Parties may often proceed in equity against an executor and may also make the sureties parties in the cause with a view to their ultimate liability.
272 But *they are under no necessity to make them such parties and the failure to do so will in no manner affect the right to proceed against them by action on the bond after they shall have established their demands against the executor, either under the statute of limitations or otherwise. Creditors upon legal demands sometimes may, and upon equitable demands must, come in the first instance into equity to assert their claims and may make the sureties parties but they may omit them and after establishing their claims against the executor and failing to get satisfaction by execution, may then sue upon the official bond, and their failure to unite the sureties in the chancery suit as defendants with the executor will in no manner affect the question as to when the cause of action upon the official bond accrued. That a decree creditor might sue upon such a bond as well as a judgment creditor was settled even before the provision of the Code, (ch. 130, § 23, p. 544,) which covered both. Bush v. Beale, 1 Gratt. 233. And it is now held even in England that an action of debt will lie upon a decree ascertaining a certain sum to be due and requiring its payment. See cases cited 2 Rob. Pr. (ed. 1855,) p. 124; 1 Ibid. 204.

That the decree was de bonis testatoris and not de bonis propriis is a matter which

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cannot avail the appellants. The appellee might complain that the decree was restricted to the assets in the hands of the executor, and for that cause might have claimed a reversal in an appellate court. Moore's ex'x v. Ferguson, 2 Munf. 421; Sheppard's ex'or v. Starke, 3 Munf. 29. But it could not prejudice the sureties and certainly cannot render the decree fraudulent and void as to them. The form of the decree was the act of the court and not of the party or her counsel, and there is nothing in the case upon which fraud in fact or in law can with any justice be imputed to either of these. If the decree were even erroneous as contended by the
273 *counsel, this would not render it a nullity. As long as it remains unreversed full force and effect must be given to it as well against the sureties as the executor himself and it cannot be questioned in this collateral way.

I think none of the grounds of error assigned can be maintained: and I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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274 *Calahan's Adm'rs v. J. R. Depriest, Trustee.

(Absent, ALLEN, P.)

January Term, 1856, Richmond.

Official Bonds—Action upon—Relator.*—In an action on the official bond of an executor against one of his sureties to recover the amount of a decree against the executor rendered in favor of the trustee of a woman, the trustee is the proper relator in the action.

This was an action of debt in the Circuit court of Campbell county by Williston Talbott, Adam Clement and two others, justices of Campbell county, at the relation of John R. Depriest, trustee of Patsy Depriest, against the administrators of David Calahan deceased, who was one of the sureties of John Rosser as executor of Henry Wood deceased. The facts are stated by Judge Lee in his opinion. Calahan's administrators applied to this court for a supersedeas to the judgment, which was allowed.

Garland, for the appellants.
Mosby, for the appellee.

LEE, J. The action in this case is upon the same bond which was the foundation of the action in the case of Lewis Franklin's adm'r against Patsy Depriest; but it was against another of the sureties and was at the relation of John R. Depriest as trustee of Patsy Depriest and her children and not at the relation of Patsy Depriest herself; and the object of the suit was to recover not Mrs. Depriest's share of the hires of the slave Squire, but the sum of one hundred and twenty-five dollars and
275 eighty-two cents with interest *on sixty dollars and sixty-two cents part thereof from the 31st of December 1833 until paid being the amount decreed to John R. Depriest as trustee for Mrs. Depriest and her children for so much found due to them from the executor on general account. The pleadings were the same as in the action against Franklin's administrator and there was, as in that, a demurrer to the evidence. But losing sight of the breach alleged in the declaration the jury found a verdict for eight hundred and twenty-one dollars and twenty cents with interest on four hundred and ninety dollars part thereof from the 31st of December 1847 till paid (being the precise amount decreed to Mrs. Depriest herself for her share of the hires of Squire) and the further sum of sixty-eight cents costs subject to the opinion of the court upon the demurrer to evidence. And the court being of opinion that the law upon this demurrer was for the plaintiff, rendered judgment for the penalty of the bond and costs to be discharged by payment of the amount so found by the jury and the costs.*

Now for reasons similar to those I have endeavored to assign for the judgment in the case of Franklin's adm'r against Patsy Depriest I think it very clear there was cause of action upon the bond for the amount decreed to be due Mrs. Depriest on general account and that the same was not barred by the statute of limitations; and as this amount was decreed to John R. Depriest as trustee for Mrs. Depriest and her children, there can be no doubt that to recover this particular amount, the suit was properly at his relation. For even one who was originally an equitable assignee only may maintain such an action if he
276 has in his own *name brought suit and obtained a decree for the debt. Commonwealth v. Barstow, 3 B. Monr. R. 293. But it is at the same time perfectly clear that John R. Depriest cannot in this action recover the amount of Mrs. Depriest's share of the hires of Squire. In fact the declaration makes no claim whatever on this account but by the only breach of the condition which it alleges, is expressly restricted to a demand of the one hundred and twenty-five dollars and eighty-two cents with interest on a part thereof decreed to John R. Depriest as trustee of Mrs. Depriest and her children for so much due them from the executor on the general account. And if the declaration had claimed the hires of Squire, still John R. Depriest has shown no right to recover them in this action. Such an action is only to be maintained at the relation of the party having the legal right to the subject demanded or in whose name the judgment or

*See generally, monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

**Note by the Reporter.*—It afterwards appeared that the error was not that of the jury or the court, but of the clerk, who in making up the record, put into it the verdict and judgment rendered in the previous case instead of the one rendered in the cause.

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decree was rendered. Garland v. Jacobs, 2 Leigh 651; Burnett v. Harwell, 3 Leigh 89. The decree for the hires was to Mrs. Depriest herself, and not to John R. Depriest, and concede (what I am not disposed to controvert) that if he had been appointed by competent authority, trustee for Mrs. Depriest as to these hires with power to demand sue for and recover them for her benefit, it would have authorized him to maintain an action for them at his own relation, yet nothing of the kind is shown here. It is true John R. Depriest was appointed trustee for Mrs. Depriest by an order made pending the cause in place of Edward B. Withers deceased who had replaced Rosser when by a previous order he had been removed as such trustee; but Rosser had been appointed the trustee by the will of Edward Wood in relation to the property given to Mrs. Depriest and her children by the will and the trust did not extend to the hires of Squire because as to him the testator died intestate. Hence the hires were de-
277 creed *directly to Mrs. Depriest (Turpin Depriest her husband being then dead) and not to John R. Depriest. It is clear therefore that he could not have recovered these hires even if the declaration had alleged as a breach the failure to pay them, and that the verdict improperly found for the plaintiffs the amount of them instead of the smaller sum due on the general account. And as the verdict must be set aside, judgment cannot now be given even for the amount which it appears the relator was entitled to recover.

There is still another error in the judgment which would render a reversal unavoidable. The judgment is against the plaintiffs individually when it should have been against them as administrators to be levied of the assets in their hands to be administered. As it must be reversed however for the reason already assigned, this error becomes immaterial.

I am of opinion to reverse the judgment, to set aside the verdict and the demurrer to evidence and remand the cause for a venire facias de novo.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

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278 *McKildoe's Ex'or v. Darracott.

(Absent, ALLEN, P.)

April Term, 1856, Richmond.

1. **Lease—Breach of Conditions—Waiver by Lessor.***—A lease being forfeited by the act of the lessee in subletting the premises, the forfeiture will be waived if the lessor with knowledge of the forfeiture, accepts rent, or sues out a distress for rent, accruing after the forfeiture.

2. **Same—Same—Same.**—A subletting is not a continuing act of forfeiture, and if the forfeiture is once waived it cannot afterwards be retracted.

This was an action of unlawful detainer instituted in the Hustings court of the city of Richmond by Peyton Johnston executor of James McKildoe deceased, against John Darracott, to recover possession of the Powhatan house in the city of Richmond. Upon the trial of the cause it appeared that the plaintiff as executor of McKildoe and guardian of his children, leased by deed to Richard F. Darracott the Powhatan house in the city of Richmond, for five years from the 1st of October 1852, reserving a rent of three thousand dollars per annum, payable quarterly; and Darracott covenanted that he would not, without the license of the said Johnston, assign or in any way dispose of his said lease, or underlet the property, or in any manner transfer or dispose of the same, or his interest therein, or any part of his said interest, during the term aforesaid; and should he do so, the said Johnston reserved the right to re-enter on the premises and property and determine the lease.

In March 1855 Richard F. Darracott having failed in business, he conveyed all his furniture in the Powhatan house and other property to William D. Winston
279 *and John O. Steger in trust for the payment of his debts. On the 2d of May 1855 Darracott addressed a note to Johnston, in which, after referring to the provisions of his lease which forbade him to sublet the house, and to his inability to keep up the hotel, proposed to surrender the lease on the 20th of the month; and gave him notice that unless he would accept the surrender of the lease he should sublet it to John Darracott for one year from the 15th instant. And he said that unless before that day he heard from him objecting to the subletting to John Darracott, and consenting to accept a surrender of the lease, he should consider the subletting met with his approbation, and would be with his license.

Not having received an answer to his letter, Richard F. Darracott proceeded to lease the house to John Darracott for one year from the 15th of May 1855; and by another letter of that date he informed Johnston that he had so leased the property to John Darracott and had put him in possession. To this letter Johnston replied on the same day, positively objecting to the transfer of the lease by Richard F. to John Darracott. And it appears that he had, between the 2d and 15th of May, apprised the parties that he objected to the lease of the premises to John Darracott, unless he would take it for the whole of the unexpired term.

On the 16th of May 1855 William D. Winston and John O. Steger addressed a note to the plaintiff, informing him that the cred-

*Lease—Breach of Conditions—Waiver.—For the proposition that where a lease has been forfeited for a breach of conditions such forfeiture is waived where the lessor knowingly accepts the rent accruing after the forfeiture, the principal case is cited and approved in the following cases: Allen v. Bartlett, 20 W. Va. 54; Hukill v. Myers, 36 W. Va. 647, 15 S. E. Rep. 153.

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itors secured by the deed of trust executed by Richard F. Darracott, desired them to proceed at once to sell the property; and as the law required that one year's rent of the premises should be secured to the landlord before the property was removed, they therewith sent him a bond securing the payment of the rent from April 1st, 1855, to April 1st, 1856. And with this note they sent the bond.

280 *When the quarter's rent fell due on the 1st of July 1855, the plaintiff wrote a note to Richard F. Darracott, dated July 2d, requesting him to let the plaintiff have the rent due for the Powhatan house before three o'clock. John Darracott offered to pay the rent, but required the plaintiff to give him a receipt for it as tenant; which the plaintiff refused to do. On the 3d of July the plaintiff gave a receipt for two hundred dollars in part of the rent, without specifying from whom it was recieved; and he sued out a warrant of distress for the balance of the rent as due from Richard F. Darracott, having first made the affidavit required by the statute; whereupon the balance of the rent was paid, and a receipt for it was given by the plaintiff without specifying by whom it was paid, except that it was paid by a check of John Darracott, payable to plaintiff's order; but the plaintiff at the time of receiving the check protested that John Darracott was not his tenant, but Richard F. Darracott was.

Upon this evidence the jury found a verdict for the plaintiff; and the defendant moved the court to set it aside and grant him a new trial; but the court overruled the motion; and he excepted, and applied to the judge of the Circuit court of the city of Richmond for a supersedeas to the judgment, which was allowed.

In February 1856 the cause came on to be heard in the Circuit court, when that court reversed the judgment of the Hustings court; and the cause was retained for trial. And thereupon the plaintiff applied to this court for a supersedeas, which was allowed.

A. Johnston and Standard, for the appellant.

Steger, for the appellee.

MONCURE, J. It was properly conceded, in the argument of this case, on the one hand, that R. F. Darracott had incurred a forfeiture of his lease from Johnston

281 *by subletting the demised premises to John Darracott; and on the other, that the forfeiture might be waived by the lessor: And the only question to be decided is, Whether it was so waived?

The underletting in this case was without the consent of the lessor, either written or parol. And a forfeiture for assigning or subletting without license may be waived, whether the license be required by the terms of the lease to be in writing or not. Goodright v. Davids, Cowp. R. 803; Roe v. Harrison, 2 T. R. 425, 430. It is unnecessary, therefore, to consider whether this case comes within the operation of the Code, p. 506, § 18; which declares that "in a deed of lease a covenant by the lessee that 'he will not assign without license,' shall have the same effect as a covenant that the lessee will not, during the term, assign, transfer or set over the premises or any part thereof, to any person without the consent in writing of the lessor, his representative or assigns."

Then, as to the question of waiver of the forfeiture. The doctrine on this subject is thus laid down by an elementary writer: "The re-entry resting, as we have seen, in the election of the lessor, he may enforce or waive his right at his pleasure. And as forfeitures, to use the phrase of the books, are odious in law, slight acts on his part have been deemed sufficient to amount to a waiver. Indeed, it may be stated as a general rule, that any recognition of a tenancy subsisting after the right of entry has accrued, and the lessor has had notice of the forfeiture, will have that effect." 2 Platt on Leases 468. To the same effect is the law laid down by other writers; and the cases cited, so far as I have seen, seem fully to sustain them.

There is, indeed, no conflict of authority in regard to the principle which governs the case. The only apparent conflict is in its application to individual cases. The principle simply is, that if the les-

282 sor, with *knowledge of the forfeiture, do any act affirming the tenancy or recognizing its continuance, he thereby waives the forfeiture. Whether the act, in a given case, will have that effect, is sometimes a question of difficulty. The acceptance of rent, eo nomine, generally, if not always, has that effect; because it can rarely, if ever, occur without the relation of landlord and tenant, and is an admission that the tenancy is then subsisting. Archbold 97, citing Penant's Case, 3 Coke 64b; Harvey v. Oswald, Cro. Eliz. 553, 572; Moore 456; 2 Anderson 90; Arnsby v. Woodward, 6 Barn. & Cress. 519, 13 Eng. C. L. R. 241. The same may be said of a distress for rent. Id.; and also of an absolute and unqualified demand of rent, whatever may be the secret motive of the lessor in demanding it. 2 Platt on Leases 468. Generally, the lessor, by merely being passive, will not waive the forfeiture. It is not enough that he knows of the breach without availing himself of his right of re-entry. The act by which the forfeiture is waived must, as we have seen, amount to an affirmance of the tenancy or a recognition of its continuance. Comyn 334; Archbold 97; Doe v. Allen, 3 Taunt. R. 78. Though if, by his acquiescence, he induce the tenant to incur expense in making improvements or otherwise, that is a circumstance from which, it seems, a jury might infer a waiver. Id.

There is a case, however, which was much relied on by the counsel for the plaintiff in error as an authority to show that the mere acceptance of rent is not of itself a waiver, but matter of evidence only to be

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left to the jury. I mean the case of Doe v. Batten, Cowp. R. 243. That was not a case of forfeiture. The question was, Whether the landlord, by receiving rent, had waived his notice to quit, and created a new tenancy for a year; or had merely received an occupation rent, instead of double
283 rent to which he was *entitled under the stat. 4 Geo. 2. It was held to be a question of intention for the consideration of the jury on all the evidence. Aston, J., expressly distinguished between that case and a case of forfeiture.

But Doe v. Batten was cited, and the doctrine therein laid down disapproved by the Court of king's bench, in Goodright v. Cordwent, 6 T. R. 219. Lord Kenyon, C. J., in delivering his opinion in that case, the other judges concurring, said, "If the defendant had paid, and the lessor of the plaintiff had received the money as a satisfaction for the injury done by the defendant in continuing on the plaintiff's land as a trespasser, then the plaintiff might have recovered in ejectment. But if it were paid eo nomine as rent, and received as such, and the jury have found that it was so, I cannot assent to the doctrine laid down in the cases cited, that the receipt of rent accruing after the expiration of the notice to quit is not a waiver of it; for according to that doctrine, the same person might stand in the relation of tenant and trespasser to his landlord at the same time."

In Blyth v. Dennett, 16 Law & Equ. R. 424, which was also a case of notice to quit, it was conceded that the acceptance to rent, accruing after the expiration of the notice, would have been a waiver of it; but no such rent had been received.

That Lord Mansfield did not intend, in Doe v. Batten, to question the principle that acceptance of rent accruing after forfeiture, with notice of the forfeiture, as a waiver of it, is conclusively shown by the case of Goodright v. Davids, Cowp. R. 803, decided only three years after the former. That was ejectment brought by lessor against lessee on the ground of forfeiture by subletting, contrary to a covenant and condition contained in the lease. The defense was that the forfeiture had been waived by the acceptance of rent.
284 *Lord Mansfield said, "This case is extremely clear. To construe this acceptance of rent due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it; but accepts rent subsequently accrued. That shows he meant the lease should continue. Cases of forfeiture are not favored in law; and where the forfeiture is once waived, the court will not assist it. The consequence is, that there must be judgment for the plaintiffs." The authority of this case has never been denied. It is cited by the elementary writers, and set forth at length in 2 Lom. Dig. marg. 91-2.

The case of Jones' devisees v. Roberts, 3 Hen. & Munf. 436, in which it was contended by the counsel for the plaintiff in error, that this court had approved the case of Doe v. Batten, was a suit for specific performance of an agreement for a lease, and there were many reasons for refusing to enforce the agreement, without relying on the doctrine of that case, which is incidentally referred to with seeming approbation by two of the judges. The question did not properly arise, and could not have been considered in the case.

Nothing done by the lessor before he has knowledge of the forfeiture can have the effect of waiving it. After he is informed of the forfeiture he must make his election, in view of all the circumstances, whether he will waive or enforce it. He is not bound to elect immediately; but may take his own time to do so. Until he makes up his mind, however, he must take care to do no act which may have the effect of affirming or recognizing the continuance of the tenancy. He cannot first waive, and then enforce the forfeiture. The lessee cannot be a tenant and a trespasser at the
285 *same time. He continues to be a tenant, if the forfeiture be waived, just as if it had never occurred. He becomes a trespasser, if it be enforced.

The waiver of one forfeiture is of course not a waiver of a subsequent forfeiture: And if the act of forfeiture be continuing, a waiver of a right of re-entry for one breach will not preclude a re-entry for a new or continuing breach. Thus, a lessor may take advantage of a forfeiture occurring de die in diem, as in the case of a neglect to repair, work a mine, or the like, continuing from day to day, notwithstanding a previous distress for rent. 2 Platt on Leases 471, and cases cited. So also, where the covenant was that rooms should not be used for certain purposes, it was held that there was a breach of this covenant every day during the term that they were so used; and that the lessor was not precluded by receiving rent subsequent to the commencement of such user, from taking advantage of the forfeiture, provided the user continued after such receipt of rent. Comyn 334; Doe v. Woodbridge, 9 Barn. & Cress. 376, 17 Eng. C. L. R. 399.

But a sublease is no more a continuing act of forfeiture than an assignment, notwithstanding what is said by Platt, Id. 472, that "It does not appear to be settled whether an underletting is or is not a continuing breach." The only authority cited for this observation is an obiter dictum of the V. C. in Dowell v. Dew, 1 Young & Col. 345, 366, 20 Eng. Ch. R. 345. But that dictum is plainly opposed to principle and the whole current of authority. The cases are numerous in which forfeitures by subletting have been held to be waived by the subsequent acceptance of rent. The case already cited from Cowper 803, is a case of that kind. There could have been no difficulty in enforcing the forfeitures in these cases if the breaches had been continuing.

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The only difference between an assignment and underlease in this respect is, that
286 the *doctrine of Dumpor's Case, 4 Coke R. 119, in regard to assignments, has not been extended to underleases. It was held in that case that a license to assign any part is a dispensation of the whole condition, and the lessee or his assigns may assign all the residue without license. Whereas it has been since held that a lessor who has a right of reentry on a breach of covenant not to underlet, does not, by waiving his entry on one underletting waive his right to re-enter on a subsequent underletting. Doe v. Bliss, 4 Taunt. R. 735; Archbold 97. In the former case the waiver is of the condition itself. In the latter only of the forfeiture for a particular breach. But in the latter each breach is a complete, and not a continuing act of forfeiture.

Having stated the legal principles which I deemed pertinent, it now only remains to apply them to the case. It is certain that Johnston never assented to the underletting to John Darracott, or affirmed or recognized his tenancy; but that he always refused to do so. It is, I think, equally certain that he did affirm and recognize the continuance of the tenancy of R. F. Darracott, with full knowledge of the forfeiture. He was fully informed on the 2d of May 1855 that the premises would be sublet to John Darracott on the 15th of that month; and again, on the 15th, was informed that they had accordingly been sublet. On the 2d of July he demanded the rent of R. F. Darracott, a quarter's rent having, on the preceding day, become due under the lease. On the 3d of that month he received two hundred dollars, and signed a receipt for it, in part of rent to the first of the month. On the 5th or 6th of the month he sued out a distress warrant against R. F. Darracott for five hundred and fifty dollars, balance of the quarter's rent due on the first of the month, having first made the necessary affidavit that the said balance was justly due him, "for rent reserved upon con-
287 tract from the said R. F. *Darracott." On the same or the next day he received J. Darracott's check for the said balance, and gave a receipt therefor, "protesting at the same time that J. Darracott was not lessee or tenant, but that R. F. Darracott was." Each and all of these acts, to wit, the demand of the rent, the distress for it, the acceptance of it, and the express declaration made at the time of its payment, were plain and palpable affirmations and recognitions of the existing tenancy of R. F. Darracott. Why, then, are they not a waiver of the forfeiture? Can it be because Johnston refused to sanction the underletting, or to recognize J. Darracott as his tenant? Certainly not. It was not necessary to do that in order to continue the existence of the lease. There was no inconsistency in repudiating the act of subletting, and at the same time insisting on the continuance of the lease. R. F. Darracott could not drive Johnston to the alternatives of sanctioning the act of forfeiture or putting an end to the lease. The right of re-entry was a cumulative remedy, to which Johnston might resort or not, at his election; and whether he resorted to it or not he might still resort to his remedy by action for the breach of the covenant not to underlet; in which action he would be entitled to recover such damages as he could show that he had sustained. See Doe v. Meux, 10 Eng. C. L. R. 417. It might have been to his interest to continue the lease notwithstanding the breach, and to rely for his indemnity on the action only. The covenant would be of no use if he could not do so. By enforcing the forfeiture he would have lost the benefit of the year's rent which had been secured to him in advance, (except so much as had accrued before the forfeiture,) and taken the chance of finding another tenant for the property.

I conclude, then, that these acts were a waiver of the forfeiture: and the
288 waiver, having once been *made, could not be withdrawn. Johnston could not affirm the continuance of the tenancy to the 1st of July and then determine it. He may have supposed that he had a right to do so; but that cannot change the legal effect of his acts. If the tenancy of R. F. Darracott is still a subsisting tenancy, it follows that Johnston is not entitled to the possession of the premises, and of course cannot recover it of J. Darracott, however wrongful the act whereby the latter acquired it.

I am for affirming the judgment of the Circuit court.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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289 *Tinsley v. Jones & als.

April Term, 1856, Richmond.

(Absent, ALLEN, P.)

Wills—Case at Bar.—B died in 1807, and by his will devised a tract of land to each of his sons J and F. He then says, "It is my will if my said son J die without issue, and the property heretofore given him shall go to his brother F, who in that case will lose the land heretofore given him. It being my will and desire then and in that case, and upon the happening of the event of my son J's death, that the land near W, which would otherwise be F's share, be sold and the money equally divided between my surviving children." J dies without issue. HELD:

1. **Same—Estates Tail—Converted into Fee Simple.***—J took an estate tail in the land devised to him, which was converted by the statute into a fee simple; and therefore the limitation over to F is void.

*Wills—Estates Tail—Converted into Fee Simple.—In Hood v. Haden, 82 Va. 597, it is said: "The same principle (that is as was decided in Ball v. Payne, 6 Rand. 73), was decided in See v. Craigen, 8 Leigh 449.

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2. Same—Same—Same—Limitation over Void.—F not being entitled to take the estate devised to J under the limitation over to him, the bequest of the proceeds of land devised to him, to the surviving children of the testator upon F's taking the land devised to J is void, and F is entitled to retain it.

The testator John Bryan, who died in 1807, devised a tract of land to each of his sons John F. and Frederick; after which his will contains a clause in these words: "It is my will, if my said son John F. Bryan die without issue, that the property heretofore given him shall go to his brother Frederick Bryan, who in that case will lose the land heretofore given him. It being my will and desire, then and in that case, and upon the happening of the event of my son John F. Bryan's death, that the land near Williamsburg, which would otherwise be Frederick's share, be sold, and the money equally divided between my surviving children." J. F. Bryan died in 1850, leaving no issue living at his death. Frederick is still living. The appellant, as the personal representative and an
290 heir *of one of the children of the testator who survived him, but died before J. F. Bryan, claims an interest in the land devised to F. Bryan under the limitation aforesaid in favor of the testator's surviving children.

In April 1820 John F. Bryan and Frederick Bryan entered into an agreement under seal, by which they agreed to unite in the sale of the land devised by their father to John F. Bryan, and to divide the proceeds of the sale between them; and Frederick Bryan covenanted to convey to John F. one-half of the land devised to Frederick, upon the condition of John F. Bryan's having a child or children; and if John F. had no child, the deed was to be void. In pursuance of this agreement they in August 1820 sold and conveyed the land of John F. Bryan to Scervant Jones.

In 1826 Frederick Bryan conveyed the land devised to him to Bennett Kirby in trust to secure to Haynes Lee a debt due to him from Frederick Bryan, and also to indemnify Lee as the security of Frederick Bryan. This land seems to have been sold under this deed of trust, and to have come through several intermediate conveyances to the possession of Scervant Jones.

After the death of John F. Bryan in 1850 this suit was instituted in the Circuit court of Williamsburg and James City, by Thomas Tinsley, a descendant of one of the daughters of the testator John Bryan, in his own right and as the administrator of the daughter, against Jones and the other descendants of John Bryan, seeking to recover the land which had been devised to Frederick Bryan; and to have it divided under the will of John Bryan. Upon the hearing the court below dismissed the bill; and thereupon Tinsley applied to this court for an appeal, which was allowed.

Morson and Wellford, for the appellant.
Robinson and Stanard, for the appellee Jones.

291 *MONCURE, J. I think that Frederick Bryan was not to lose the land devised to him, unless and until he should become entitled to the land devised to John F. Bryan. The will so expressly declares, and that was the testator's plain intention. Then, if the land devised to John F. Bryan was devised to him in tail, the limitation over to Frederick can never take effect; being a remainder limited on an estate tail, and destroyed by the statute converting that estate into a fee simple.

The question therefore is, Whether John F. Bryan took an estate tail in the land devised to him? If he did, it must have been by virtue of the words "die without issue," in the limitation over; there being no words of inheritance superadded to the devise. The first words of the limitation over are, "It is my will if my said son John F. Bryan die without issue, that the property heretofore given him shall go to his brother Frederick Bryan." If the will had stopped here, it would, by clear implication, have created an estate tail in J. F. Bryan; it being well settled that a limitation over in these words superadded to an estate given to the ancestor in fee or for life, will in the one case cut down, and in the other enlarge, the estate of the ancestor into an estate tail. The remaining words are, "who (that is F. Bryan) in that case will lose the land heretofore given him. It being my will and desire then and in that case," &c. (ut supra). Do these words restrict the technical meaning of the words "die without issue," and prevent them from conferring an estate tail on J. F. Bryan? If the words "and upon the happening of the event of my son J. F. Bryan's death," had been omitted, the residue certainly would not have had that effect. The whole question then is, as to the effect of the last recited words in the connection in which they stand.

292 *"Issue" is nomen collectivum, and a word of very extensive import, embracing the whole line of lineal descendants. It is used in the statute de donis, in some instances, at least, synonymously with heirs of the body; and a devise to A and his issue has even been stated by an eminent judge, (Lord Thurlow,) as "the aptest way of describing an estate tail, according to the statute." 2 Jarm. on Wills 329, 331. It is a technical word of established meaning, and must always have its effect accordingly,

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In that case, a will dated in 1803 contained the following clause: 'I give and bequeath to my daughter, Phœbe, the upper half of my plantation * * *; but should she die without heirs of her own body,' then over. It was held that the daughter took an estate tail converted into fee simple. See also, Tate v. Tally, 3 Call 354; Smith v. Chapman, 1 H. & M. 300; Bramble v. Billups, 4 Leigh 90; Callis v. Kemp, 11 Gratt. 78; *Tinsley v. Jones, 13 Gratt. 269;* 2 Min. Inst. (3d Ed.) marg. p. 394 *et seq.*"

See, in accord, Graham v. Graham, 4 W. Va. 320. The principal case is cited in 4 Va. Law Reg. 656, 657, 658, 810; 5 Va. Law Reg. 86.

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unless there be a clear manifestation of intention in the context to use it in the restricted sense of issue living at the death. It has been long settled that words (occurring in a will which took effect before the revision of 1819) referring to the death of a person without issue, whether the terms be "if he die without issue," "if he have no issue," "if he die before he has any issue," or "for want, or in default of issue," unexplained by the context, and whether applied to real or personal estate, are construed to import a general indefinite failure of issue. Id. 418. "The rule (in the language of Lord Redesdale) is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." Id. 284. Or "unless (in the language of another distinguished judge, Lord Alvanley, in Poole v. Poole, 3 Bos. & Pul. 620) the intent appear so plainly to the contrary that no one can misunderstand it." As to personalty, it seems the word "issue" yields more readily to expressions and circumstances in the will tending to confine it to the restricted sense than when applied to real estate. Id. 427. Thus, where the phrase is, "leaving no issue," the settled construction is that, applied to real estate, it means an indefinite failure of issue, but in reference to personal estate, it imports a failure of issue at the death. Forth v. Chapman, 1 P. Wms. 663, is the leading authority for this distinction;
293 but it has *been confirmed by a long train of subsequent decisions. 2 Jarm. 419, and cases cited; also Bramford v. Lord, 78 Eng. C. L. R. 707; Dunn & wife v. Bray, 1 Call 338; Hill v. Burrow, 3 Id. 342. The question in this case arises in regard to real, and not personal estate. For though the land in controversy is that which was devised to F. Bryan which, in the event of the limitation over taking effect, is directed to be sold and the money divided, (thus converting the subject, in that event, into personal estate,) yet, as we have seen, the question on which the case depends is as to the estate devised to J. F. Bryan, which in no event is directed to be sold.

Then do the words "upon the happening of the event of my son J. F. Bryan's death" clearly manifest an intention to use the word "issue" in a restricted sense? Similar words have, in England, been held not to have that effect. 2 Jarm. 439. In Walter v. Drew, 1 Com. R. 373, the words of the devise were, "It is my will that if W, my son, shall happen to die and have no issue, &c., then and in that case, and not otherwise, after the death of the said W, I give, &c., all my lands, &c. unto R, my son, to have and to hold the same after the death of the said W, to him and his heirs." Held that W took an estate tail. In Doe v. Cooper, 1 East. R. 229, it was held that a devise of land to R C for the term only of his life, and after his decease to his issue as tenants in common, but in case he should die without leaving issue, then to E H in fee, gives to R C an estate tail. In Doe v. Goldsmith, 7 Taunt. 209, 2 Eng. C. L. R. 73, the devise was to F G and his assigns for his life, and immediately after his decease to the heirs of his body in such parts or shares as he should by deed or will appoint; and in default of such heir of his body, then immediately after his decease to
J G. Held, that F G took an estate
294 tail by *implication. See also Broadhurst v. Morris, 22 Id. 1, and Doe v. Rucastle, &c., 65 Id. 876.

I have seen no English case in which similar words have had the effect of restricting the technical meaning of the words "die without issue," in regard to real estate, though there have been several in which they have had that effect in regard to personal estate. 2 Jarm. 443; as in Pinbury v. Elkin, 1 P. Wms. 563; which was followed by Stratton v. Payne, 3 Bro. P. C. Toml. ed. 99 (cited in Read v. Shell, 2 Atk. 647); Wilkinson v. South, 7 T. R. 553; Trotter v. Oswald, 1 Cox's Cas. 317; and Rackstraw v. Vile, 1 Sim. & Stu. 604, 1 Cond. Eng. Ch. R. 309. But in Donn v. Penny, 19 Ves. R. 545, the words "after him" (following the words "for want of issue") were held by Sir W. Grant not to vary the construction. "That no judge of later times, (says Jarman, p. 446,) would have departed from the legal sense of the words upon such an expression as that in Pinbury v. Elkin, admits of little doubt." But he thinks that, followed as that case has been by the other cases above mentioned, it is too late to question its authority. "We are taught, however, (he says,) by Sir W. Grant's decision in Donn v. Penny, that the doctrine of the case of Pinbury v. Elkin will not be applied to any case in which the variation of phrase is such as fairly to take it out of the reach of its authority."

But stronger manifestation of intention to use the words "die without issue" in a restricted sense will be required in a case in which a life estate only is given to the ancestor, than in a case in which a fee simple is given to him. In the latter case the issue may inherit the estate from the ancestor as his heirs at law, or derive it from him by deed or will; whereas in the former they cannot get it at all, if the words be construed in a restricted sense; and it is therefore necessary to con-
295 strue *them in a technical sense to effectuate the manifest intention of the testator. There can be no conceivable motive for limiting the estate over only in the event of the ancestor's dying without issue, but that the issue, if any, may have the estate. The restrictive words should therefore be extremely strong to require such a construction as would deprive the issue of any possible means of succeeding to the estate. See 2 Jarm. 440-1-2; in which the case of Wyld v. Lewis, 1 Atk. R. 432, is cited as having been decided under the influence of these views. But the opinion of Tucker, P., in Doe v. Craigen, 8 Leigh 449, is conclusive on this subject.

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"Here, (said he,) the words, if she dies without heirs of her body, do not amount to a devise to the heirs of her body after the determination of her estate for life; and the consequence would be, that if she takes but an estate for life, her issue can never take any thing. The law of England would therefore construe this clearly an estate tail." "The estate for life must be enlarged into a fee tail, according to the general intent." The authorities upon this subject, he said, are numerous; and he cited several, not only from the English, but also from our own reports.

The will in this case does not give an express estate for life to J. F. Bryan; but it gives the land to him, without the superaddition of any words of inheritance; and there is nothing in the will, but the limitation over in the event of his dying without issue, to manifest an intention to give them more than a life estate. The consequence is, that but for that limitation over he would have been entitled only to a life estate, independently of the act dispensing with the necessity of words of inheritance in the creation of an estate in fee simple. The act of 1785 converting estates tail into estates in fee, declares that every estate in lands which since the 7th of October
296 1776 *hath been, or hereafter shall be limited so that, as the law aforetime was, such an estate would have been an estate tail, shall be deemed to have been, and to continue, an estate in fee simple. 12 Hen. Stat. 156. The question, therefore, in determining whether an estate tail is created, always is, (or at least was before the revision of 1819,) Whether it would have been such an estate under the law as it was before the 7th of October 1776. In the language of Roane, J., in Tate v. Talley, 3 Call 354, the act "refers to and reserves all laws then in force for the decision of the question, Whether, in future as well as in past cases, an estate tail would (but for the interposition of the act) have passed or not?" And in the language of Fleming, J., in the same case, "the whole effect of the statute is to convert estates tail into estates in fee simple, and not to alter the meaning of words or destroy the established rules of construction." The doctrine of that case, which seems indeed to be nothing more than the necessary construction of the act according to its terms, has been recognized and acted on in all the subsequent cases. Some of the judges in some of the cases supposed that as the same act of 1785, which referred to the law as it aforetime was, also dispensed with the necessity of words of inheritance in the creation of a fee, the law as it aforetime was must be considered as modified to that extent in the determination of cases arising afterwards. But that view, it seems to me, is opposed not only to the manifest design of the provision dispensing with words of inheritance, but to the plain language of the act. That design was to effectuate the probable intent of a grantor or testator where there is nothing in the deed or will to show that a less estate than a fee was intended to be given, and where but for the provision the grantee or devisee would be entitled only to a life estate. The act refers to and
297 adopts the law as it *aforetime was without limitation or restriction; and it expressly declares that every estate, &c., "shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, &c., by construction or operation of law." Where an estate is devised to A, and if he die without issue, to B, the statute, or rather the provision in question, does not give A an estate in fee, because the will, "by construction or operation of law," gives him an estate tail. So also where the words "then on the happening of his death," or any other words insufficient to restrict the technical meaning of the word "issue," are superadded thereto. But it seems to be now definitely settled that the provision in question can have no effect in such cases. "From an examination of the cases, (says Tucker, P., in Doe v. Craigen, supra,) it will be found that the question is expressly decided against the statute (that is against the effect of the said provision) in Ball v. Payne, 6 Rand. 73; and that the case of Bramble v. Billups, 4 Leigh 90, recognizes the principles of that decision in extenso." Though he had struggled against that construction in more than one case, yet he said he could no longer undertake to controvert it, and must therefore surrender. 8 Leigh 452.

The case of Lucas & wife v. Duffield, 6 Gratt. 456, was cited and very much relied on by the counsel of the appellant, to show that the words "die without issue," in this case, were used in the restricted sense of issue living at the death of J. F. Bryan, who did not therefore take an estate tail. Without undertaking to reconcile that case with others on the same subject, it is sufficient to say that it certainly does not profess, nor was it thereby intended, to overrule the case of Lee v. Craigen, and other cases therein referred to; from which it is plainly distinguishable in this, that the land there was devised to W D, to
298 him and his heirs. *No reasons are assigned for the judgment; but, in construing the words "die without legal issue," to mean issue living at the death of W D, the court no doubt considered that it would not only be pursuing the restrictive words contained in the clause of attestation, but would be giving effect to the whole will, and that the issue might inherit the land as heirs of W D, or derive it from him by deed or will, and thus get the benefit intended for them, while the limitation over would take effect as an executory devise. The decision I imagine would have been different if a life estate only had been given by the will to W D; and the manifest general intent in favor of the issue could only have been effected by enlarging that life estate into an estate in tail. See Roe v. Grew, 2 Wils. R. 322; and Doe v. Applin, 4 T. R. 82.

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The result of what I have said is, that in my opinion J. F. Bryan took an estate tail in the land devised to him, with remainder limited thereon to F. Bryan. It is not material to enquire whether that remainder is limited to take effect on the death of J. F. Bryan without issue indefinitely, or without issue living at his death; as, by the act for docking entails, all remainders, as well contingent as vested, dependent on the estate in tail, are utterly barred; and as the case occurred before the act of 1819 giving effect to every limitation upon such an estate which would be valid when limited upon an estate in fee simple created by technical language. 1 Rev. Code, p. 369, § 25.

The following cases in our own reports tend strongly to sustain the principles on which the foregoing opinion is based: Carter v. Tyler, 1 Call 165; Hill v. Burrow, 3 Id. 342; Tate v. Tally, Id. 354; Eldridge v. Fisher, 1 Hen. & Munf. 559; Goodrich v. Harding, 3 Rand. 280; Bells v. Gillespie, 5 Id. 273; Broaddus v. Turner, Id. 308; Ball v. Payne, 6 Id. 73; Jiggetts v. Davis, 1 Leigh 368; Callava v. Pope, 3 Id.
299 103; Bramble *v. Billups, 4 Id. 90; Doe v. Anderson, Id. 118; Doe v. Craigen, 8 Id. 449; Wright v. Cohoon, 12 Id. 370; Callis v. Kemp, 11 Gratt. 78; and Moore v. Brooks, 12 Id. 135. All of these cases concern real estate; in regard to which there has been little conflict in the decisions of this court. Many cases concerning personal property might be cited for the same purpose; but it cannot be necessary to do so.

It now only remains to consider whether, as contended by the counsel for the appellant, F. Bryan has concluded himself and his assigns from setting up the title of J. F. Bryan as tenant in tail, by the agreement with him of the 20th of April 1820, and by joining him in the deed of the 21st of August of that year, conveying the land to the appellee Jones. I think not. The agreement was between the two brothers; and was a compromise of their respective rights, whatever they might be, in the land devised to J. F. Bryan. None of the other children of the testator were parties to it, or had any interest whatever in the subject. The agreement was not intended to benefit, and could not injure them in any way. The only consideration required of F. Bryan for being permitted to participate in the purchase money of the land was his joining in the deed and giving a covenant of warranty to the purchaser, and a covenant to convey to J. F. Bryan, in the event of his having a child or children, one-half of the land devised to F. Bryan, which is the land now in controversy. That land, as early as February 1826, was conveyed by F. Bryan by deed of trust for the benefit of a creditor. The deed was duly recorded; the land was sold under it; has been conveyed to several successive owners; and ultimately to the appellee Jones, as he says, for full value paid for the fee simple estate; he and those under whom he claims having been advised, as he says, that F. Bryan
300 *had a good title to the land under his father's will. If the said appellee had notice of the agreement aforesaid, it does not appear that the intermediate vendors had; nor do I deem it material whether they had or not.

I think the decree ought to be affirmed.

The other judges concurred in the opinion of Moncure, J.

Decree affirmed.

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301 *Brooke & als. v. Shacklett.

Carter & als. v. Wolfe.

April Term, 1856, Richmond.

1. **Case Approved.***—The case of *Gallego's ex'ors* v. *The Attorney General*, 3 Leigh 450, approved.
2. **Religious Congregations—Statutes.**†—The act, Code, ch. 77, § 8, 9, 10, 11, 12, 13, relates only to conveyances, devises and dedications of property for the use of "religious congregations," in the limited and local sense of the term, viz: for the members of those religious congregations, who, from their residence at or near the place of public worship, may be expected to use it for such purpose.‡
3. **Same—Gift Must Design Enjoyment of Local Society.**—No deed which does not respect the rights of the local society or religious congregation; and no deed which does not design the enjoyment of the uses of the property conveyed by the local religious society or congregation, can be placed within the influence of the statute.
4. **Deed—Sanctions Ministers' Appointment—Validity.**—A deed conveying property in trust for the use

*Case Approved.—For the law as laid down in Gallego v. Attorney General, 3 Leigh 450, and approved in the first headnote of the principal case, the principal case is cited and approved in the following cases: Com. v. Levy, 23 Gratt. 40; Wilson v. Perry, 29 W. Va. 189, 1 S. E. Rep. 317, and cases cited; Wilmoth v. Wilmoth, 34 W. Va. 436, 12 S. E. Rep. 734, and cases cited; Pack v. Shanklin, 43 W. Va. 317, 27 S. E. Rep. 394; Heiskell v. Trout, 31 W. Va. 812, 8 S. E. Rep. 559; Knox v. Knox, 9 W. Va. 145; Kelly v. Love, 20 Gratt. 130, and monographic *note* on "Charities" appended at end of case.

†Church Property.—See monographic *note* on "Charities" appended to Kelly v. Love, 20 Gratt. 130.

‡The substance of the statute is stated by JUDGE DANIEL in his opinion.

I. IN GENERAL.

A Church—Definition.—The collective body of Christians, or those who acknowledge Christ as the Savior of mankind form the Church. Wilson v. Perry, 29 W. Va. 169, 1 S. E. Rep. 302.

Same—Cannot Be Incorporated.—"The General Assembly shall not grant a charter of incorporation to any church or religious denomination." Constitution of Virginia, Art. V, § 17.

The case of Trustees v. Guthrie, 86 Va. 125, 10 S. E. Rep. 318, called for a construction of this section of the constitution. The facts were as follows: A corporation styled the "Trustees of the General Assembly of the Presbyterian Church in the United States," with power to carry on foreign missions, etc., to establish committees, etc., deemed branches, for its

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of the local society, is not without the operation of the statute, by reason that it sanctions the appointment of the ministers and authorizes them to use the house for preaching, without any reference to the vote or wish of the congregation; it being a Methodist church, and the ministers being to be appointed by the conference, according to the constitution of that church.

8. **Same—Ministers' Right to Preach in Church—Powers of—Majority—Laws of Church.**—Deed conveys a house of worship in trust for a local religious congregation; and provides, that the trustees are at all times to permit the ministers belonging to the Methodist Episcopal church, who shall be duly authorized by the conferences of the church, to preach in the house. Upon a question of the right of a minister to preach in the house, that question is to be determined by enquiring, not whether he represents the wishes of a majority of the members of the society, but whether he has been appointed and assigned to the society in accordance to the laws of the church.

6. **Plan for Separation of Church—Right to Adopt.**—The general conference of the Methodist Episcopal church in the United States had the conditional power to adopt the plan for the separation of the church, adopted in 1844.

302 *7. **Same—Same—Right of Majority to Use Church-House.**—A society of the church which, according to the plan of separation, is a border society, having by a majority of its members resolved to adhere to the Methodist Episcopal church south, is entitled to the use of the church-house in exclusion of those who repudiate the authority of said church, and refuse to receive the pastors appointed by it.

By deed bearing date the 3d day of June 1842, John C. Davis and wife, in consideration of ninety dollars, conveyed to Benjamin Brooke, George W. Shacklett and three others, a lot in the town of Salem in the county of Fauquier, upon the following trusts: In trust that they shall erect and build, or cause to be erected and built thereon, a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church at their general conferences in the United States of America; and in further trust and confidence, that they shall at all times forever hereafter, permit such ministers and preachers belonging to said church as shall from time to time be duly authorized by the general conferences of the ministers and preachers of the said Methodist Episcopal church, or by the annual conferences authorized by the said general conference, to preach and expound God's holy word therein. And in further trust and confidence, that as often as any one or more of the trustees herein before mentioned shall die or cease to be a member or members of the said church, according to the rules and discipline as aforesaid, then and in such case it shall be the duty of the stationed preacher or minister (authorized as aforesaid) who shall have the pastoral charge of the members of the said church, to call a meeting of the re-

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purposes, with a provision that any bequest to the corporation for any such committees, etc., should pass to said trustees, created a committee called the "Executive Committee of Foreign Missions," commonly known as "The Board of Foreign Missions," and the executive officer as "the secretary," and the corporation itself as the "Southern Presbyterian Church." *Held*, the creation of such corporation was not the incorporation of a church or religious denomination, which is forbidden by Virginia Const., Art. V, § 17.

Religious Congregations.—Religious congregations include, as well those which are united with others under a common government, as those which are independent or congregational in their organization and government. The phrase, however, does not apply to whole denominations of sects, but it is to be understood in the limited and local sense of the words, so as to restrict the benefit of such conveyances to single congregations, whose members, from their residence at or near the place of public worship, may be expected to use it for such a purpose. Brooke v. Shacklett, 13 Gratt. 313; Hoskinson v. Pusey, 32 Gratt. 431.

Public Policy.—The legislation of Virginia has never exhibited any hostility to bequests for religious uses. Prot. E. Ed. Soc. v. Churchman, 80 Va. 718; Trustees v. Guthrie, 86 Va. 125, 10 S. E. Rep. 318.

II. VALIDITY OF GIFTS TO CHURCHES.

A. INDEPENDENTLY OF STATUTE.—In Virginia gifts for religious purposes in general are void as they create trusts of a vague and indefinite character. The Virginia decisions as to the validity of such trusts, and the general powers of a court of chancery, in the absence of statute, over trusts of this nature, have been conflicting. As held in Fifield, v. Van Wyck, 94 Va. 557, 27 S. E. Rep. 446, the latest Virginia case involving a determination of this question, chancery courts have no jurisdiction to declare vague and indefinite charity trusts, independently of statutory provisions.

As to the general subject of chancery jurisdiction over vague and indefinite charities, see monographic *note* on "Charities."

B. CONSTITUTIONAL AND STATUTORY PROVISIONS.

1. CONSTITUTIONAL PROVISIONS.—The Virginia Constitution, Art. V, § 17, provides that the general assembly may secure the title to church property, to an extent to be limited by law. For construction of this section of the constitution, see Trustees v. Guthrie, 86 Va. 125, 10 S. E. Rep. 318.

2. STATUTORY PROVISIONS.—In 1866-67 (Acts 1866-67 p. 907, Va. Code 1887, § 1398), the Virginia Legislature enacted a statute providing that gifts of land for certain religious purposes should be valid when such donations were made by conveyance, devise or dedications since Jan. 1, 1777, and after that date (1866-67), donations made by conveyance only, for such purposes, should be valid. For amendments to Va. Code, 1887, § 1398, see Pollard's Supp. Va. Code, § 1398.

For like provision in West Virginia relative to gifts for religious uses, the law governing which is very similar to Virginia, see W. Va. Code, 1899, ch. 57, § 1. These statutes have been brought in question and construed in the following cases: Brooke v. Shacklett, 13 Gratt. 301; Hoskinson v. Pusey, 32 Gratt. 428; Finley v. Brent, 87 Va. 103, 12 S. E. Rep.

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maining trustees as soon as conveniently may be; and when so met, the said minister or preacher shall proceed to nominate one or more persons to fill the place or
303 places of him or them whose *office or offices has or have been vacated as aforesaid: provided, the person or persons so nominated shall have been one year a member or members of the said church immediately preceding such nomination, and be at least twenty-one years of age. And the said trustees, so assembled, shall proceed to elect, and by a majority of votes appoint the person or persons so nominated to fill such vacancy or vacancies, in order to keep up the number of five trustees forever. And in case of an equal number of votes for and against the said nomination, the stationed minister or preacher shall have the casting vote: provided, nevertheless, that if the said trustees, or any of them, or their successors, have advanced, or shall advance, any sum or sums of money, or are or shall be responsible for any sum or sums of money on account of the said premises, and they, the said trustees or their successors, be obliged to pay the said sum or sums of money, they, or a majority of them, shall be authorized to raise the said sum or sums of money by a mortgage on said premises, or by selling the said premises, after notice given to the pastor, or preacher, who has the oversight of the congregation attending divine service on the said premises. If the money due be not paid to the said trustees or their successors within one year after such notice given, and if such sale take place, the said trustees, or their successors, after paying the debt, and other expenses which are due, from the money arising from such sale, shall deposit the remainder of the money produced by the said sale in the hands of the steward or stewards of the society belonging to or attending divine service on the said premises, which surplus of the produce of such sale, so deposited in the hands of said steward or stewards, shall be at the disposal of the next yearly conference, authorized as aforesaid; which said yearly conference shall dispose of said money according to the best of
304 *their judgment for the use of said society. And the said John C. Davis and Susanna his wife do by these presents warrant and forever defend all and singular the before mentioned and described lot or piece of land with the appurtenances thereto belonging, unto them, the said Benjamin Brooke, W. H. Rector, George W. Shacklett, James F. Milton and Richard H. Carter, and their successors, chosen and appointed as aforesaid, from the claim or claims of them, the said John C. Davis and Susanna his wife, their heirs and assigns, and from the claim or claims of all persons claiming by or under them.

The bill states, and it is not denied in the answer, that the said trustees, by means of subscriptions obtained from the members of the congregation, on whose behalf plaintiff sues, and from other sources, built a

228; Boxwell v. Affleck, 79 Va. 402; Prot. E. Ed. Soc. v. Churchman, 80 Va. 718; Seaburn v. Seaburn, 15 Gratt. 423; Bible Soc. v. Pendleton, 7 W. Va. 79; Wilson v. Perry, 29 W. Va. 169, 1 S. E. Rep. 302; Trustees v. Guthrie, 86 Va. 125, 10 S. E. Rep. 318; Carskadon v. Torreyson, 17 W. Va. 43.

Objects and Purposes of the Statute.

a. *Land.*—The statute validates conveyances of land for religious congregations for the following uses: As a place for public worship; as a burial place, or a residence for a minister. If any other purposes and objects than those above designated shall be aimed at, the conveyance is, as to such purposes at least, as void as if the statute had never been enacted. Brooke v. Shacklett, 13 Gratt. 301; Linn v. Carson, 32 Gratt. 170.

Same—Gift Must Design Enjoyment by Local Society.—No deed which does not respect the rights of the local society or religious congregation; and no deed which does not design the enjoyment of the uses of the property, conveyed, by the local religious society or congregation, can be placed within the influence of the statute. Brooke v. Shacklett, 13 Gratt. 301.

Dedication—Local Society.—No dedication of property to religious uses which does not respect the rights of the local society or religious congregation can be placed within the purview of the statute. Brooke v. Shacklett, 13 Gratt. 301.

Statute Authorizes a "Conveyance," Not a "Devise."—The act, Code 1849, ch. 77, § 8 (Va. Code 1887, § 1398), relative to gifts for the use of religious congregations, does not authorize a devise of land, but only a conveyance by deed. Seaburn v. Seaburn, 15 Gratt. 423. For like interpretation of W. Va. Code, 1899, ch. 57, § 1, which is similar to Va. Statute, see Bible Soc. v. Pendleton, 7 W. Va. 79, which cites Seaburn v. Seaburn, 15 Gratt. 423.

Bequest of Money—Building Church—Supporting Pastor.—The statute does not authorize a bequest of money to be expended in building a church at a specified place, or for the support of the pastor of such church. Seaburn v. Seaburn, 15 Gratt. 423. See Bible Soc. v Pendleton, 7 W. Va. 79, for like interpretation of W. Va. Code, ch. 57, § 1, this statute being similar in its provisions to Va. Code 1887, § 1398.

Conveyance—Congregation Distinguished from Church at Large.—A conveyance for the use of a particular congregation, in the limited and local sense of the term, that is, for the members, as such, of a certain, defined congregation, who, from their residence at or near the place of public worship, may be expected to use it for that purpose, is valid under Va. Code 1873, ch. 76, § 8 (Va. Code 1887, § 1398).

If it were for the use of the church in the general sense, as for the use of the Methodist Episcopal Church, such conveyance would be void. Hoskinson v. Pusey, 32 Gratt. 428; Boxwell v. Affleck, 79 Va. 402.

Deed—Sanctions Minister's Appointment—Validity.—A deed conveying property in trust for the use of a local society, is not without the operation of the statute, by reason that it sanctions the appointment of the minister and authorizes them to use the house for preaching, even though it be without reference to the wishes of the congregation. Brooke v. Shacklett, 13 Gratt. 301.

Construction.—No very liberal rule of construction should be given to the statute, Va. Code 1887, § 1398, but it should be construed according to the general rule. Seaburn v. Seaburn, 15 Gratt. 423.

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church-house on said lot, and that the same had been used by the congregation and the ministers and preachers aforesaid, according to the trust, for a long time. This was the church-house in controversy in the case of Brooke & als. v. Shacklett.

By deed bearing date the 15th day of August 1805, Daniel Floweree and wife, in consideration of the conveyance of a lot of land to them, conveyed with general warranty to Benjamin Rector and others a lot of land in the village of Rectortown in the county of Fauquier, upon the same trusts as those above stated as contained in the deed from Davis and wife to Brooke and others. And a church-house was built thereon by the same means and was used in the same way. This is the church-house in controversy in the case of Carter & als. v. Wolfe. All the proceedings and all the other facts in the two cases are precisely the same; and they were heard together in the court below and in this court.

In 1844 a committee of the general conference of the Methodist Episcopal
305 church held in New York, *made a report, which was adopted by the general conference, of which the introduction and the first, second and ninth clauses are as follows:

The select committee of nine, to consider and report on the declaration of the delegates from the conferences of the slaveholding states, beg leave to submit the following report:

Whereas a declaration has been presented to this general conference, with the signatures of fifty-one delegates of the body from thirteen annual conferences in the slaveholding states, representing that, for various reasons enumerated, the objects and purposes of the christian ministry and church organization cannot be successfully accomplished (by them) under the jurisdiction of this general conference, as now constituted; and

Whereas, in the event of a separation, a contingency to which the declaration asks attention as not improbable, we esteem it the duty of this general conference to meet the emergency with christian kindness and the strictest equity: therefore,

Resolved, by the delegates of the several annual conferences in general conference assembled,

That should the delegates from the conferences in the slaveholding states find it necessary to unite in a distinct ecclesiastical connection, the following rule shall be observed with regard to the northern boundary of such connection: All the societies, stations and conferences adhering to the church in the south, by a vote of a majority of the members of said societies, stations and conferences, shall remain under the unmolested pastoral care of the southern church, (and the ministers of the Methodist Episcopal church shall in nowise attempt to organize churches or societies within the limits of the church south; nor

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Division in Church—Property—Retroactive Effect of § 1400, Va. Code 1887.—The provision of Va. Code 1887, § 1400, that in the contingency of a division of any religious society, it should be lawful for a majority to determine to which branch such congregation shall hereafter belong, etc., and should conclude questions as to property held in trust for such congregation, is void when applied to property theretofore granted in trust for a particular congregation, as it alters the terms of the trust and impairs the obligation of the contract, and is repugnant to both the federal and state constitutions. Finley v. Brent, 87 Va. 103, 12 S. E. Rep. 228.

b. Books and Furniture.—The statute, Va. Code 1887, § 1401, seems to contemplate books and furniture for the benefit of the congregation, church, or religious society, and their use on the land in the ceremonies of public worship, or at the residence of the minister.

Same—Uses of Local Society.—The uses mentioned in the statute must belong peculiarly to the local society or "religious congregation" at or near the locality of the property conveyed. Brooke v. Shacklett, 13 Gratt. 301.

Same—How Acquired.—No particular mode of acquiring books and furniture (the only chattels allowed to be acquired) is prescribed. It may therefore be by gift or purchase *inter vivos* or by will. Va. Code 1887, § 1401.

III. RIGHTS AND POWERS OF CHURCH BODIES.

Civil War—How Property Rights Affected.—Const. of Va. art. 11, § 8, provides that the rights of ecclesiastical bodies in and to church property conveyed to them by regular deed of conveyance, shall not be affected by the late civil war, nor any antecedent or subsequent event, nor by an act of the legislature purporting to govern the same, but all such property shall pass to and be held by the parties set forth in the original deeds of conveyance, or the legal assignees of such original parties holding through or by conveyance, and any act or acts of the legislature in opposition thereto shall be null and void.

Powers of General Church Bodies—Transfer of Property.—Where property is given to the uses of a particular congregation, the gift is not to the church in a general sense, because as such it would be void, and the general conference of the church has no power, directly or indirectly, to transfer the property of the congregation. Boxwell v. Affleck, 79 Va. 402; Finley v. Brent, 87 Va. 103, 12 S. E. Rep. 228.

Powers of Majority over Property—Division in Congregation.—Where property is granted in trust for the sole and exclusive benefit of a certain religious congregation of a regular orthodox church, and the majority of the congregation leave that church and join another, they cannot take with them the property for the use of the church to which they go. Finley v. Brent, 87 Va. 103, 12 S. E. Rep. 228.

Powers of Majority—Minister's Right to Preach in Building.—A deed conveyed a house of worship in trust for a local religious congregation. It provided that the trustees should at all times permit the ministers belonging to the church, of which the local society was a part, and who should be qualified only by the conferences of that church, to preach in the house. Upon a question of the right of a minister to preach in the house, it was held, that such question should be determined by enquiring whether the minister had been appointed

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shall they attempt to exercise any pastoral oversight therein, it being understood that the ministry of the south reciprocally
306 *observe the same rule in relation to stations, societies and conferences adhering by vote of a majority to the Methodist Episcopal church,) provided, also, that this rule shall apply only to societies, stations and conferences bordering on the line of division, and not to interior charges, which shall in all cases be left to the care of that church within whose territory they are situated.

2d. That ministers, local and traveling, of every grade and office in the Methodist Episcopal church, may, as they prefer, remain in that church, or, without blame, attach themselves to the church south.

9th. That all the property of the Methodist Episcopal church in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal church, so far as this resolution can be of force in the premises.

In May 1845 the representatives of thirteen annual conferences which are within the slaveholding states, met at Louisville, Kentucky, and by a vote of ninety-four to three, adopted the following resolutions:

Be it resolved, by the delegates of the several annual conferences of the Methodist Episcopal church in the slaveholding states, in general convention assembled, that it is right, expedient and necessary to erect the annual conferences represented in this convention into a distinct ecclesiastical connection, separate from the jurisdiction of the general conference of the Methodist Episcopal church, as at present constituted; and accordingly we, the delegates of the said annual conferences, acting under the provisional plan of separation adopted by the general conference of 1844, do solemnly declare the jurisdiction hitherto exercised over said annual conferences by the general conference of the Methodist Episco-
307 pal church, entirely *dissolved; and that said annual conferences shall be and they hereby are constituted a separate ecclesiastical connection under the provisional plan of separation aforesaid, and based upon the discipline of the Methodist Episcopal church, comprehending the doctrines, and entire moral, ecclesiastical and economical rules and regulations, of said discipline, except only in so far as verbal alterations may be necessary to a distinct organization, and to be known by the style and title of the Methodist Episcopal Church south.

Resolved, that this convention request the bishops presiding at the ensuing session of the border conferences of the Methodist Episcopal church south, to incorporate into the aforesaid conferences any societies or stations adjoining the line of division: provided, such societies or stations, by a

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and assigned to the society in accordance with the laws of the church, and not whether he represented the wishes of a majority of the members of the society. Brooke v. Shacklett, 13 Gratt. 301.

Powers of Majority—New Organization—Property.—An organized church cannot be divested of its property even though a majority of its members enter into a new organization which adopts the name of the original church; provided the old organization still exists. Venable v. Coffman, 2 W. Va. 310.

Members Excluded from Buildings—Rights.—When members are improperly excluded from the church buildings they may be restored to their rights and privileges by equitable proceedings. See *post*, "Procedure." Wade v. Hancock, 76 Va. 620; Brooke v. Shacklett, 13 Gratt. 301; Hoskinson v. Pusey, 32 Gratt. 428.

Disregard of Congregation's Wish—Validity of Gift.—The statute authorizes a gift by deed in trust for the use of local societies, and such a gift is not void, or without the purview of the statute, because the deed sanctions the appointment of the minister in a certain way without reference to the wish or vote of the congregation. Brooke v. Shacklett, 13 Gratt. 301.

Title in Trustees—Remains in Trust for Church during Existence.—Where the legal title to property was vested in trustees for the use and benefit of a certain church, it was held that until the title was legally divested, it must continue to be held as a trust for said church so long as it has an existence. Venable v. Coffman, 2 W. Va. 310.

IV. TAXATION.

The constitutions of Virginia, art. 10, § 3, and W. Va. art. 10, § 1, provide that property used for religious purposes may be exempted from taxation by law. In accordance with the constitutional privilege, the legislatures of both states have enacted statutes, Va. Code 1887, §§ 457, 488, W. Va. Code 1899, ch. 29, § 43, relieving churches from the payment of taxes upon property held for religious uses.

Constitutionality of Va. Code 1887, §§ 457, 488.—In passing upon these provisions the court in City of Petersburg v. Petersburg Ben. M. Ass'n, 78 Va. 431, held them to be valid.

Proceeds of Property.—The court in the above case further held the grant of power to exempt from taxation all property used for benevolent purposes, to carry with it the power to exempt property the proceeds whereof is used for those purposes.

V. PROCEDURE.

Churches May Sue to Redress Any Wrong or Damage.—A church, although it has no corporate existence in this state, is clearly recognized by the law of Virginia as being a legal organization, capable of holding property, and it may sue to redress any wrong or damage that it might suffer by reason of an illegal infringement of its rights relative to property that it may lawfully hold. Perkins v. Seigfried, 97 Va. 444, 34 S. E. Rep. 64.

How a Church May Sue—Equity.—A suit may be brought in equity by one member of the congregation suing on behalf of himself and the other members. Perkins v. Seigfried, 97 Va. 444, 34 S. E. Rep. 64; Berkshire v. Evans, 4 Leigh 223; Coffman v. Sangston, 21 Gratt. 268.

Rights of Members—Excluded from Building.—Where members of a congregation are entitled to the use of buildings, and are improperly excluded by the trustees, they may be restored to such rights and

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majority of the members, according to the provisions of the plan of separation as adopted by the late general conference, request such an arrangement.

The Virginia conference was represented in the convention at Louisville, and became a part of the Methodist Episcopal church south. The Baltimore conference was not represented in that convention, and in 1846 it formally resolved to adhere to the Methodist Episcopal church. A part of this conference was in Virginia, and the Loudoun and Warrenton circuits belonged to it; and they extended to the Rappahannock river; which was the dividing line between the Virginia and Baltimore conferences.

After the action of the Louisville convention, and of the Baltimore conference, the societies worshiping at Salem and Rectortown, by the vote of a majority of their members, resolved to adhere to the Methodist church south. These societies claimed to be border societies, and therefore entitled, under the plan of separation, to elect whether they would adhere to the northern or southern church. Whether they
308 were *such border societies the proof was somewhat contradictory, though the weight of the evidence was in their favor.

The trustees in the deeds holding the church-houses for the use of the societies and ministers connected with the southern church, George W. Shacklett in the first case, and Andrew Wolfe in the second, filed their bills in the Circuit court of Fauquier county, in behalf of themselves and the congregation worshiping in the church-houses, respectively, against the trustees, in which, after setting out the deeds and the division of the Methodist church, as herein before stated, they insisted that these societies were not border societies, and entitled under the plan of separation to adhere to the church south; that the trustees were abusing their trust in excluding from the use of the said church-houses the members and ministers of the Methodist Episcopal church, and in converting them to the use of the members and ministers of the Methodist church south. And they prayed that the trustees might be compelled to execute the trusts of the deeds truly and faithfully, and apply the said church-houses to the use of the members and ministers of the Methodist Episcopal church in the United States worshiping in said houses, or that the said trustees be removed and others appointed in their place; and for general relief.

The trustees answered the bills, insisting that these were border societies, and entitled to adhere to the church south. And the causes coming on to be heard upon the facts and evidence herein before stated, the court held, that the plaintiffs and the other members of the congregations of the Methodist Episcopal church worshiping at the church-houses in Salem and Rectortown, in the bills and proceedings mentioned, with the ministers duly appointed by the Methodist Episcopal church, for said congregations and church-houses to minister therein, were the beneficiaries
309 *in the deeds aforesaid; and the legal title only being in the trustees, that it was their duty to appropriate the same for the use and benefit of the said congregations and ministers and for none others: And the decree was accordingly. And the

privileges by filing a bill in equity for this purpose. Wade v. Hancock, 76 Va. 620; Brooke v. Shacklett, 13 Gratt. 301; Hoskinson v. Pusey, 32 Gratt. 428.

Suits by Members against Trustee to Compel Proper Application of Property.—See Va. Code 1877, § 1404.

Recovery of Property—Action of Unlawful Detainer.—Trustees, who are the regularly appointed successors of the original trustees in the deed conveying the property, may maintain an action of unlawful detainer to recover the possession of the church building. Allen v. Paul, 24 Gratt. 332.

Sale—Extent of Equity Jurisdiction.—Va. Code 1887, § 1405, authorizes the circuit court of the county or corporation wherein the land lies, upon the application of any member of the congregation, in a proper case, to decree the sale of church property.

Construing this statute in Linn v. Carson, 32 Gratt. 170, the court said, that the authority given in the instances mentioned in the statute does not exclude the authority of a court of equity in other cases in the exercise of its general jurisdiction to decree a sale. "It may be regarded rather as predicated of the amenability of church property to the general jurisdiction of courts of equity, just as the property of other individuals or association of individuals is, and that this section was designed only to give the jurisdiction upon the application of any member of a religious society to effect a sale for the benefit of the society, and for direction to the court in the disposition of the proceeds of the sale."

Sale—Powers of Trustees.—A deed conveyed land to certain trustees, on condition that they build thereon, when they thought fit, a church, and permit certain persons to preach in it, and further, to be used "for such other purposes as should be deemed appropriate and necessary to further the cause of Christ." It contained no covenant to rebuild, on condition that the land revert, upon failure of the trustees to maintain the church. *Held*, the trustees may sell the land and invest the proceeds in a parsonage for the same congregation, in connection with a new church on a different lot. Hardy v. Wiley, 87 Va. 125, 12 S. E. Rep. 233. As to provisions for sale, see Va. Code 1887, ch. 64.

Sale—Lien on Church Property.—Where the church discipline gives a lien to parties incurring debt on behalf of the congregation for the payment of the purchase price of lands, or for advancements, or where they have, at the instance of the trustees, made themselves liable for any such debt, a court of equity will enforce such claim. Linn v. Carson, 32 Gratt. 170; Hoskinson v. Pusey, 32 Gratt. 442.

But compare Clark v. Oliver, 91 Va. 421, 22 S. E. Rep. 175, where it is held, that a court of equity will not in the absence of statutory authority, entertain jurisdiction to enforce a purely legal demand. The right to charge the property specifically must be first acquired. In the course of the opinion the court cited Linn v. Carson, 32 Gratt. 170, and said that this case rested upon its own peculiar facts. The church discipline gave a "lien."

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court proceeded further to remove the trustees; and declared that it would upon the application of the proper authorities of the congregations aforesaid appoint new trustees in their stead. From these decrees the trustees applied to this court for appeals, which were allowed.

The cases were elaborately argued by Griswold, Patton and Robinson, for the appellants, and Morson, for the appellees.

DANIEL, J., delivered his opinion in the case of Brooke v. Shacklett, but it applies equally to both cases:

In the case of Gallego's ex'ors v. Attorney General, 3 Leigh 450, decided by this court in 1832, it was held that the courts of chancery in this state had no jurisdiction to enforce devises and bequests to religious societies or congregations. The court said, that as the statute of charitable uses, 43 Eliz. under which alone such vague bequests could be established, if ever in force in Virginia, had been repealed in 1792, in the general repeal of English statutes, charitable bequests were to be treated as standing on the same footing with other bequests. If definite, they were to be treated as trusts which courts of equity would execute by virtue of their ordinary jurisdiction; but if indefinite, they were no longer recognized by law, and could not be enforced: And a devise or bequest of property to or for the uses of a religious congregation was, it was said, of the character last mentioned. It was too uncertain as to the beneficiaries.

The reasoning of the court, it is
310 obvious, applies *with equal force to a conveyance of property to a religious congregation by deed.

I do not deem it at all necessary to enquire how far the decision in the case just cited may conform to the views of courts elsewhere in respect to this branch of the law, inasmuch as I am not aware that the authority of the case as a true exposition of the law in this state, has been ever seriously questioned. If, therefore, the law now stood as it did prior to the passage of certain acts whose provisions will be presently noticed, I should find no difficulty in holding that the bill of the appellee ought to have been dismissed as stating no case for the jurisdiction of a court of equity. For though there can be no reverter of the property in question to the grantor or his heirs, inasmuch as the deed purports to be founded on a valuable consideration, and contains a warranty warranting to the trustees and their successors, the property, against the claim of the grantors, their heirs, and all persons claiming by or under them; Yet the same indefiniteness as to the beneficiaries which defeated the bequest to the Roman Catholic congregation in Gallego's ex'ors v. Attorney General, is to be found in the deed here, and would present an insuperable difficulty in the way of the court's undertaking to control the trustees in the performance of their duties, at the instance of a beneficiary in the deed, whether he claimed a use in the property as a member of the Methodist Episcopal church, or as a member of the congregation of that church, worshiping at Salem church-house. It becomes necessary, therefore, to examine the acts of assembly just mentioned, and to enquire whether the trusts of the deed can be brought within the scope of their provisions.

The first of the acts to which I refer, is the act entitled an act concerning conveyances or devises of places of public worship, passed February 3d, 1842.
311 *This act in substance declares, that where any lot or parcel of land has been heretofore, or shall be hereafter, conveyed to one or more trustees for the use and benefit of any religious congregation as and for a place of public worship, the same and all improvements thereupon shall be held by such trustee or trustees, and their successors, for the purposes of the trust, and not otherwise; that where such conveyance or devise has been heretofore made to trustees, or where such conveyance or devise shall hereafter be made, whether by the intervention of trustees or not, the Circuit superior court of law and chancery for the county or corporation where the property is situate, shall, on application of the attorney for the commonwealth on behalf of the authorized authorities of any such religious congregation, have power and authority to appoint trustees originally where there were none, or to substitute others from time to time, in cases of death, removal from the county or corporation, or other inability to execute the trust beneficially and conveniently; and the legal title shall thereupon become exclusively vested in the whole number of the then trustees, and their successors. The act, after further providing that a majority of the acting trustees of any such congregation may sue and be sued in relation to the title, possession or enjoyment of such property, concludes with a proviso, that such trustees, for the use of a religious congregation, shall not hereafter take or hold at any one time any tract of land in the country, exceeding in quantity thirty acres, or in any incorporated town, exceeding two acres; and that such real property shall not be held by them for any other use than as a place of public worship, religious or other instruction, burial ground and residence of their minister. The next in order is the act of 1846-7, which gives to any one or more of the members of any religious congregation the right, in his or their
312 *names, on behalf of such congregation, to commence and prosecute a suit in equity against the trustees, to compel them to apply the property for the use or benefit of the congregation, as their duty shall require. In 1849 these acts were substantially re-enacted and are embodied in the Code, in the eighth, ninth, tenth, eleventh, twelfth and thirteenth sections of chapter 77. The only material changes made by these sections of the Code in the provisions of the acts of 1842 and 1846-7, are those to be found in the eighth and

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tenth sections; by the former of which, validity is given not only to every conveyance and devise, but also to every dedication of property for the uses aforesaid; and by the latter of which it is declared that when books or furniture shall be given or acquired for the benefit of such congregation, to be used on the said land in the ceremonies of public worship, or at the residence of their minister, the same shall stand vested in the trustees having the legal title to the land, to be held by them as the land is held, for the benefit of the congregation.

There is, I think, nothing in the language of these laws to show that the legislature designed to confer peculiar benefits on any particular religious sect or sects. And the manifestation of any such design would not only have been utterly at war with the whole spirit of our institutions, but in direct conflict with the letter of the constitution declaring that the legislature "shall not confer any peculiar privileges or advantages on any one sect or denomination." The terms of the acts are broad enough to embrace not only such congregations as may be independent of others, choosing their own pastors, and making the laws for their own government, but also such as may be united with other congregations under a common government, from which they may respectively receive the pastors that are to instruct them or the laws
313 that *are to regulate them, without having any voice either in the selection or appointment of the former, or in the framing or enactment of the latter. And such is, I think, the obvious design of the legislature. The benefits which these acts confer are intended for any and every religious congregation, without regard to the peculiarities of religious faith or the forms of church government. It is, however, equally obvious that the conveyances, devises and dedications to which the acts mean to give validity, are conveyances, devises and dedications of property for the use of the "religious congregations" therein mentioned, in the limited and local sense of the term, viz: for the members (of these religious congregations) as such, who, from their residence at or near the place of public worship, may be expected to use it for such purpose. This interpretation is to be drawn from the general tenor of the acts, but more especially from the language of those portions of them that stand in the Code as the eighth and tenth sections of the chapter before referred to. The dedications of real estate must be made for the use of the "religious congregation, as a place for public worship, or as a burial place, or a residence for a minister;" and that of the "books and furniture," "for the benefit of such congregation, to be used on the said land in the ceremonies of public worship, or at the residence of their minister;" uses, which it is plain, from their very nature and the connection in which they are mentioned, must belong peculiarly to the local society, "the religious congregation" at or near the locality of the property conveyed. No dedication of property to religious uses, which does not respect these rights of the local society or religious congregation, no deed which does not design such enjoyment of the uses of the property conveyed, by the local religious society or congregation, can be placed within the influence and protection of the statutes.

314 *The deed under consideration, in its first clause or declaration of trusts, provides that the trustees are to hold the property conveyed to them, and their successors forever, in trust that they shall build or cause to be built thereon a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church, at their general conferences in the United States of America; and in further trust and confidence that they shall at all times forever hereafter permit such ministers and preachers belonging to said church, as shall from time to time be duly authorized by the general conferences of the ministers and preachers of the said Methodist Episcopal church, or by the annual conferences authorized by the said general conference, to preach and expound God's holy word therein.

I am free to admit, that the first impression which this clause of the deed is calculated to make is that of a declaration of trust, not for the benefit of a local society, or congregation of Methodists worshiping or expected to worship at a particular place, but for the benefit of the "Methodist Episcopal church in the United States as an aggregate body or sect," to the exclusion of any peculiar rights of property in the land conveyed, in such local society or congregation. And if such is the true interpretation to be given the deed, it would plainly stand, for reasons already mentioned, out of the influence and operation of the statutes. Upon a fuller and more rigid examination of the deed, however, in which I have been much aided by the clear and forcible views presented by Chief Justice Marshall of Kentucky, in announcing the interpretation placed by the Supreme court of that state, on a deed identical in its features with the deed
315 under *consideration, (see Gibson v. Armstrong, 7 B. Monr. R. 481.) I have come to the conclusion that the deed is entitled to be regarded as substantially a conveyance of the property therein mentioned, to the uses of the local society. And that said property is thus placed within the pale of the statutes.

It is to be observed, as already stated, that the house or place of worship to be erected is to be for the use of the members of the Methodist Episcopal church, &c.; and as the members of the local society are necessarily members of the Methodist Episcopal church, in the sense in which the term is used in the deed, it follows that the land

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is conveyed for the benefit, to some extent at least, of the local society or congregation. It is to be noted further also, that except upon the happening of a certain contingency, the deed contemplates the perpetual use of the property as a place of worship. And it is obvious, from the nature of things, that the usual occupancy of the property, in attending upon the preaching and exhorations of their minister and in meeting for the observance of the various religious duties and exercises enjoined upon its members by the rules of the church, is one that can be enjoyed only by the local society; and that any use or occupancy of the house by other members of the church must be necessarily casual and infrequent; so much as not to interfere with the full use and enjoyment of it as a place of worship by the local members. Hence it is fairly inferrible that the former use and not the latter was mainly if not exclusively within the contemplation of the parties to the deed. This view is made still more apparent in the subsequent declaration of the trusts. The deed proceeds to provide further, that in case one or more of the trustees die or cease to be a member or members of the said church, the stationed minister or preacher who shall have the pastoral
316 charge of the *members of the said church, (meaning plainly the society,) is to call a meeting of the remaining trustees, who, upon his nomination, are to appoint one or more persons, who shall have been one year a member or members of said church, to fill such vacancy: showing that the minister provided for in the deed is to have charge of the members of the local society; who, consequently, are expected to attend upon and receive his religious instructions and ministrations; and who are thus necessarily the members that are, peculiarly, to enjoy the occupancy of the house as a place of worship. And in the next and last clause, in which, upon a certain contingency, provision is made for the sale of the property for the discharge of debts incurred by the trustees on account of the premises, the surplus arising from the sale, after paying the debts, is directed to be placed in the hands of the steward of the society attending divine service on the premises, and is to be disposed of by the next yearly conference, according to the best of their judgment, for the use of said society.

Does not this provision strongly persuade to the conclusion of a design that, in the event no sale of the property is ever required, or until it is required, the immediate control and peculiar use of the property is to be and remain with the local society, by the contribution of whose members, in the main, (as is stated in the bill and not denied in the answer,) the church-house was erected, and to whose use the surplus proceeds of the property, in the event of a sale, are to be appropriated?

"The primary object of the whole transaction, (in the language of Chief Justice Marshall in the case before cited,) must necessarily have been to provide and secure a place of worship according to the Methodist Episcopal discipline for the local society of that denomination, by and for
317 which contributions *were made, and which was expected to attend worship on the premises. The members of the Methodist Episcopal church at large, not belonging to the local society, can, in a general view, have no other use of the local premises but through the instrumentality of the local society, and by means of the subordination of the local use to the laws and authority of the church at large."

The provision that the trustees are at all times to permit the ministers and preachers belonging to the Methodist Episcopal church, who shall be duly authorized by the conferences of the church, to preach in the house to be erected, it is obvious, cannot in any degree detract from the character and effect of the deed as a dedication of property to the use and benefit of a religious congregation, in conformity with the statute. For the religious congregations, whose worship is not conducted under the lead and instruction of a minister, are comparatively few in number, and it is expressly provided in the statutes, as we have seen, that one of the uses to which the property dedicated may be applied, is, as "a residence for a minister." The only ground, therefore, on which it can be argued that this feature of the deed places it without the pale of the statute, is, that it sanctions the appointment of the ministers, and authorizes them to use the house for preaching, without any reference to the vote or wish of the congregation. It is true, that under the deed, and according to the rules and discipline therein referred to, the local societies have no voice in the selection of their ministers. But it does not follow that the deed therefore fails to fulfill any requirement of the statute, or is in any regard in conflict with its spirit. It could not have been unknown to the legislature that a large number of the religious congregations in the state are in such predicament; receiving their ministers from
318 bodies who are bound by no rule *of church government to consult the preferences of the local societies or congregations in appointing the pastors who are to have charge of them. To declare the deed objectionable and invalid because of the feature in question, would therefore be to impute to the legislature the design of making a most unjust and invidious discrimination against all the congregations just mentioned, and in favor of those who have the selection of their own pastors. Such an idea is wholly inadmissible. Upon the whole, therefore, though some of the provisions of the deed, upon a first inspection, did seem to me to look another way, I am satisfied that it does import a substantial dedication of the property therein mentioned to the uses of the local society, and that we cannot reject it, without adopting in respect to it, rules of construction favorable to the defeat rather than the upholding

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of such instruments: And I cannot see that we have the warrant of any sufficient reason for such a course.

The dangers to be apprehended from church establishments, and the evils likely to flow from allowing them to acquire property under such broad powers as were at one time claimed and exercised by the chancellor in England as representing the superintendency of the crown, as parens patriæ, over charities, might be very properly looked to and considered by a court engaged, as this court was, in the case of Gallego's ex'ors v. Attorney General, in enquiring whether it had been left free to exercise a jurisdiction, which when once admitted it had no power to limit by any well defined boundaries. The subject is however presented to our consideration under circumstances wholly different. The transfer and acquisition of property for religious purposes has been made the subject of a legislation in which the extent and the uses to which dedications of this character may be made, are precisely fixed and ascertained. The legislature has
319 declared *that permanency may be legally assured to the houses of worship, the pastoral residences, and the burial places of the various religious congregations of the country. They have given the form and sanction of law to the opinion that the good to the community likely to result from placing the title to such property on a firm and certain footing, and thus putting an end, as far as the law can, to the unseemly disorder that might otherwise arise from leaving it to the uncertain tenure by which it has been hitherto held, is of such character and weight as to overbalance any vague apprehension that the object may not be attained without furnishing occasion for ecclesiastical encroachments dangerous to the institutions of the state. This course of the legislature has been approved by the convention of 1850–51, and in the 32d section of the 4th article of our new constitution it is declared, that the general assembly may secure the title to church property to an extent to be limited by law; whilst an additional guard against the dangers adverted to is thrown around the subject by a provision that there shall not be any grants of charters of incorporation to any church or religious denomination.

In passing now, therefore, on such a deed as the one under consideration, no jealousy of the extension of ecclesiastical power can be properly allowed to exert an influence in the selection of the rules of interpretation to be applied. On the contrary, we should rather favor that interpretation of the instrument which, consistently with the rules of construction, will place it within the operation of the changed policy of our legislation.

The deed being valid, as we must, I think, hold it to be, all doubt as to the jurisdiction of the court is ended; and we have decided which of the two parties litigant are entitled to the use of the property which the deed conveys. There is no dis-
320 pute between *the parties about any matter of religious faith. The doctrines of the two parties are identical. Neither party denies that the ministers of the other are, in the doctrinal sense of the word, members of the Methodist Episcopal church. But it is most obvious that "simply holding the same faith, without submitting to the government and discipline of a church, cannot make or keep a man a member of that church. To constitute a member of any church, two points at least are essential, without meaning to say that others are not so, a profession of its faith and a submission to its government." Den v. Bolton, 7 Halst. R. 215.

The local society of which both of the parties litigant claim to be members, is not a separate and independent society or congregation making its own laws, but is one of a large number of local societies belonging (prior to a division of the church which will be presently noticed) to the Methodist Episcopal church in the United States. According to the plan of church government, annual conferences were composed of the traveling preachers within certain boundaries fixed by the general conference. The preachers were received into the church by the annual conferences, and distributed or assigned to their several charges by the bishops. The general conference was composed of one for every twenty-one members of each annual conference appointed either by seniority or choice at the discretion of each annual conference; Yet so that such representatives should have traveled at least a certain number of years. The general conference elected the bishops, and had "full powers to make rules and regulations for the church under certain specified limitations and restrictions." The members of the local societies had no right to be represented by delegates either in the annual conferences or in the general conference. They had no voice in making the rules for the government of the church; none
321 in the appointment or selection *of the preacher to whose charge they might be committed. If at any time before the division of the church a controversy had arisen among the members of the society at Salem church-house, in respect to the occupancy of the house—each party under the lead of a preacher claiming its exclusive use for purposes of worship—the dispute must have been determined by enquiring, not which of the two parties constituted a majority, or represented the wishes of a majority, of the members of the society, but which of the two preachers had been appointed and assigned to the society in accordance to the laws of the church; which of the two parties was acting in conformity with the discipline of the church, and submitting to its lawful government.

These views conduct us necessarily to the enquiry as to what effect the division of the church is to have on the control of the uses of the houses of worship by the local societies.

I do not deem it necessary to go into any

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statement of the causes which led to this division, which was effected under certain resolutions adopted by the general conference in 1844. The resolutions are preceded by a preamble setting forth that a declaration had been presented with the signatures of fifty-one delegates of the body from thirteen annual conferences in the slaveholding states, representing that for various reasons enumerated, the objects and purposes of the christian ministry and church organization could not be successfully accomplished by them under the jurisdiction of the general conference as then constituted; and that in the event of a separation, a contingency to which the declaration asked attention as not improbable, the conference esteemed it a duty to meet the emergency with christian kindness and the strictest equity.

The first resolution declares, that
322 should the delegates *from the annual conferences in the slaveholding states find it necessary to unite in a distinct ecclesiastical connection, the following rule shall be observed with regard to the northern boundary of such connection: All the societies, stations and conferences adhering to the church in the south by a vote of a majority of the members of said societies, stations and conferences, shall remain under the unmolested pastoral care of the southern church (and the ministers of the Methodist Episcopal church shall in no case attempt to organize churches or societies within the limits of the church south; nor shall they attempt to exercise any pastoral oversight therein, it being understood that the ministry of the south reciprocally observe the same rule in relation to stations, societies and conferences adhering by vote of a majority to the Methodist Episcopal church); provided also that this rule shall apply only to societies, stations and conferences bordering on the line of division, and not to interior charges, which shall in all cases be left to the care of that church within whose territory they are situated.

By the second resolution it is declared that ministers, local and traveling, of every grade and office in the Methodist Episcopal church may, as they prefer, remain in that church, or, without blame, attach themselves to the church south.

And by the ninth it is declared that all the property of the Methodist Episcopal church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal church, so far as this resolution can be of force in the premises.

In May of the following year (1845) dele-
gates, regularly appointed by the
323 several annual conferences of *the Methodist Episcopal church in the slaveholding states, met in Louisville, Kentucky, in a general convention, and adopted by a vote (of ninety-four to three) a resolution by which they declare the jurisdiction hitherto exercised over said annual conference by the general conference of the Methodist Episcopal church entirely dissolved; and that said annual conferences shall be and they hereby are constituted a separate ecclesiastical connection under the provisional plan of separation aforesaid, and based upon the discipline of the Methodist Episcopal church, comprehending the doctrines and entire moral, ecclesiastical and economical rules and regulations of said discipline, except only in so far as verbal alterations may be necessary to a distinct organization, and to be known by the style and title of the Methodist Episcopal church south.

If this division of the church was lawful, it is obvious, I think, that the members of the local societies in the southern organization of the church stand in the same relation to the general conference, the annual conferences, the bishops, pastors, rules and discipline of the Methodist Episcopal church south, that they occupied before the division, in respect to those of the Methodist Episcopal church. There has been no change of faith, no change of doctrine, no change of discipline, no change in the mode of administering it: All remain as before. By the express terms of the plan of separation, no blame is to be attached to the pastors in the south for adhering to the church south; and the members of the local societies are to remain under the unmolested care of the southern church, as they were before under that of the Methodist Episcopal church. And the southern church is to occupy the same relation to the church property in the south that the Methodist Episcopal church before occupied in respect to it. If the division has been lawfully effected,
why may not a controversy among the
324 local *members of a society in respect to the use of the church property be settled by a resort to the same mode of enquiry, (merely changing the name of the church,) that would have determined it before? Upon the hypothesis that the plan of separation is constitutional, the questions upon which such a controversy would now turn, would be, Which of the two parties is in regular connection with the Methodist Episcopal church south, recognizing its discipline, submitting to its government, and receiving its pastors? Those who can identify themselves with the party indicated in the enquiry, are entitled to the use of the property.

We have still to enquire, Whether the general conference of 1844 had the power to adopt the resolutions authorizing the division? If I had the largest freedom of time and space, I should not desire to pursue any very extended course of statement or of argument in considering this question. And I do not think that there is any necessity for my doing so. The question is one which has been deemed for some years past of such public concernment, of such vast importance in its bearing on the rights, interest and feeling of a large portion of the community, as to have been

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made the subject of the fullest examination. The zeal, ability and research of the most eminent men of the bar and of the church have been enlisted in its discussion. No fact or argument that could elucidate the subject remains to be stated or urged. Not only so, but the question has been decided by the Supreme court of Kentucky and by the Supreme court of the United States, upon such mature deliberation and with such unanimity, in each case, as to leave but little room for hesitating as to the propriety of regarding the question as settled. In each case the validity of the plan of separation was sustained. Smith v. Swormstedt, 16 How. U. S. R. 288; Gibson v. Armstrong, 7 B. Monr. R. 481.

325 *I deem it necessary to say but little more than that I concur in these decisions. I have not been able to perceive on what ground it is to be maintained that the general conference of 1844 was not invested with as full powers over the subject as any general conference that preceded it. The six restrictive articles adopted by the conference of 1808 and by succeeding conferences manifestly contain no limitation of power that can bear on the question. The ministers and preachers in whom resided the supreme power, had, when they assembled in 1784 to frame a government for the church, full power to place it under one or two or a still greater number of general organizations, if they had believed that the interests of the church would be thereby promoted. And I do not see how it can be said that the general conferences of 1792, 1796, 1800, 1804 and 1808, composed as they were of the body of the ministers and preachers, did not each have the same power. And when they determined at the last mentioned conference (1808) to meet no longer en masse, but thereafter, by a delegation from their own body, the provision, which they adopted, that the general conference should have full powers to make rules and regulations for the church, under the limitations and restrictions contained in the six restrictive articles just mentioned, amounted in substance to an authority to the delegates in conference thereafter to exercise all the powers (except those prohibited in said restrictive articles) that could at any time have been exercised by a full conference of all the ministers and preachers. No further limitation on the powers of the general conference having been subsequently made, it seems to me that the conference of 1844 was clothed with the power which it claimed and exercised.

The Baltimore conference sent no delegates to the Louisville convention, and

326 in 1846 adopted resolutions *declaring that they still regarded themselves a constituent part of the Methodist Episcopal church in the United States. By virtue of this action of said conference, the society at Salem church being within the limits of that conference, would have been left to stand in connection with the northern division of the church, as they stood before the division of the church; and the appellants, under the influence of the principles which I have endeavored to establish, would thus have been entitled, though a minority, to prevail in this controversy were it not for the provision in the first resolution of the plan of separation, by which the border societies have a right, by vote of a majority of its members, to choose to which jurisdictional division of the church they will belong. The members of Salem church, at a meeting which seems to have been fairly conducted, have determined, by a majority vote, to adhere to the church south.

A still further question, however, remains to be settled, viz: Whether this is a border society? The boundaries of the annual conferences have been from time to time fixed by the general conference, but no boundaries have been fixed for the societies, stations and circuits. In this state of things, it is obvious that in some cases it may be extremely difficult, if not impracticable, to carry out the plan of separation. It is next to impossible to lay down any general rule by which to define a border society. In some cases, however, as in the case of the Maysville Church, in 7 B. Monr. R. 481, and in the case of Clift Church, (which was argued with this,) the proximity of the houses of worship to a common boundary of two conferences was so close that no question seems to have arisen as to the claim of the societies to be regarded as border societies, in the meaning of the resolutions.

One of the witnesses expresses the belief that Salem society is not a border

327 society, and that a portion of *Warrenton circuit is interposed between it and the Rappahannock river, which is the common boundary of the Virginia and Baltimore conferences. But some five or six other witnesses express the belief that Salem is a border society, and that no portion of the country between the church and the river is attached to the Warrenton circuit. The weight of this testimony is in favor of the proposition that it is a border society; and upon a question of the kind the conduct of the parties interested, as showing how they have regarded the matter, is entitled to much weight. The minority, by going into a vote on the question, have treated it as one on which a vote might be properly taken; which would not be the case on any other hypothesis than that of the society's being a border society. And it seems to me, therefore, that this conduct of the parties, taken in connection with the other proofs in the cause, justifies us in treating this as a border society.

By the vote of a majority, the society has been placed, in the manner contemplated and allowed by the plan of separation, in jurisdictional connection with the ecclesiastical government of the Methodist Episcopal church south; which, by virtue of its organization under said plan, is now the lawful successor of the Methodist Episcopal church in respect to the disciplinary control and protection of the members of the church

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adhering to the southern division. And such members have now the same right to enjoy the church property which was held by their societies before the division, in exclusion of those who repudiate the authority of the Methodist Episcopal church south, and refuse to receive the pastors appointed by it, that they had, before the division and whilst in connection with the Methodist Episcopal church, to enjoy said property in exclusion of any who
328 might have refused *to submit to the discipline and to receive the preachers of said last mentioned church.

Such being the views which I have taken of the case, it seems to me that the decree of the Circuit court is erroneous, and ought to be reversed, and that the bill should be dismissed.

LEE and SAMUELS, Js., concurred in the results of the opinion of Daniel, J., but not in the views or reasoning.

ALLEN, P., and MONCURE, J., concurred in the opinion.

Decree reversed.

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329 *Tazewell's Ex'or v. Whittle's Adm'r.

April Term, 1856, Richmond.

1. **Chancery Practice—Answer—Statute of Limitations.***—Any thing in an answer which will apprise the plaintiff that the defendant relies on the statute of limitations is sufficient, if such facts are stated as are necessary to show that the statute is applicable.

2. **Same—Same—Same—Who May Plead.**†—In a bill by creditor of testator against executor and legatee, the latter relies upon the statute of limitations in his answer. This is sufficient to protect the estate from a decree against the executor.

3. **Same—Same—Same—Commissioner's Report.**‡—The plaintiff having stated in the bill that his debt was evidenced by deed, if it appears in the progress of the cause that it was by parol, the executor may set up the defense of the statute by exception to the commissioner's report.

4. **Debts of Decedent—Statute of Limitations—Statement of Debt Furnished Executor—Effect.**—That the creditor has furnished the executor, at his request, with a statement of his debt which the executor does not object to, will not remove the bar of the statute.

5. **Debts of Decedent—Barred—Effect of Acknowledgment of Executor.**§—To take a debt out of the statute the acknowledgment of an executor must be express. And *quære*, if there must not be an express promise to pay.

6. **Charge in Will for Payment of Debts—Effect upon Statute of Limitations.**‖—A charge in a will for payment of debts will not revive a debt barred by the statute at the death of the testator.

7. **Same—Same.**—If the creditor relies upon a charge in a will to prevent the operation of the statute, it is for him to show that the testator died before his debt was barred.

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*__Chancery Practice—Answer—Statute of Limitations.__—For the proposition that it must appear somewhere in the pleadings that the statute of limitations has been relied upon, the principal case is cited and approved in the following cases: Drumright v. Hite (Va.), 26 S. E. Rep. 583; Hubble v. Poff, 96 Va. 647, 37 S. E. Rep. 277; Smith v. Pattie, 81 Va. 665. See, in accord, Calvert v. Millstead, 5 Leigh 93; Gibson v. Green, 89 Va. 524, 16 S. E. Rep. 661; Hickman v. Stout, 2 Leigh 6; Smith v. Hutchinson, 78 Va. 683; Seborn v. Beckwith, 30 W. Va. 774, 5 S. E. Rep. 450; Hudson v. Hudson, 6 Leigh 352; Reynolds v. Lee, Va. Law J. 1881, 649; Dorr v. Rohr, 82 Va. 366; Switzer v. Moffsurger, 82 Va. 522; Herrington v. Harkins, 1 Rob. 599.

The bar of the statute may be objected in an action at law to a matter of set-off without formal plea. Trimyer v. Pollard, 5 Gratt. 460; Bell v. Crawford, 8 Gratt. 110.

In West Virginia it is held in accordance with the general American doctrine including the Supreme Court of the United States, that the defence of the statute of limitations can be taken advantage of by a demurrer to the bill. Jackson v. Hull, 21 W. Va. 601; Thompson v. Whitaker Ins. Co., 41 W. Va. 574, 23 S. E. Rep. 795; Van Winkle v. Blackford, 33 W. Va. 584, 11 S. E. Rep. 26; Paxton v. Paxton, 38 W. Va. 617, 18 S. E. Rep. 765; Whittaker v. South West Imp. Co., 34 W. Va. 217, 12 S. E. Rep. 507; Humphrey v. Spencer, 36 W. Va. 17, 18, 14 S. E. Rep. 412, 413; Seborn v. Beckwith, 30 W. Va. 774, 5 S. E. Rep. 450.

†__Same—Same—Same—Who May Plead.__—For the proposition that it is competent to any party interested in a fund to take advantage of the statute and this, notwithstanding the execution of the deceased party refused to do so, the principal case is cited and followed in the following cases: Woodyard v. Polsley, 14 W. Va. 221; McCartney v. Tyrer, 94 Va. 203, 26 S. E. Rep. 421; Smith v. Pattie, 81 Va. 666. See, in accord, McClaugherty v. Croft, 41 W. Va. 270, 27 S. E. Rep. 246; Werdenbaugh v. Reid, 20 W. Va. 588; Shipley v. Pew, 23 W. Va. 497.

‡__Same—Same—Same—Commissioner's Report.__—For the proposition that in chancery the bar of the statute may be set up by exception to the commissioner's report, the principal case is cited and followed in Woodyard v. Polsley, 14 W. Va. 221; Smith v. Pattie, 81 Va. 666; Johnston v. Wilson, 29 Gratt. 384. See, in accord, Jincey v. Winfield, 9 Gratt. 721; Leith v. Carter, 83 Va. 889, 5 S. E. Rep. 584; Ayer v. Burke, 82 Va. 338; Blair v. Carter, 78 Va. 621.

§__Debts of Decedent—Barred—Effect of Acknowledgment of Executor.__—In Abrahams v. Swann, 18 W. Va. 280, it is said: "The position taken by the counsel of the plaintiff in error is, that if the bar of the statute is sought to be removed by proof of a new promise in writing, such promise must be clear, explicit, unequivocal and determinate, and if any conditions are annexed, they must be proven to have been performed; and if an acknowledgment is relied upon to take a case out of the statute of limitations, it should be a direct acknowledgment of a subsisting debt from which an implied promise may be fairly inferred. These positions are sustained by the authorities referred to by the counsel of the plaintiff in error: Bell v. Morrison *et al.*, 1 Pet. 351; Moore v. President, etc., Bank of Columbia, 6 Peters 86; Bell v. Crawford, 8 Gratt. 110; *Tazewell v. White's Adm'r, 13 Gratt. 329;* Aylett's Ex'or v. Robinson, 9 Leigh 45."

‖__Charge in Will for Payment of Debt—Effect upon Statute of Limitations.__—See *foot-note* to Baylor v. Dejarnette, 13 Gratt. 152.

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8. Settlement of Decedent's Estate—Laches of Creditor.*—Though a creditor's debt is evidenced by deed, yet where there has been gross laches in its prosecution, and the account cannot be settled without injustice to the estate of the deceased debtor, a court of equity will not give the creditor relief.

In June 1825 Fortescue Whittle, as administrator of Conway Whittle deceased, filed his bill in the late Richmond chancery court against William Tazewell, surviving executor of Littleton Tazewell deceased, in which he stated, that on the 24th of March 1803 his intestate let by deed a tract
330 of land in the county of *James City called Piney Grove to Littleton Tazewell, to hold from that time until the end of the year 1810; for which Tazewell the lessee covenanted to pay him for the remaining part of the year 1803 one hundred and sixty-six dollars and sixty-six cents, and during the residue of the term an annual rent of three hundred and thirty-three dollars and thirty-three and one-third cents; and that the lessee took possession of the land and held it until the lease expired. That at the same time his intestate sold and delivered to Tazewell personal property consisting of horses, cattle, sheep, hogs, implements of husbandry and other articles, for which Tazewell covenanted to pay him one thousand two hundred and seventy-seven dollars and six cents. And that it was agreed that the lessee should retain four hundred dollars for the purpose of making certain improvements upon the farm. That the parties were relations and intimate friends, which induced Tazewell to expect and ask for time to comply with his contract; and the same consideration induced Conway Whittle to grant it; so that for rent at the death of the latter, there was due to him from Tazewell two thousand one hundred dollars, exclusive of interest. That on account of the amount due for the purchase of the property sold to Tazewell nothing was paid until 1810, when two payments were made which reduced the amount due on that account to three hundred and sixty-one dollars and seventy cents, with interest from the 8th of August 1810.

The bill, after stating the death of Littleton Tazewell, and his having left a will charging his real estate with the payment of his debts, and the qualification of his widow and William Tazewell as his personal representatives, sets out a correspondence between William Tazewell and Conway Whittle, and also a correspondence between said Tazewell and the plaintiff, in relation to this debt due from Littleton Tazewell to *Conway Whittle.
331 That he supposed that the debt was due by parol until after 1821, when he instituted an action at law to recover it; and when he learned for the first time, that the lease of the land and the sale of the property was by deed. That he therefore dismissed his action at law, being advised that he could not there find redress. That the deed had been lost, but that it was probably executed in duplicate, and if so, it was probable that one of the duplicates was among the papers of Littleton Tazewell.

The executor William Tazewell was called upon to answer the bill fully and particularly. And the prayer of the bill was for a settlement of the executor's accounts, and the payment of the amount due with interest: And if the personal estate was not sufficient for the purpose, that the real estate of Littleton Tazewell, which had been subjected by his will to the payment of his debts, might be sold for that purpose.

William Tazewell answered the bill. He objected to the jurisdiction of the court; and submitted, whether the court would enquire into the justness of a demand which had been standing upon an open account for about twenty years; and whether even should the statute of limitations not bar the claim, it might not be esteemed a stale account, especially as the same, if due at all, was due more than five years before the death of Littleton Tazewell. He admitted that the estate called Piney Grove in the county of James City, was rented by Conway Whittle to Littleton Tazewell; but at what time this was done, for what period, or on what terms, he did not know, and called for strict proof. He denied that Littleton Tazewell had ever consented for the sum of four hundred dollars to improve the Piney Grove estate to the extent that he did improve it. He said that the plantation had been unoccupied for many years; that the dwelling-house had been burned
332 down; only one *negro-house was standing, and that in so old and shattered a condition that it was not worth repairing; and the fencing entirely rotten or removed. Instead of this state of things, when the plantation was returned to Conway Whittle, beside other valuable improvements Littleton Tazewell had built on it at his cost, a good dwelling-house with two rooms on each floor and a brick chimney at each end, and a large well built barn, which together could not have been worth less than two thousand dollars.

He further stated that when he wrote the letters exhibited by the plaintiff he was acting as the agent of Mrs. Tazewell; that they supposed, as a claim had been made, that the plaintiff had some documents to sustain it; and on which if any thing was due, it was very inconsiderable, as Littleton Tazewell had been often heard to say, that on a settlement of accounts with Conway Whittle there would be little or nothing due on either side. That it was true he did request the plaintiff to furnish a state-

*Settlement of Decedent's Estate—Laches of Creditor.—For the proposition laid down in the last headnote of the principal case, that equity will not give relief where there has been gross laches in the prosecution of a suit, the principal case is cited and approved in Wilson v. Barclay, 22 Gratt. 542; Nelson v. Kownslar, 79 Va. 491, and cases cited. See also, Doggett v. Helm, 17 Gratt. 96, and *foot-note* where there is a collection of cases on the point. See also, Hill v. Bowyer, 18 Gratt. 364, and *foot-note*.

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ment of what appeared to be due by any documents in his hands; but that though a statement was furnished no proof of its accuracy or any documents accompanied it, or had ever been furnished.

He stated further that he knew nothing of the deed of lease. It had never been in his possession, nor did he believe that Mrs. Tazewell ever had it in her possession. And he called for proof that it ever existed, and of its contents and stipulations.

The plaintiff filed with his bill a letter from Littleton Tazewell to Conway Whittle, dated "Williamsburg, July 26th, 1809," in which he said, "I have experienced considerable uneasiness at not having been able to pay your claim against me for articles purchased at P. Grove. Until the last year I made scarcely any thing for market. By the end of this year I trust it will be
333 in my power to settle with you *without selling any other property, such excepted as can be spared conveniently. Mr. Tyler has talked of purchasing the plantation, in which case I shall have no difficulty in selling to him the stock, &c., on the place. Provided you can sell without a sacrifice, I think it will be advisable. Lands generally are not benefited by being leased; though that rule does not hold as relates to my lease."

The account of the personal property sold which was filed with the bill contained credits for two payments made, one for six hundred and fifty dollars made on the 30th of July 1810, and the other for the like sum made on the 8th of August of the same year.

The plaintiff also filed with his bill two letters of William Tazewell, one to Conway Whittle, dated the 24th of July 1816, in which he says, "You will oblige by forwarding a statement of your claim on the estate of L. Tazewell deceased to the executrix at Williamsburg." He expresses the opinion that the estate will be ample to pay all the debts, and concludes by saying, "All that is now asked of the creditors is that they will not compel a sacrifice of the property."

On this letter is an endorsement by Conway Whittle, stating that it had been answered on the 30th of July 1816, stating that he was about to start to the springs, and on his return would furnish the amount; and that he felt disposed to accommodate the executors with any reasonable time to enable them to make the most of the property.

The other letter was to Fortescue Whittle, and dated at Richmond, 30th November 1819. After acknowledging the receipt of a letter from Whittle, he says, that Mrs. Tazewell writes that she can find no documents establishing debits against your late brother, except mechanics' bills and receipts for improvements made at Piney Grove.
334 "She did not fail to *express her sensibility of the indulgence that had been extended to her by the representatives of your brother. You will oblige by furnishing a statement of what appears to be due from any documents in your hands."

It does not appear with certainty when Littleton Tazewell died; though William Tazewell states in a note addressed to the commissioner in May 1829, that he died in November 1815. His will was admitted to record on the 27th of November of that year, and by it he gave his executors power to sell his real estate for the payment of his debts.

On the 13th of January 1827 a decree was made in the cause directing the defendant William Tazewell to settle his administration account. At this time no evidence as to the deed of lease, or its terms, or of the property sold, had been filed. In the month of February several depositions were taken by the plaintiff. The only witness who proved the existence of the deed was Charles Z. Abrahams. He stated that there was a deed of lease which was executed, as he thought, in the month of May 1804. That he saw both Whittle and Tazewell execute it, and that himself and two others attested it. The last he saw of it, it was in the hands of Whittle. He was inclined to think the lease commenced in 1804; did not remember how long it was to continue; and that the rent reserved was about ninety pounds per annum.

The witness stated further that Tazewell was to be allowed for the buildings he put upon the plantation. That it was in a wretched condition, having little or no fencing around it, nor any building of any description except an old log house. That the witness did the carpenters' work of a dwelling-house on the place, and finished a dairy, for which he received from Littleton Tazewell and the executor one hundred and eighty-nine pounds, eight shillings
335 and one penny. This did *not include materials, or any other than the carpenters' work. He stated further that a smoke-house and a large barn were built on the place.

There were other witnesses, one of whom aided to build the barn, who thought that the lease commenced in 1803, and that the rent was one hundred pounds a year. It was very certain that it terminated with the end of the year 1809; and the only witness who spoke of the period of its existence fixed it at six years.

There was but one witness who spoke of the property purchased by Tazewell from Whittle. He stated that he was building a barn on the place. He thought Tazewell took possession in 1803; and he mentions a number of horses, oxen and implements of husbandry, which were received from Whittle by Tazewell; but according to his estimate of their value, they did not amount to one thousand dollars.

In April 1829 the commissioner issued a notice that he would proceed on the 25th of May to execute the order of the court directing the settlement of the executor's accounts; and in January 1834 he made his report, showing a balance in favor of the executor. This report, though certainly

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very defective, was not excepted to by the plaintiff until February 1846.

In 1842 the plaintiff amended his bill, and made William O. Goode, who had married the only child of Littleton Tazewell, a defendant, and he revived the suit against Edward S. Gay, executor of William Tazewell who had died previously.

Gay answered, disclaiming all knowledge of the plaintiff's claim, referring to the answer of his testator, and relying upon all the grounds of defense therein set up. Goode also answered in 1843, setting up the statute of limitations, if there was no deed, objecting that no sufficient excuse had been shown for the failure to produce it,
336 and no affidavit made that it *was lost; and also objecting that the court had no jurisdiction of the cause.

In February 1846 the plaintiff filed an affidavit that he had not been able to find the deed of lease among the papers of Conway Whittle; and did not know what had become of it. And in July following the cause came on to be heard, when the court made an order directing one of the commissioners of the court to take an account of the moneys due from Littleton Tazewell to Conway Whittle, under the contracts of lease and sale in the bill mentioned.

In January 1848 the commissioner made his report, in which he stated the amount due on the lease on the 31st of December 1809, at one thousand four hundred and seventy dollars and thirty cents of principal, and two hundred and six dollars and two cents of interest; and the amount due on the 8th of August 1810, for the property purchased, at the sum of four hundred and sixty-three dollars and thirty-two cents.

In 1852 the defendant Gay filed various exceptions to this report, and especially relied on the statute of limitations as a bar to so much of the claim as related to the purchase of property.

The report of the executor's account, made in the case of Saunders v. Tazewell's ex'or, was by consent filed in this case. That report had been twice recommitted, and there were numerous exceptions to it. It stated an amount due from the executor William Tazewell sufficient to pay the debts in both cases, if all the exceptions of the defendant were overruled.

In February 1853 the cause came on to be finally heard with the case of Saunders' ex'or v. Tazewell's ex'or, when the court overruled all the defendant's exceptions to the report of the plaintiff's debt, and having had a special statement made showing the amount of the debt due to be, on
337 the 1st of January *1853, seven thousand and sixty-five dollars and fifty-five cents, made a decree in favor of the plaintiff for that amount, with interest on one thousand nine hundred and thirty-five dollars and sixty-two cents, from the 1st of January preceding till paid; to be paid by the defendant Gay out of the assets of his testator in his hands to be administered. From this decree Gay applied to this court for an appeal, which was allowed.

There were a number of questions in the cause elaborately argued, which, as they are not involved in the decision of this court, will not be noticed further.

Grattan, for the appellant:

The claim of the plaintiff as stated in his bill arises from two sources, though both were stated to be embraced by the same deed. Let us first consider the claim arising out of the sale of property. This sale according to the bill was made in 1803, and was evidenced by deed, and amounted to one thousand two hundred and seventy-seven dollars and six cents.

Now it is very clear that none of the witnesses who have been examined in the cause, and that no paper filed, gives the slightest ground even to suppose that this sale was evidenced by deed. Abrahams who is the only witness who speaks of the deed, not only does not speak of it as embracing the sale of the property, but says that he knew nothing about the sale. Then is not this branch of the plaintiff's claim barred by the statute of limitations.

It is said that the statute of limitations is no defense unless it is pleaded; and further that the precise time which will bar must be stated in the plea. And the cases of Hickman v. Stout, 2 Leigh 6, and Hudson v. Hudson, 6 Munf. 352, are cited. The latter of these cases is relied on for the
338 last branch of this proposition; *and if the case is really an authority for it, then it stands alone in its requirements. Aylett v. Robinson, 9 Leigh 45; Harpending v. The Dutch Church, 16 Peters' R. 455, 486. Although the bill charges that the sale was by deed, yet the answer of William Tazewell refers to the statute; the answer of Goode who married the only daughter and principal devisee and legatee of Littleton Tazewell, sets it up; and the defendant Gay in his exceptions to the commissioner's report expressly relies upon it. Now although it is a general rule that the statute must be pleaded, yet where from the mode of proceeding this cannot be done, it may be relied on without plea. Thus in Shewen v. Vanderhorst, 4 Cond. Eng. Ch. R. 458, it was held that any party interested might set up the statute against a creditor in the master's office. So in Purcell v. Wilson, 4 Gratt. 16, an action of ejectment, the defendant was permitted to rely on the statute upon the trial in order to limit the recovery of mesne profits, as he had no opportunity to plead it. In Trimyer v. Pollard, 5 Gratt. 460, and Bell v. Crawford, 8 Gratt. 110, a plaintiff was held entitled to rely upon the statute on the trial, to defeat a set off; and in Jincey v. Winfield, 9 Gratt. 708, a party was allowed to set it up by exception to the report of a commissioner.

If, then, the statute of limitations has been properly relied on, the question is, Does it apply? According to the plaintiff's pretensions, the debt was due in 1803, and this suit was instituted in 1825. Unless, therefore, the plaintiff can show something which will take the case out of the opera-

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tion of the statute, it must bar his recovery. But there is nothing in the record which can have that effect. Even if the letter of Littleton Tazewell of July 26th, 1809, or the two letters of William Tazewell in 1816 and 1819, were acknowledgments of the debt sufficient to remove the bar of
339 *the statute, still the suit was not brought within five years from the date of the latest of these letters. But the letters of William Tazewell are wholly insufficient for that purpose. They, in fact, admit no debt; and certainly not this claim on account of property sold to Littleton Tazewell. It does not appear that he knew that there had been such a purchase. Whatever may have been the case formerly, certainly at the present day these letters are wholly inoperative to take the case out of the statute. On this point the court is referred, without comment, to the cases of Bell v. Morrison, 1 Peters' R. 351, 360-1-2; Butcher v. Hixton, 4 Leigh 519; Farmers Bank v. Clarke, Id. 603; Aylett v. Robinson, 9 Leigh 45; Sutton v. Burrus, Id. 381; Bell v. Crawford, 8 Gratt. 110, 116-17-20.

But further. If these letters were sufficient in the case of a debtor to revive his own debt, they are not sufficient in the case of an executor to revive the debt of his testator. In such a case there must be an express acknowledgment of the debt, and as it would seem, an express promise to pay. Braxton v. Harrison, 11 Gratt. 30, 56, 57; Tullock v. Dunn, 21 Eng. C. L. R. 478. Indeed, although an executor may revive a debt by his acknowledgment made before the debt is barred by the statute, yet after a debt is barred it is not competent for an executor to revive it by any acknowledgment. Braxton v. Harrison, supra; Thompson v. Peter, 12 Wheat. R. 565.

The only other ground which can be resorted to for the removal of the bar of the statute is the charge for the payment of debts in the will of Littleton Tazewell. It does not appear when he died, though William Tazewell states that he died in November 1815. If this shall be considered as evidence, then it is apparent that even admitting that the letter of Littleton Tazewell of July 1809, is a sufficient acknowledgment of the debt, yet that was
340 more than five years before *his death, and the debt was therefore barred when he died. But if the statement of William Tazewell is not evidence, then the burden being upon the plaintiff to remove the bar of the statute, he has failed to show that Littleton Tazewell died and the charge in his will took effect before the debt was barred.

Then will a charge in a will revive a debt barred by the statute? At one time this seems to have been supposed to be the law. Roane, J., in Lewis v. Bacon, 3 Hen. & Munf. 89; and that judge seems to have supposed that it extended even to personal estate. As to the latter point, it certainly is not the law here now. Braxton v. Woods, 4 Gratt. 25. And indeed the general question is now settled in the negative too firmly to admit of any further discussion of it. Burke v. Jones, 2 Ves. & Beame 275; Hargreaves v. Michel, 6 Madd. 326; Fergus v. Gore, 1 Sch. & Lef. 107; Roosevelt v. Mark, 6 John. Ch. R. 266, 293.

The second ground of the plaintiff's claim is the lease. This was by deed, and therefore the statute of limitations does not apply to it. The question, however, still arises, whether, under all the circumstances of the case, a court of equity will give the plaintiff a decree?

The counsel then went into an examination of the facts to show that there had been gross neglect on the part of the plaintiff, and that the account could not now be taken without doing great injustice to the estate of Littleton Tazewell. He referred to Carr v. Chapman, 5 Leigh 164; Hayes v. Goode, 7 Id. 452; Page v. Booth, 1 Rob. R. 161; West v. Thornton, 7 Gratt. 177; Smith v. Thompson, Id. 112; Hillis v. Hamilton, 10 Id. 300; Crawford v. Patterson, 11 Id. 364.

Stanard, for the appellee:

The counsel for the appellant has correctly stated that the claim of the
341 plaintiff arises from two sources; *one the lease of the land, and the other the sale of the property. And in the first place, let us consider the questions connected with the sale of the property.

The letter of Littleton Tazewell, written in July 1809, is conclusive to prove a sale of property by Conway Whittle to Tazewell, and that the purchase money of that property was still due at the date of that letter. There are moreover witnesses who prove the property sold, which may well be supposed to have been sold for the sum stated in the plaintiff's bill. But if there was doubt upon this point, there can be none on the proposition that the defendant, if he relies upon the credits stated in the account filed by the plaintiff with his bill, must take that account altogether; and therefore if the defendant is to be credited for the payment of one thousand and three hundred dollars in 1810, he must be charged with the sum of one thousand two hundred and seventy-seven dollars and six cents in 1803. Robertson v. Archer, 5 Rand. 319.

But the principal reliance of the defendant as to this part of the plaintiff's claim is the statute of limitations. To entitle a party to the benefit of this defense, he must plead it or rely upon it in some form in his pleadings, and the time prescribed by the statute should be particularly pleaded or relied on. Hudson v. Hudson, 6 Munf. 352; Hickman v. Stout, 2 Leigh 6. Then the first question is, whether the statute has been sufficiently pleaded; and that question is clearly settled in the negative by a reference to the defendant's answer.

It is insisted on the other side that the defendant was entitled to set up the defense of the statute by an exception to the commissioner's report, and that such an exception had been taken to the report in this

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case. The report in this case was made in 1848, and during the whole time that the case was before the commissioner,
342 *it does not appear that the defendant attended him, and certainly no such objection was taken before him; and in fact it was not taken in court until 1852. Now if this defense of the statute may be set up in this mode, it must be done before the commissioner, so that the plaintiff may have an opportunity to repel it by proof.

But if the objection of the statute is properly taken, then the next question is, Does it constitute a bar? We have the letter of Littleton Tazewell in July 1809 admitting the debt, and we have the payments made by him and credited in the account as late as August 1810. And we have the death of Littleton Tazewell and his will admitted to probat in November 1815 creating a trust for the payment of debts.

In considering the question whether the trust of the will for the payment of debts will repel the bar of the statute in this case, we should look to the law as it was then understood and expounded; and clearly at the time of the death of Littleton Tazewell the trust of his will would have repelled the bar of the statute to the extent of the trust subject, though the debt was barred at his death. Lewis v. Bacon, 3 Hen. & Munf. 89. Judge Roane went even further, and held that the debt was revived to the fullest extent. It is true that such is not now the doctrine of the courts; Burke v. Jones, 2 Ves. & Beame 275; but the question is, what was the law of Virginia in 1815, not what it is now.

But take the doctrine as stated in Burke v. Jones, supra, as the law of this case. We show that in August 1810 our debt was admitted to be due by Littleton Tazewell, and that he then made a payment upon it; and we show his will admitted to probat in November 1815, creating a trust which it is conceded prevents the running of the statute against all debts not then barred.

Having done this, we have made
343 *out our case, and it is for the other side to show that the debt was barred at the time. The party pleading the statute must bring himself within it.

If the debt has not been revived by the will, has it not been revived by the acts of the executor. It is said by the counsel for the appellant that an executor cannot revive a debt barred by the statute. In this, however, he is mistaken. Baxter v. Penniman, 8 Mass. R. 134; Emerson v. Thompson, 16 Mass. R. 429; Northcutt v. Wilkinson, 12 B. Monr. R. 408. An admission by an executor will take a case out of the statute, when such an admission made by the debtor would have that effect. There is some difference in the English cases where there is more than one executor, and the admission is by one. But in this case the executors were acting together. Both the letters of William Tazewell show that he was acting for both, and the last was written after an examination of the papers of their testator with reference to the plaintiff's claim. This letter, too, was answered, and the account asked for furnished, as admitted by William Tazewell's answer; and that was never objected to until this suit was commenced. None even of the modern cases would reject this evidence as an admission of the debt sufficient to revive it. Ault v. Goodrich, 3 Cond. Eng. Ch. R. 740; Smith v. Poole, 35 Eng. Ch. R. 16; Townes v. Birchett, 12 Leigh 173.

The counsel then went into an examination of the facts of the case, and endeavored to maintain that it was not a case in which the court would refuse relief. He referred to Baker v. Morris, 10 Leigh 284.

MONCURE, J. The debt for which the decree in this case was rendered consists of two parts; first, a balance claimed to be due for personal property sold by Conway Whittle to Littleton Tazewell in March 1803; and secondly, a balance claimed
344 to be due for *rent of a tract of land called Piney Grove, leased by said Whittle to said Tazewell from that time until the end of 1809.

First: As to the balance claimed on account of the sale of personal property. This debt was due by parol contract. The original cause of action accrued in 1803 or 1804. The suit was brought in 1825. It is of course barred by the statute of limitations; if the appellant had a right to avail himself of that defense, and if the debt has not been taken out of the operation of the statute.

It is objected that the appellant had no right to avail himself of the statute; not having relied on the same by plea or answer. It is certainly true, as a general rule, that this defense must be made by plea or answer: and the rule applies as well to a court of equity as a court of law. If this case comes under the rule, I think the defense was sufficiently made by answer. The same strictness of pleading is not required in equity as at law. It is not common to plead the statute specially or formally in equity; but only to rely upon it, in general terms, in the answer. The only reason for requiring the defense to be made by plea or answer is that the plaintiff may have an opportunity, if he can, to take the case out of the operation of the statute. Anything in an answer which will apprise the plaintiff that the defendant relies on the statute will be sufficient, if such facts be averred as are necessary to show that the statute is applicable. In this case the executor of Littleton Tazewell in his answer submits to the court, "Whether, even should the statute of limitations not bar the claim, it may not be esteemed a stale account, especially as the same, if due at all, was so more than five years before the death of the testator." This plainly shows that if the statute should be a bar to the claim, the respondent intended to rely upon it. And the facts necessary
345 *to sustain the defense are here set forth. In this respect the case differs from that of Hudsons v. Hudson's adm'r, 6

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Munf. 352. It is certainly an informal mode of pleading the statute: but proceeded no doubt from the fact that the plaintiff had alleged the debt to be due by specialty; to which of course the statute would not have applied. Again: the defendant Goode expressly and formally relies on the statute in his answer; and as he, in right of his deceased wife, is sole residuary legatee of Littleton Tazewell, his defense enures to the benefit of the executor. In Shewen v. Vanderhorst, 4 Cond. Eng. Ch. R. 458, a creditor applied, under the common decree in an administration suit, to prove a debt which was barred by lapse of time; and the executors refusing to interfere, the plaintiff a residuary legatee, insisted on setting up the objection of the statute: Held, that it was competent for the plaintiff or any other party interested in the fund to take advantage of the statute, notwithstanding the refusal of the executors. In this case the executor, instead of refusing, manifested his intention to rely on the statute if it should be applicable.

But I do not think this case comes under the general rule. The plaintiff averred in his bill that the debt was due by specialty; which was alleged to be lost. It afterwards appeared that the debt was not due by specialty, but by simple contract: or at least that was the presumption from the absence of any proof on the subject. Until then, it did not appear that the statute afforded a bar to the claim. The proper mode of making the defense, therefore, was by exception to the commissioner's report of the claim; which exception was accordingly taken.

The appellant then had a right to avail himself of the statute; and the next question is, Whether the debt has been taken out of its operation? The counsel for the appellee contended that it has; 1st,
346 by the *will, which charges the whole estate of the testator with the payment of his debts; and 2dly, by a new promise or acknowledgment, made by the personal representatives or one of them, within five years before the institution of the suit.

As to the charge created by the will. It raises no trust in regard to the personal estate; and is merely inoperative, so far as that is concerned. It cannot therefore prevent the statute from being a bar to a suit brought to obtain payment of a debt out of the personal estate. Jones v. Scott, 4 Cond. Eng. Ch. R. 413; S. C. 4 Clarke & Fin. 382; Brown's adm'r v. Griffiths, 6 Munf. 450; Braxton v. Wood's adm'r, 4 Gratt. 25. But the charge creates a trust in regard to the real estate. Formerly it was supposed that such a trust embraced all debts of the testator, whether barred or not by the statute at the time of his death. But since the decision of Burke v. Jones, 2 Ves. & Beame 275, it has been considered to be well settled that a debt barred at the time of the testator's death, is not revived by such a charge, in regard to real any more than personal estate. The able judgment of Sir Thomas Plumer in that case, as Ch. Kent has said, is well founded upon principle and upon the authorities, and puts an end to the question. Roosevelt v. Mark, 6 John. Ch. R. 266. See the principles stated and the cases collected on this subject in 1 Rob. Pr. new ed. p. 566-571. "The doctrine, then, (in the language of that writer,) is narrowed down to this, that where there is a devise of real estate for the payment of debts, there is, as to the proceeds of such real estate, a trust created (according to Lord Redesdale's opinion) for those creditors whose debts, at the testator's death, were not barred by the statute; and after that event the statute does not so run as to affect the claim of those creditors upon these proceeds." It is unnecessary to deter-
347 mine the construction and effect *of the provision on this subject in the Code, p. 592, ¶ 9, as it does not apply to this case.

In Lewis' ex'or v. Bacon's legatee, 3 Hen. & Munf. 89, it was held that a debt barred at the time of the testator's death was, to some extent, revived by such a trust. But that case was decided in 1808, before the decision of Burke v. Jones, and ought not to be considered as settling the law of this state in opposition to the sound doctrine of the latter case. It was decided by three judges, who differed among themselves and made a compromise decree; and was decided at a period when the statute was almost entirely frittered away by the course of adjudication here and elsewhere. A striking illustration of this is afforded in the opinion of Judge Roane, who says, "It has been established, (and if it has not it ought to be,) that an advertisement by a debtor notifying all those who have any just debts owing to them, that they may apply at such a place and get payment, is such an acknowledgment as will bring a debt out of the statute." Id. 109. He was for considering the debt revived as to the personal as well as the real estate.

Then was the debt barred by the statute at the time of the testator's death? There is nothing in the record to show the precise period of his death; except the statement made by his executor and returned with Commissioner Green's report, from which it appears that he died in November 1815; in which month also his will was admitted to probat. Regarding that as the period of his death, the debt in question was barred, in any view which can be taken as to the time when the cause of action accrued; whether it was in March 1804, when it is said the debt first became due, or July 26, 1809, the date of his letter to C. Whittle, or August 8, 1810, the date of the last credit given on account of the debt. But it was contended (and perhaps properly) that
348 there is no sufficient evidence of *the period of his death, or that it happened within five years after the cause of action accrued. Concede this, and still it does not help the objection to the bar of the statute. The appellant relies on the statute; which is certainly a bar, unless

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the claimant can show something which will take the case out of its operation. The burden of doing this devolves on the latter. He seeks to do it by producing the will. But that is not enough; as the will was admitted to probat more than five years after the cause of action accrued. He ought further to have proved, if he could, that the testator died within five years after the cause of action accrued. This he has not done, and therefore he has failed to repel the bar of the statute by means of the will.

As to any new promise or acknowledgment by the personal representatives, or either of them. The debt, as we have seen, was barred at the time of the testator's death; and if the counsel for the appellant was right in maintaining that a personal representative cannot revive such a debt, then there is an end of the question. But without expressing any opinion upon that point, and conceding, so far as this case is concerned, that such a debt may be revived by a personal representative, let us enquire whether this debt has been so revived.

The letters of W. Tazewell of the 24th of July 1816, and 30th of November 1819, are plainly insufficient, according to all the recent authorities, to revive the debt. Even if they were sufficient; more than five years elapsed between the date of the last, and the institution of the suit; so that the debt was then again barred, unless in the mean time revived by some other promise or acknowledgment. The only evidence of any such promise or acknowledgment is the fact admitted in the answer of W. Tazewell; that, in compliance with the re-
349 quest contained in his letter of *the 30th of November 1819, Whittle would furnish a statement of what appeared to be due from any documents in his hands, "a statement was furnished, but no proof of its accuracy or any documents accompanied it, and none have been furnished to this day." This fact, whether taken by itself, or in connection with the letters, cannot amount to such a promise or acknowledgment as will take the debt out of the statute. The only authority relied on to give it that effect, is Townes v. Birchett, 12 Leigh 173; decided by two judges in a court of three, and of course not a binding authority. The majority, Judges Tucker and Cabell, were of opinion that the rule, that "an account current rendered by one party to another, received and held without complaint or objection, shall be deemed a stated account," is not confined to accounts rendered by merchant to merchant of mutual dealings between them as merchants. The third judge, Allen, was of opinion that the rule is so confined. Whether it be so or not, it cannot apply to this case; in which an account current is not rendered by one party to another, of transactions of which they are both cognizant; but in which an account is rendered against the estate of a decedent to his personal representative, wholly ignorant of the nature or amount of the debt. A promise by the executor to pay the debt cannot be inferred from his receiving and holding the account without objection; and more especially, if the debt be barred by the statute. If an executor can revive a debt so barred, he can only do it by an express promise; or, at least, by such an express acknowledgment as plainly implies a promise to pay the debt. Indeed, in Tullock v. Dunn, 21 Eng. C. L. R. 478, Chief Justice Abbott said, "As against an executor, an acknowledgment merely is not sufficient; there must be an express promise." See also 1 Rob. Pr. new ed. 575. But even if the statement ren-
350 dered *could be considered as an account stated, and sufficient to revive the debt, it does not appear that it was rendered within five years before the institution of the suit. In every view of the case, therefore, the claim which arose from the sale of personal property, is barred by the statute.

Secondly: As to the claim for rent. The complainant alleged in his bill that the land was leased by deed on the 24th of March 1803, to be held from that time until the end of 1810, at the rent of one hundred and sixty-six dollars and sixty-six and two-thirds cents for the remaining part of 1803, and three hundred and thirty-three dollars and thirty-three and one-third cents per year for the residue of the term; that it was agreed that the lessee should retain four hundred dollars for the purpose of making certain improvements on the land; and that the deed contained a covenant for the payment of the rent, but, by some accident or misfortune unknown to the complainant, had been lost: And he claimed the whole amount of the rent, subject only to a credit for the four hundred dollars. W. Tazewell in his answer admitted that the land was rented of C. Whittle by L. Tazewell; but at what time, for what period, or on what terms, he did not know, and called for the strictest proof. He denied "that L. Tazewell ever consented, for the sum of four hundred dollars, to improve the Piney Grove estate to the extent which he did improve it. For the plantation had been unoccupied for many years; the dwelling-house had been burnt down; only one negro-house was standing, and that in so old and shattered a condition that it was not worth repairing, and the fencing entirely rotten or removed. Instead of this state of things when the plantation was returned to C. Whittle, besides other valuable improvements, L. Tazewell had built on it at his cost, a good dwelling-house with two rooms on the floor, and a brick chimney at each
351 *end, and a large well built barn, which together could not have been worth less than two thousand dollars." He denied all knowledge of the deed of lease, and demanded proof that it ever existed, and of its contents. The evidence shows that a deed of lease was executed, but does not show what were its contents. It shows that the annual rent was probably one hundred pounds, though Abrahams, the witness mainly relied on to sustain the

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claim, thinks the rent was ninety pounds. It further shows that the lease probably commenced in 1803, though Abrahams thinks it was in 1804; and that it determined at the end of 1809 instead of 1810, as alleged in the bill. There is no evidence of the loss of the lease, or of any search having been made for it. Abrahams, who proves its execution, thinks he last saw it in possession of C. Whittle, and advised L. Tazewell to take a copy; but does not know whether he did or not. There is no evidence that L. Tazewell agreed to make the improvements for four hundred dollars. On the contrary, Abrahams proves that the plantation was in a wretched condition, having little or no fencing around it, nor any building upon it except an old log house; that during the term he built a dwelling-house and smoke-house, and completed a dairy, and other workmen built a very substantial barn; and that under the agreement between C. Whittle and L. Tazewell, the cost of building all the said houses was to be deducted from the rent. His bill alone amounted to six hundred and ninety-six dollars and thirty-five cents; and included no charge for materials. It does not appear what was the cost of materials, nor what the cost of the barn and other improvements made upon the land. There is reason, however, for believing that the whole cost of improvements made by L. Tazewell under the agreement was equal, or nearly so, to the whole amount of the rent, and that at the termination of the
352 lease he owed little *or nothing on account of rent. That this was the opinion of the parties, or at least of L. Tazewell, is manifest from the tenor of his letter to C. Whittle of July 26, 1809, in which he says, "I have experienced considerable uneasiness at not having been able to pay your claim against me for articles purchased at Piney Grove," excuses himself for not having done so, and expresses a hope that he would be able to do so by the end of the year; but makes no allusion whatever to any debt on account of rent. Is it credible that he would not have made such an allusion if he had owed all the rents (except four hundred dollars for improvements) according to the pretension set up in this suit; or even if he had owed any material part of them? He lived six years after the date of that letter, and C. Whittle survived him; and yet it does not appear, and is not pretended, that he ever admitted his liability, or that application was ever made to him for anything, on account of rent. Nor was any account for rent ever rendered to him or his representatives until after W. Tazewell's letter of November 30th, 1819. If C. Whittle intended to make any claim on account of rent, the circumstances required him to make it promptly, and to prosecute it with diligence. Instead of doing so, no claim was asserted during the lives of the parties, nor until 1819, nor any suit brought until 1821; when, it seems, a suit at law was brought, which was pending two or three years and then dismissed; the executor of C. Whittle having then, for the first time, discovered that the debt was not due by parol, as he had supposed, but by a specialty which had been lost. In 1825 this suit was brought in equity. In 1827 an order was made for the settlement of the account of L. Tazewell's executor. Afterwards, in the same year, for the first time, depositions were taken to sustain the claim. In 1829 the order of account was placed in
353 the hands of a commissioner, *whose report was not made until 1834; after which nothing further was done until 1841, when leave was obtained to file an amended bill, which was accordingly filed, but more than a year thereafter. In 1846 an order was, for the first time, made, to take an account of what was due from the estate of L. Tazewell to the estate of C. Whittle; and it was not until 1853 that the decree was made from which this appeal was taken. It would be difficult to excuse such gross laches in such a case. The excuse assigned for it is wholly inadequate for the purpose. A just account cannot now be settled. The proper parties to make the settlement are not in esse, but have long been in their graves. Their representatives know little or nothing about the facts; and even the original representatives of the alleged debtor have long since passed from the stage. There may or may not be something due. It is matter of conjecture merely; and the most probable conjecture is that nothing is due. I think we must so conclude; and, at all events, that no relief can now be given on account of the claim for rent.

For the foregoing reasons, I am of opinion that the decree ought to be reversed, and the bill dismissed with costs.

The other judges concurred in the opinion of Moncure, J.

Decree reversed.

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354 *Tazewell's Ex'or v. Saunders' Ex'or & al.

April Term, 1856, Richmond.

1. **Prosecution of Claim—Laches.***—Laches in the assertion or prosecution of a claim is not always enough to defeat it. The laches must be such as

*Prosecution of Claim—Laches.—For the proposition that *laches* in the prosecution of a claim is not always sufficient to defeat it, but that the laches must be such as to afford a reasonable presumption of the satisfaction or the abandonment of the claim, the principal case is cited and approved in the following cases: Tunstall v. Withers, 86 Va. 900, 11 S. E. Rep. 565; Armentrout v. Shafer, 89 Va. 569, 16 S. E. Rep. 726.

In Terry v. Fontaine, 83 Va. 455, 2 S. E. Rep. 743, the rule is approved, but the court held in that case that the bill should be dismissed for laches. See, on the subject of laches, *foot-note* to Hill v. Bowyer, 18 Gratt. 864, where there is a collection of the authorities and a collection of all the cases to which *foot-notes* on the subject have been written.

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to afford a reasonable presumption of the satisfaction or abandonment of the claim; or such as to prevent a proper defense by reason of the death of parties, loss of evidence or otherwise.

2. **Chancery Practice—Interest beyond Penalty of Bond.***—Courts of equity will decree interest upon a bond or judgment beyond the penalty, against the principal debtor.

3. **Appellate Practice—Omission of Credit by Commissioner—Correction of.**—A commissioner having by mistake omitted a credit in ascertaining the amount due upon a bond, the appellate court will correct the decree in this respect, and affirm it with costs.

On the 20th of July 1795 Littleton Tazewell executed to John Bracken and Robert Saunders, executors of James Carter deceased, a bond in the penalty of one thousand two hundred and fifty-three pounds six shillings and seven and a half pence, with condition to pay one-half of that sum on the 1st day of the next January, with interest from the date. Upon this bond there was a credit of two hundred and fifty pounds, under date of October 24th, 1796.

Littleton Tazewell died in 1815; and by his will, which was duly admitted to probat, he authorized his executors to sell any part of his estate real or personal for the payment of his debts; and he directed that his estate should be kept together for the support of his widow and only child until the latter should marry. Mrs. Tazewell and Dr. William Tazewell qualified as executors of the will.

In September 1817 Bracken and Saunders recovered a judgment by default upon the bond aforesaid, against Mrs. Tazewell as executrix of her husband. In April 1818 this judgment was enjoined by Mrs.
355 Tazewell *and Dr. Tazewell; and it was not dissolved until August 1836. In the meantime Mrs. Tazewell died, and an order was made in the injunction cause, requiring Dr. Tazewell to consent to the revival of the judgment against him as executor; and this was done in April 1832. In August 1836 the injunction was dissolved, but without damages, and with costs to the plaintiff, which were directed to be credited on the judgment; the court being of opinion that the plaintiff was entitled to come into equity against a judgment for the purchase money for land, to a part of which he could not otherwise obtain title. The only part of this injunction cause which is in the present case is the final decree. From that it appears that the land on which the judgment enjoined had been obtained, was given upon the purchase of a tract of land called "Secretaries," the title to a part of which had not been made when the injunction was obtained, but was perfected by a conveyance decreed in the cause. And the final decree directed that the land should be conveyed to the surviving husband and heirs at law of Sarah Tazewell, the only child of Littleton Tazewell; and further, that if the judgment was not satisfied within three months after the date of the decree, the land called Secretaries should be sold to satisfy the judgment.

In January 1837 an execution was issued on the judgment, which had been revived against Dr. Tazewell as the executor, and was returned "no effects." In October 1842 Robert Saunders, executor of Robert Saunders deceased, and administrator de bonis non with the will annexed of James Carter, instituted this suit in the Superior court of chancery for the Richmond circuit, for the purpose of obtaining satisfaction of the said judgment out of the estate of Littleton Tazewell deceased. He made Edward S. Gay, executor of William Tazewell deceased, and William O. Goode, in his
356 *own right and as executor of Mrs. Tazewell, defendants. The accounts of the executors of Littleton Tazewell were referred to a commissioner; and his report was twice recommitted. One of the questions of controversy before the commissioner was, as to which of the executors was to be charged with the personal estate of their testator. The executor of Dr. Tazewell insisted, as Dr. Tazewell had insisted in his lifetime, that he had not acted as executor in the time of Mrs. Tazewell; whilst the commissioner held that he was the sole acting executor; and therefore charged him with the whole estate, except a very small portion of it. There were other questions also, and several exceptions to the report of Dr. Tazewell's executor. These questions were, however, only important, with reference to the preceding case of Whittle v. Tazewell; as there was no question that Dr. Tazewell had acted as executor after the death of Mrs. Tazewell, and as such had sold the real estate, the proceeds of which in his hands were more than sufficient to pay the debt of Saunders.

The cause came on to be finally heard on the 1st day of February 1853, with the case of Whittle's adm'r v. Tazewell's ex'or, when the court, adopting a special statement which made the assets of the estate of Littleton Tazewell in the hands of Dr. Tazewell to amount to fourteen thousand four hundred and fifty-three dollars and fifty-five cents, which was more than sufficient to pay both debts, rendered a decree in favor of the plaintiff Saunders for the sum of five thousand two hundred and ninety-two dollars and twenty-five cents, with interest at five per cent. per annum on the principal sum due him, from January 1st, 1850; to be paid by the executor of Dr. Tazewell out of the assets in his hands, that being the amount of the sum mentioned in the condition of the bond on which the judgment had been recovered, with in-

*Chancery Practice—Interest beyond Penalty of Bond.—The proposition laid down in the principal case that courts of equity will decree interest upon a bond or judgment, beyond the penalty, against the principal debtor, was approved in Perry v. Horn, 22 W. Va. 385, citing the principal case, and the doctrine extended to the surety also. The principal case is cited in Stuart v. Hurt, 88 Va. 345, 13 S. E. Rep. 438. See generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

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357 terest from its date, *subject to the credit for two hundred and fifty pounds, paid in October 1796. The amount of the decree exceeded the whole penalty of the bond; and there was an omission to credit the amount of the costs in the injunction suit, as directed by the decree in that case. From this decree Tazewell's executor applied to this court for an appeal, which was allowed.

Grattan, for the appellant, commented on the facts of the case, and insisted that the laches of the plaintiff below forbade the interference of a court of equity in his behalf; and that on that ground the bill should have been dismissed. He then proceeded:

But if the bill is not to be dismissed, then the question arises as to the amount of the plaintiff's recovery. The decree in the cause is for more than the whole penalty of the bond; and that although two hundred and fifty pounds had been paid upon it in October 1796. We insist that, except under special circumstances, a court of equity cannot decree beyond the penalty of a bond, or the amount of the judgment. In an early case in Virginia it was held that a debtor might discharge a judgment by paying the penalty and the costs. Downman v. Downman, 1 Wash. 26. We know that at law interest beyond the penalty of a bond can only be recovered by the verdict of a jury giving the excess of interest in the shape of damages. By the act of 1804, 1 Rev. Code, p. 208, § 58, the court is put in the place of a jury; but that is only in those cases, where the court could before give interest up to the decree; and by the act it may give it to the time of payment. Deanes v. Scriba, 2 Call 415; Snickers v. Dorsey, 2 Munf. 505. And this act was not applicable to judgments. Mercer v. Beale, 4 Leigh 189.

But although interest beyond the penalty of a bond was allowed at law to be recovered in the shape of damages for the detention of the debt, the courts of

358 *equity of England have by a long course of decisions refused to follow the common law courts, and have limited the recovery to the amount of the penalty, unless the creditor had been delayed by the improper conduct of the debtor in the recovery of his debt. Nor have they limited the doctrine to cases where the debt was due by bond alone. Thus it will be seen that in cases of judgments the same rule has been followed. Denny v. Ld. Enniskillen, 12 Cond. Eng. Ch. R. 609; Gaunt v. Taylor. 9 Id. 47; Tunstall v. Trappes, 5 Id. 123, 129-30; Booth v. Leycester, 15 Id. 247; Deschamp v. Vanneck, 2 Ves. jr. R. 716. So in the case of annuities. Creuze v. Hunter, 2 Ves. jr. R. 157; Mackworth v. Thomas, 5 Id. 329; Crosse v. Beddingfield, 35 Eng. Ch. R. 31; Anderson v. Dwyer, 1 Sch. & Lef. 301. Among the many cases in which the rule has been applied to bonds, are Tew v. Earl of Winterton, 3 Bro. C. C. 489; Clarke v. Seton, 6 Ves. R. 411; Hughes v. Wynne, 6 Cond. Eng. Ch. R. 477. There are cases, it is true, in which interest has been allowed beyond the penalty in England; but they are cases which come within the exception before stated; as Grant v. Grant, 5 Cond. Eng. Ch. R. 144; or the debt and not the bond has been secured by a mortgage, and satisfaction has been sought out of the mortgage subject; as Clarke v. Ld. Abingdon, 17 Ves. R. 106. In Virginia, interest beyond the penalty was allowed in Beall v. Silver, 2 Rand. 401; a case of gross fraud; and in Baker v. Morris, 10 Leigh 284. This last case was decided by but two judges in a court of three, and is therefore not an authority. The question, too, was obviously not considered, and was decided upon the authority of the case of Tennants v. Gray, 5 Munf. 494, a case at law, without adverting to the difference in the rules prevailing at law and in equity.

It is true that President Pendleton said in an early case that it was natural

359 justice that a man who had *the money of another should pay interest upon it. Whether that observation be correct or not as a moral proposition we need not stop to enquire. It is equally true that it is the business of courts to enforce the contracts of parties as made by them, and not to change them according to their own notions of natural justice. And certainly, however just it may be to pay interest on money, there are cases in which the law does not authorize it. Thus no interest is allowed on an unliquidated account, on estimated hires of slaves, and, until a late day, on rents. McConico v. Curzen, 2 Call 358; Waggoner v. Gray's adm'rs, 2 Hen. & Munf. 603; Baird v. Bland, 5 Munf. 492; Shields v. Anderson, 3 Leigh 729; Kyle v. Roberts, 6 Id. 495.

The question then is, Has the creditor been delayed by the improper conduct of his debtor? He was certainly not delayed by his debtor until the judgment was recovered in 1817, near twenty-two years after the bond became payable. The injunction obtained in 1818 was properly obtained, as is proved by the decree dissolving it. And indeed that decree shows that the title to the land for which the bond was given was not perfected until 1836, when the injunction was dissolved. It is true the execution issued in 1837 was returned No effects; but the assets in the hands of the executor were equitable assets; and there were other suits pending by other parties, claiming to be creditors, all of whom were equally entitled to their share of these assets. This suit was not commenced until 1842, when Dr. Tazewell was dead; and this record abundantly proves that his executor resorted to no improper means to delay the cause; but only made such a defense as justice to his testator's estate required and demanded.

Stanard, for the appellee, referred to the facts of the case to show that the

360 plaintiff below was not subject *to the imputation of laches in the prosecution of his claim.

On the question as to the extent of the

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plaintiff's recovery, he said: All the cases cited on the other side are cases in which the party comes in to enforce a bond, and are not cases of judgments: and a distinction has been taken between the two classes of cases. This distinction is stated by Mr. Leigh in Baker v. Morris, 10 Leigh 284, and it is in strict accordance with McClure v. Dunkin, 1 East's R. 436, and Tennants v. Gray, 5 Munf. 494. According to this last case, a party is entitled to recover interest beyond the penalty in the shape of damages, in a court of law. And here, when we are forced into equity to recover, the court of equity is in the place of the jury. We know that prior to the act of 1804, 1 Rev. Code, p. 208, § 88, the court could only give interest up to the decree; but that act authorized the interest to be continued up to the time of payment. And in Beall v. Silver, 2 Rand. 401, which was a suit in equity to enforce a judgment which did not carry interest, the court gave it.

But if this is to be treated as a case upon a bond, this court cannot refuse to give interest beyond the penalty without overruling Baker v. Morris, 10 Leigh 284. In that case the question was elaborately argued by the counsel, and two of the judges affirmed the decree of Judge Parker, who had decided the cause in the court below, but was then a member of the court. And Judge Stanard was for reversing the decree and dismissing the bill on the ground that the plaintiff was not entitled to any relief; and expressed no opinion on the question as to the interest beyond the penalty. The case then had the concurrence of three of the judges of the court; and no judge dissented on this point.

But if this court should be of opinion
361 that Baker v. *Morris is not an authoritative decision of this question, still it is a decision to be respected; and that especially as it is in accordance with other decisions. Smeedes v. Hooghtaling, 3 Caines' R. 48; Tennants v. Gray, 5 Munf. 484. Nor is the case of Hughes v. Wynne, 6 Cond. Eng. Ch. R. 477, inconsistent with the decision in Baker v. Morris, though there is a dictum of Sir John Leach in that case, which may be against it. In Clarke v. Lord Abingdon, 17 Ves. R. 106, there was a bond and mortgage, and Sir William Grant said, the creditor had two securities. If he sued on the bond he was limited to the penalty; but that the mortgage did not secure the bond but the debt. Upon the principle of that case we are entitled to the interest under the trust of the will of Littleton Tazewell, which directs his whole property to be sold if necessary for the payment of debts.

But further. All the cases hold that if the creditor is hindered in the recovery of his debt, he is entitled to interest beyond the penalty. Mr. Leigh in Baker v. Morris specifies the case of an injunction as one which entitles the creditor to the recovery. And here he was delayed by an injunction from 1818 to 1836. And although it appears there was some difficulty about the title to the land for which the bond was given, it does not appear that the difficulty was occasioned by either Carter or his executors.

Again. In 1836 the injunction was dissolved, and in 1837 an execution was issued on the judgment, when the interest was less than the penalty of the bond. What excuse was there at that time for the failure to pay? In Bodily v. Bellamy, 2 Burr. R. 1094, the penalty of the bond having been more than the principal and interest due, when the debtor delayed the recovery improperly he was compelled to pay all the interest. There is in fact no distinction between this case and that of Beall v.
362 Silver, 2 Rand. 401. In *that case interest was allowed because of a fraudulent conveyance. Here the executor improperly refuses to pay, though he had ample assets in his hands.

In Jones' ex'or v. Williams, 2 Call 102, Judge Pendleton says, "It is natural justice that he who has the use of another's money, should pay interest upon it." This is the sense and spirit of our legislation, as well as of our judicial decisions. To effect this object, courts of law allow the interest to be given in the shape of damages; and it will be an anomaly indeed, if courts of equity which, to effect justice, relieved the debtor from the penalty which he incurred by failing to pay according to his contract, should hesitate to compel him to do justice even after courts of law have set them the example.

MONCURE, J. The first question presenting itself for consideration in this case is, Whether Saunders' executor is entitled to any relief at all against Littleton Tazewell's estate? That a claim for which the cause of action accrued in 1796, against a debtor who died in 1815, leaving apparently an ample estate for the payment of his debts, has not yet been prosecuted to a recovery, would seem to impute great laches to those whose interest or duty it was to prosecute the claim. But laches in the assertion or prosecution of a claim is not always enough to defeat it. The laches must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim; or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise. In this case it cannot be said that the claim has been satisfied or abandoned. The debtor died within twenty years after the cause of action accrued, and before any presumption of payment had arisen from lapse of time. The debt was due by specialty, to which no act of limitations then applied. The
363 debtor by his will created *a trust of his real estate for the payment of his debts, which as to the trust subject, would keep alive a debt against which no presumption of payment or act of limitations had then run. In less than two years after his death, to wit, in September 1817, a judgment at law was recovered against his executrix for the debt. Very soon there-

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after, to wit, in April 1818, the judgment was enjoined. The executrix having died thereafter, (but at what time does not appear,) the judgment was in 1832 revived against the surviving executor, by his counsel, though it seems in pursuance of an order made in the injunction suit. In August 1836 the injunction was dissolved. Robert Saunders, one of the original obligees in the bond and sole plaintiff in the revived judgment, having died, it appears to have been again revived in the name of his executor. In January 1837 an execution was sued out on the last revived judgment, and returned "No effects found." In October 1842 this suit was brought in equity for a discovery and account of assets and satisfaction out of the same. There has been no unnecessary delay in the prosecution of the suit. The only delay since the death of the debtor which can justly be imputed to the creditor, or tend to raise a presumption against the claim, is that of five or six years between the return of the execution and the institution of this suit. That delay, though not well accounted for, is wholly insufficient to repel the force of the other circumstances; which conclusively show that the claim has been neither satisfied nor abandoned, but that it was promptly asserted after the debtor's death, and has at different times since been thrice recognized and established by a court of law, and once by a court of equity. Nor can it be said that the debtor or his personal representatives have been prevented from making a proper defense by any laches of the creditor or his representative. The
364 only difficulty which exists on *that subject has resulted from the neglect of duty of the debtor's representatives. That difficulty is, not in ascertaining what is due on account of the debt, or whether there were assets enough for its payment, but in ascertaining what part of these assets came to the hands of the representatives respectively, and what disposition has been made of them. It was their duty to have returned a full inventory of the estate, to have settled just and regular accounts, and thus to have furnished record evidence of the amount of assets, and the disposition made of them. They were early warned of the existence of this claim, and it was their duty to have provided for its payment. These plain duties they neglected, and the consequence of their neglect must not fall on the creditor; who, I therefore think, is entitled to relief against his debtor's estate.

The next question is, What is the measure of that relief? Does it extend to the whole principal and interest claimed, or is it limited by the amount of the penalty of the bond?

In Lord Lonsdale v. Church, 2 T. R. 388, Buller, J., after reviewing the authorities, expressed a decided opinion that in an action on a bond, damages may be recovered for the excess of principal and interest over the penalty of the bond; though the case went off without an adjudication of the question. Afterwards, however, in Knight v. Maclean, 3 Bro. C. C. 496, which came on to be argued before the same judge sitting for the lord chancellor, he sustained an exception to a master's report not allowing interest beyond the penalty of a bond. "There may be cases (he said) that say the interest shall only be to the amount of the penalty; but they are very old cases, and were determined in conformity to the rule of law. But it is now held otherwise even there." "Then, if it be so at law, where is the equity to prevent it being so here? Will a court of equity narrow
365 the remedy of creditors whom *in general it favors more than a court at law does?" This decision of Judge Buller, notwithstanding the strong reasons with which it was enforced, was reversed on reargument before the lord chancellor, Thurlow; who, about the same time, decided Tew v. Winterton, Id. 489, in the same way. And in Wild v. Clarkeson, 6 T. R. 303, Lord Lonsdale v. Church, supra, was denied by the Court of king's bench. Without reviewing all the cases, (which are numerous,) it must be admitted to be now settled in England, as a general rule, that no more than the penalty of a bond can be recovered, either at law or in equity. See 1 Saund. Rep. 58, (b,) and the cases cited in the notes, and also in the note to Hellen v. Ardley, 14 Eng. C. L. R. 186. But many exceptions have been established to the rule. As in McClure v. Durkin, 1 East's R. 436, in which it was held that in an action on a judgment it was competent to the jury to allow interest to the amount of what was due, although it exceeded the penalty of the bond on which the action was brought. So if the party be by injunction prevented from recovering his debt at law while the demand was under the penalty. Show. P. C. 15, 6 Ves. R. 79. So interest will be given beyond the penalty of a bond upon a mortgage for the same debt, though by a surety. Clarke v. Ld. Abingdon, 17 Ves. R. 106; or upon a promissory note bearing interest and given for the same debt. So if an obligor goes into a court of equity for relief as plaintiff, although he submits to nothing, yet by the mere circumstance of filing the bill, he would be taken to submit to every thing conscience and justice require. Pultaney v. Warren, 6 Ves. R. 73, 92. See the note to Hellen v. Ardley, supra.

This case might perhaps, if it were necessary, be brought within one or more of the foregoing exceptions. It might be contended that it comes within the exception established by McClure v. Dunkin, of
366 a *suit upon a judgment; or that established by Show. P. C. 15, and 6 Ves. R. 79, of a party prevented by injunction from recovering his debt at law while the demand was under the penalty. It was argued that the injunction was properly awarded; and though dissolved, yet it was without damages, and with costs to the plaintiff in the injunction; and therefore that the creditor, and not the debtor, is responsible for the consequences of the in-

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junction. A copy of the decree of dissolution is the only part of the record in the injunction case that is before us; from which it appears that there were two causes of litigation in the case, one of which was decided in favor of the plaintiffs, and the other in favor of the defendants; but it does not appear which was the principal cause.

But I do not think it necessary to maintain that this case comes within any exception to the general rule, as now settled in England. I think no such general rule exists here; and that the decided preponderance of the American cases, so far as I have seen, is against its existence, and in favor of the doctrine as laid down by Buller. Many of those cases are cited in Perkins' note to Tew v. Winterton, 3 Bro. C. C. 489. In one of them, Mower v. Kip, 6 Paige's R. 88, the chancellor, after laying down the limitation under which a surety may be liable beyond the penalty, says, "Such a limitation of liability, however, is not applicable to the principal debtor in a money bond. As to him, the amount secured by the condition of the bond is the real debt which he is, both legally and equitably, bound to pay; and if he neglects to pay the money when it becomes due, there is no rule of justice or of common sense which should excuse him from the payment of the whole amount of the principal and interest, whether it be more or less than the formal penalty of the bond." "The general current of the American cases (he says) is in favor of allowing
367 *interest by way of damages beyond the penalty; and in many cases this principle has been extended to the case of a surety." In this state, Tennants v. Gray, 5 Munf. 494, is admitted to be an express authority in favor of the right at law to recover interest beyond the penalty in the shape of damages. That was a unanimous decision of the court, and it is believed has ever since been regarded as having settled the law of this state; which is an answer to the objection that it stands as a solitary case. If solitary, it is because it has never been questioned. But it has been incidentally recognized by this court in several cases; and never has, I believe, been questioned in any case. In Roane's adm'r v. Drummond's adm'r, 6 Rand. 182, the principle was applied to a judgment for a penal sum. In Baker v. Morris' adm'r, 10 Leigh 284, (in which there was very great delay in the assertion of the claim,) full interest was given by a court of equity, though, with the principal, it exceeded the penalty of the bond. It was said, in the argument of this case, that that was a decision of two judges in a court of three, and therefore not a binding authority. The third judge, as was properly answered in the argument, expressed no opinion on this question, but dissented on another ground. And Judge Parker, who was then on this bench, had decided the case in the court below. It therefore comes up as nearly as possible to a binding authority. But admitting the doctrine at law to be settled by Tennant's ex'or v. Gray, as I think it certainly is, the same doctrine in equity results as a necessary consequence. The doctrine at law and in equity has, I think, run on all fours in England. Or perhaps it would be more proper to say that the doctrine in equity was built upon the doctrine at law. The difficulty arose at law, where the penalty was considered the debt. There would otherwise have been no difficulty in equity, which generally
368 regards *substance and not form. But in this instance it at length determined to follow the law, and consider the penalty as the ultimatum of the debt. Knight v. Maclean, supra; Mackworth v. Thomas, 5 Ves. R. 329; Clarke v. Seton, 6 Id. 411. It is like the case of a judgment; on which, in England, interest is not generally recoverable, either in an action at law or suit in equity; but may be recovered in the former under certain circumstances in the shape of damages, and will be given in the latter under the same circumstances. Equity in this respect follows the law. Gaunt v. Taylor, 9 Cond. Eng. Ch. R. 47.

In this state, interest is generally recoverable on a judgment, both at law and in equity. Beall v. Silver, 2 Rand. 401; Roane's adm'r v. Drummond's adm'rs, 6 Id. 182; Clarke's adm'r v. Day, 2 Leigh 172; Mercer's adm'r v. Beale, 4 Id. 189; Laidley v. Menifield, 7 Id. 346. But if the judgment does not carry interest on its face, it can only be recovered by action or suit upon the judgment. It is not part of the judgment, and of course cannot be recovered by execution thereon, nor does the lien of the judgment extend to it. Mercer's adm'r v. Beale, supra; Michaux's adm'r v. Brown, 10 Gratt. 612; Mower v. Kip, 6 Paige's R. 88. I think, therefore, the true doctrine with us is, that full interest on a bond, or judgment for a penalty, is generally recoverable at law or in equity, though the principal and interest exceed the penalty. The only difference between the two forums being, that according to the strict rules of law the penalty must still be regarded in form as the debt, and the excess of interest can only be recovered indirectly in the shape of damages; while equity takes no notice of the penalty, but gives a direct decree for the principal and running interest, as in other cases. Full interest should always be given, though there be a penalty, and the principal and interest exceed it, wherever full interest would be
369 *given if there were no penalty. In other words, the penalty should have no effect on the question of interest, except in regard to the form of recovering the excess in an action at law upon the bond. What I have said on this subject has reference only to the case of a principal debtor. I express no opinion in regard to the liability of a surety beyond the penalty, it being unnecessary to do so. I think this doctrine is more reasonable than the English, and more consistent with our course of business, the uniform tendency of our adjudications,

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and the spirit of our legislation. The penalty of the bond, in its origin, was intended for the benefit of the obligee, and became the debt due to him when the condition was broken. It never was intended for the benefit of the obligor and to limit his liability in case of his long continued default. Courts of equity, at an early period, interposed for his relief, by compelling the obligee to receive the principal and interest in discharge of the penalty. And courts of law have long since been authorized by statute to give the same equitable relief. The penal part of the obligation has thus lost its function, and become an unmeaning form. Why should an effect be now given to it, which was never intended by the contracting parties; and which converts what was designed as a penalty on the obligor for his default into a penalty on the obligee for his indulgence? In England even, ascertained debts bear interest only in particular cases. Here they bear interest generally. According to our notion, it is "natural justice that he who has the use of another's money should pay interest." Pendleton, P., in Jones' ex'or v. Williams, 2 Call 106. In England, as we have seen, interest will not generally be given on judgments; while in this state it will. A debtor who is restrained by attachment from paying the debt will generally be compelled, in this state, to pay interest on the money while in his hands, "because the
370 *owner of the debt has a right to the interest; because money is worth its interest, and if the holder does not think so, he has always the privilege of bringing the money into court." 2 Rob. Pr. 206, and cases cited. Other cases might be cited to show the general inclination of our courts in favor of the allowance of interest. As to the spirit of our legislation on the subject. At an early period running interest was made recoverable, first, in actions at law upon contracts, 1 Rev. Code 1819, p. 508, § 80; and then in suits in equity. Id. 208, § 58. It was a general rule formerly that interest was not recoverable on rent in arrear; but it has since been directed to be allowed by statute. Acts 1826–7, p. 26, ch. 27, § 3. By the Code, p. 673, § 14, the jury is authorized to allow interest even in an action founded in tort. And it is provided, that "if a verdict be rendered hereafter which does not allow interest, the sum thereby found shall bear interest from its date," and judgment shall be entered accordingly. I am therefore of opinion that the relief to which the creditor is entitled in this case is not limited by the penalty of the bond, but extends to the whole principal and interest of the judgment, subject only to the proper credits.

The remaining question is, Against whom ought the decree to be rendered? The debtor charged his whole estate for the payment of his debts; and it was ample for that purpose. The great controversy in the case has been as to what has become of the estate, and what portions thereof are properly chargeable to the personal representatives respectively. On the one hand, it was contended that W. Tazewell was the sole acting executor, and is chargeable with all the estate not affirmatively appearing to have come to the hands of Mrs. Tazewell the executrix. On the other, it was contended that she, during her life, was the sole acting representative; that W. Tazewell qualified only to
371 *unite in the sale and conveyance of the real estate, which he was advised required the co-operation of both executors; that he only acted during her life as her agent, and that, not in her character of executrix only, but chiefly in her character of devise and legatee entitled with her daughter to the possession and use of the whole estate, and that he is chargeable only with such portion of the estate as appeared to have come to his hands as executor. The difficulty of determining this controversy is apparent from the fact that three several reports were made by the commissioner under three several decrees of the court; the commissioner on each occasion being satisfied, and making his report on the basis, that W. Tazewell was the sole acting executor, while the court, not being satisfied on the subject, twice recommitted the report with the exceptions to the commissioner to be re-examined and restated by him. And at last the court, not being able to settle the whole controversy to its satisfaction, but being of opinion that assets properly applicable to the claims of the plaintiffs in this case and that of Whittle's administrator, which came on for hearing with it, and sufficient to discharge both of the said claims, did come to the hands of W. Tazewell as executor, decreed that the appellant, executor of W. Tazewell, out of the assets of his testator in his hands to be administered, should pay both of the said claims and the costs of the claimants respectively. The court did not pass upon the report and exceptions further than was necessary to make the said decree. If it were necessary for this court to decide all the questions raised by those exceptions, it would be difficult if not impossible to do so. But I think it is not. If there were any doubt as to the sufficiency of the assets which came to the hands of W. Tazewell to satisfy both of the aforesaid claims, there can be none as to their sufficiency to
372 satisfy the claim of Saunders' *executor, which alone will remain to be paid if the bill of Whittle's administrator be (according to my opinion in that case) dismissed. Without saying any thing of the personalty, the proceeds of the real estate alone, sold by W. Tazewell as executor, on or before the 1st of January 1832, are much more than sufficient to satisfy that claim; and that too, after deducting one hundred and eighty-nine dollars and twenty cents with interest on one hundred and fifty-five dollars and twelve cents from December 31, 1831, appearing to be due to said executor on his own account settled before commissioner Green in the case of Whittle's administrator. That certainly is

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the most favorable view which can be taken of the case for the said executor. He cannot therefore be prejudiced by the decree, and cannot complain of it. He cannot complain that the court did not decide questions of difficulty raised by his own default, when it certainly appears that there is in his hands a fund properly applicable to the payment of the decree, and sufficient for the purpose. Full power was given him by the will to sell the whole or any part of the testator's estate, real or personal, for the payment of his debts. The real estate was sold by him for that purpose in 1831 or 1832, and he or his representative yet holds the proceeds, or is liable for them. It may be said that the other creditors are entitled to participate with the claimant in this case in the application of these proceeds, which are equitable assets. No other creditors have claimed since the testator's death in 1815, more than forty years ago; and it is now too late for them to come in, if there be any. It may be said that the personal estate is first applicable, and should be accounted for and applied, before the proceeds of the real estate are applied to the payment of debts. The decree is not in rem against the proceeds of the real estate, but against the executor personally, who
373 is, *beyond all question, liable to a personal decree in respect to the real if not the personal estate; and it matters not which, in this case. It cannot devolve on the creditor to continue an already long protracted and expensive litigation, merely for the purpose of ascertaining the order in which a fund is liable to the payment of his claim, to which the whole fund is certainly liable. It is enough that this decree will leave that question open and untouched; to be raised and litigated by any person who may have a right, or choose to do so. I think, therefore, the Circuit court did not err in rendering a decree in favor of Saunders' ex'or against W. Tazewell's ex'or. But there is a small error in the amount of the decree. The claim was subject to a credit for fifty-three dollars and forty-eight cents, the costs recovered by L. Tazewell's representatives in the injunction suit. Commissioner Poitiaux, in his statement of the claim, added instead of subtracting the amount of this credit. Afterwards, Commissioner Davis, in making a special statement of the claim on which the decree was founded, deducted the same amount from the balance reported due by Commissioner Poitiaux; thus leaving the matter where it stood at first, without any credit for these costs. The error must now be corrected, by deducting fifty-three dollars and forty-eight cents from the amount of the decree; which can be amended in this respect, under the provisions of chap. 181 of the Code, p. 680.

Besides a decree against W. Tazewell's executor, Saunders' executor was entitled to a decree against C. Tazewell's administrator, payable out of her assets in his hands. He probably did not take such a decree, because he was satisfied there were no such assets, which appears to be the fact, from the answer of the said administrator. At all events, Saunders' executor does not complain of the decree of the Circuit court in this respect; and as it is interlocutory, he may still
374 *apply to that court for a further decree against the said administrator. It is therefore unnecessary for this court to render such a decree.

Before concluding my opinion, it may be proper to notice an objection taken in the argument, that no account had been given of the sale of the tract of land called "Secretaries," decreed to be sold for the satisfaction of the claim of Saunders' executor, by the decree which dissolved the injunction. That objection was raised for the first time in this court; which would probably be a sufficient answer to it. But a better answer is, that the decree unconditionally dissolved the injunction, and left the creditor free to enforce his judgment at law. The decree for the sale of "Secretaries" was collateral; and if any thing ever arose from it which could benefit the representatives of L. Tazewell, it was for them to show it.

I am therefore of opinion that the decree ought to be amended as aforesaid; and as amended, ought (so far as it applies to this case) to be affirmed with costs.

The other judges concurred in the opinion of Moncure, J.

Decree amended and affirmed.

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375 *Richmond and York River R. R. Co. v. Wicker.

April Term, 1856, Richmond.

1. **Dissolution of Injunction—Appeal—When Allowed.**—An appeal may be taken from an order made in vacation, overruling a motion to dissolve an injunction, when the principals of the cause are thereby adjudicated.
2. **Statute—Case at Bar.***—The act, Code, ch. 56, § 4, p. 292, does not apply to a case in which a rail road company is not entering upon the land of the owner of a dwelling-house.†

The Richmond and York river rail road company were authorized by the council of the city of Richmond, to bring their road into the city by a route and in a mode agreed upon by the council and the company. This route passed through a lot purchased by the company of Freeman, which adjoined a lot owned by Lucy Ann Wicker and her children, upon which there was a dwelling-house which was rented out

*The principal case is cited in Hodges v. Seaboard, etc., R. R. Co., 88 Va. 658, 14 S. E. Rep. 380; McConiha v. Guthrie, 21 W. Va. 145.

†Code, ch. 56, § 4, p. 292, after authorizing a rail road company to enter upon lands for the purpose of laying out its road, says, "Nor shall any company, under any provision in this chapter, invade the dwelling-house of any free person, or any space within sixty feet thereof, without the consent of the owner."

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by them. The company having commenced to excavate the track for their road on the lot purchased of Freeman, at the distance of about fifteen feet from the dwelling-house on Wicker's lot, Mrs. Wicker, for herself and her children, applied to the judge of the Circuit court of Richmond for an injunction to restrain the company from invading the said dwelling-house or any space within sixty feet thereof. She charged in her bill that the company had blocked up the access to her property, destroyed its value as a dwelling-house
376 *without giving her any notice of their purpose, and without tendering her any compensation; thus doing to her great damage, and to her children irreparable mischief. The injunction was granted.

The company demurred to the bill; and also answered, insisting that having obtained permission to bring their road into the city, they had a right to locate it on their own ground, though it should pass within sixty feet of the plaintiff's dwelling-house.

The court overruled the demurrer. And thereupon the defendants having given the plaintiff notice, moved the court to dissolve the injunction; which motion the court also overruled. The defendants then applied to this court for an appeal, which was allowed.

Lyons, for the appellant.
Crump, for the appellee.

SAMUELS, J. In this case the question is presented, Whether the general assembly intended by the statute, Code, ch. 56, § 4, p. 292, to forbid the construction of works of internal improvement within the space of sixty feet about any dwelling-house whatever, by whomsoever that space may be owned, or only to protect the owners in the enjoyment of their dwelling-houses, and of a space of sixty feet of their own land lying about such dwelling-houses? In my opinion, the terms of the statute, standing alone, import that a dwelling-house and a space of sixty feet about it are exempt from invasion by internal improvement companies, as being reserved to the owner thereof. Without such invasion the owner enjoys his dwelling-house and circumjacent land to the extent of his boundary, however large. If, however, public necessity requires that a portion of his property be taken from him, it may be done, but not so as to invade his
377 dwelling-house *or a space of sixty feet about it. The law merely reserves to the owner a limited extent of his own property, but does not confer on him any control whatever over the land of the coterminous owner. The law gives to every owner of land a right to use it as he may please, if he take care to do nothing to impair the right of individuals or of the public. In our case, before the location of this road the appellee had no control over the lot belonging to Freeman, on which the rail road is located. Her only right in regard to it was to have it kept clear of nuisance. Yet it is not alleged in the bill, as any part of the appellee's equity, that the rail road is or will be a nuisance. The damage and irreparable mischief alleged are only such as will result from the construction of the road within the sixty feet; but no specification is made of the reasons to apprehend that damage or mischief may ensue. This is asserting a power of control over the property of another, not known in law, unless it be conferred by this statute. It was perfectly competent for the general assembly to exempt from the operation of the internal improvement laws any portion of an individual's property, and to secure him in the enjoyment thereof. If, however, the general assembly should go beyond this, and attempt to confer on such individual the right to control this coterminous neighbor in the use of his property, in any mode theretofore lawful, it may be doubted whether the attempt would not be against the constitution. The attempt, however, has not been made in this case, and it would be out of place to consider what would be the law if such had been the purpose of the statute.

In construing a statute, which is itself a revisal of former statutes, if there be any doubt about its meaning, we should look to the former laws, of which it
378 is *a revisal. They are allowed weight in settling the construction in such case. The statute, 2 Rev. Code, p. 213, § 7, in regard to turnpike roads, enacted before rail roads were used in Virginia, protected only the dwelling-house, yard, garden and curtilage, from invasion by turnpike companies. It said nothing whatever about the use which might be made of coterminous land. The general rail road law, enacted March 11, 1837, Sess. Acts, p. 104, § 5, provides, "that no dwelling-house or space within sixty feet of one, belonging to any person, be invaded without his consent:" and the present statute in its terms is substantially the same as that of 1837. Looking to the distinct, well defined rights of property as between coterminous land holders, that one has no right to control the use which the other may make of his property, so long as he keeps within the law against nuisances, we must hold, upon the facts of this case, that the appellee has no right to control the use made of the coterminous lot by the owners thereof; and the injunction should therefore have been dissolved. It is thus unnecessary to decide whether the charter of the appellant and the arrangement made with the council of the city of Richmond withdraws the case from the general rail road law, and gives the appellant rights not conferred by that law, seeing that, in the opinion of the court, the general law gives the right asserted by the appellant, and that it is not compelled to rely on its charter for any right not conferred on all rail road companies. Nor is it necessary to decide what power the general assembly would have to confer on the appellee a new right to control the use to be made of the lot occupied by the appellant, seeing that the law does not confer,

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nor attempt to confer, such new right. Nor is it necessary to decide whether under the law a distinction is to be made be-
379 tween a dwelling-house *occupied by the owner as such, and a dwelling-house let to a tenant; seeing that in regard to either no protection is afforded beyond the limits of sixty feet of the land occupied with it.

I am of opinion to reverse the order, and to dissolve the injunction.

The other judges concurred in the opinion of Samuels, J.

Decree reversed, and injunction dissolved.

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380 *Steed v. Baker & al.*

July Term, 1855, Lewisburg.

Adverse Claim to Land—Case at Bar.—Bill by vendee of land to enjoin the payment of purchase money on the ground of defect of title to a part of the land. The bill states that the adverse claimant bought a part of the land under a sale for taxes, and another part from the attorney of his vendor, and charges generally that the deeds for the land sold for taxes were null and void, and the purchase from the attorney was fraudulent: And he makes his vendor and the adverse claimant defendants. The vendor in his answer charges, and sets out fraud in his attorney and the adverse claimant. The latter was in possession under his deeds, and this was known to plaintiff before his purchase. HELD:

1. **Same—Allegation of Fraud.**—The general allegation of fraud in the bill is not sufficient to raise that question.
2. **Same—Decree between Codefendants—Case at Bar.**—That there is no privity between plaintiff and the adverse claimant, and the equity between the latter and the vendor does not arise upon the pleadings and proofs between plaintiff and defendants, and is not therefore the proper subject of a decree between codefendants.
3. **Same—Jurisdiction to Try.**†—That the adverse claimant being in possession under his deeds, the question of their validity, independent of the ground of fraud, is proper to be tried in a court of law; and a court of equity has no jurisdiction to try it.

The facts of the case are sufficiently stated in the opinion of Judge Allen.

Fry, for the appellant.
Fisher, for the appellees.

ALLEN, P. In this case the appellee Baker, the purchaser of the interest of A. Bauseman in certain lands in Wood county, and which had been conveyed
381 *to him by a deed with special warranty, filed a bill to enjoin the collection of the purchase money unpaid, upon the ground of a defect of title to a large portion of the land.

The bill alleges, amongst other things, that prior to his purchase, a portion of the land, two hundred acres, was sold by the sheriff of Wood county in February 1835 for the nonpayment of taxes, at which sale Josiah M. Steed became the purchaser; that he assigned the interest so acquired to his father Henry Steed the appellant, to whom the clerk of Wood county conveyed the two hundred acres on the 22d of May 1837. The bill also avers that the said Adam Bauseman, on the 20th of November 1837, executed a power of attorney to said J. M. Steed to sell and convey his interest in said lands, and that J. M. Steed, under such power, sold to his father Henry Steed the interest of A. Bauseman in and to one of the tracts of land in question, and conveyed the same, estimated to be one hundred acres, by deed dated the 11th of September 1840; and that under said deed Henry Steed had taken possession of the land, and held and claimed the same against the appellee Baker. The bill further avers, that on the 19th of October 1840 the appellant H. Steed purchased a further portion of three hundred acres of said lands, at a sale for taxes, and received a deed therefor from the clerk of the court on the 7th of September 1843. The conveyance from A. Bauseman and wife to Baker is dated the 16th of October 1841, and purports to convey one equal undivided moiety of two tracts of land, each containing five hundred acres, with covenants of warranty against themselves and all persons claiming under them.

The bill further charges in general terms, that the sale made by J. M. Steed to the appellant was fraudulent, and that the
382 appellant had not, so far as the *appellee Baker knew, paid a cent of the purchase money to the agent J. M. Steed or his principal A. Bauseman.

It further charges in general terms, that the sale of the two hundred acres for taxes was illegal, without showing in what particular; and also charges that the sale and conveyance thereof to Henry Steed was illegal, fraudulent and void. And it further avers, that the appellant was employed by J. M. Steed the agent of Bauseman, to buy in the land for the heirs of the original patentee Jacob Bauseman, at the last sale

*This case should have been reported in 12 Grattan; but the opinion was not in the possession of the reporter.

†**Adverse Claim to Land—Jurisdiction to Try.**—In Johnston v. Jarrett, 14 W. Va. 235, it is said: "A court of equity has no jurisdiction to settle the title, or boundaries, of land between adverse claimants, unless the plaintiff has an equity against the adverse claimants; and equity against other persons will not give the jurisdiction. Stuart's Heirs v. Coalter, 4 Rand. 74; Lange v. Jones, 5 Leigh 192; *Steed v. Baker, 13 Gratt. 380;* Wolfe v. Scarborough, 2 Ohio St. 361. In this cause the plaintiff has no equity against the adverse claimants. His equity is against the purchaser, James Jarrett." The principal case is also cited and approved in Sulphur Mines Co. v. Boswell, 94 Va. 485, 27 S. E. Rep. 24. In the dissenting opinion of BRANNON, J., in Davis v. Settle, 43 W. Va. 37, 26 S. E. Rep. 564, the principal case is cited and the rule approved. See, in accord, Collins v. Sutton, 94 Va. 127, 26 S. E. Rep. 415; Carrington v. Otis, 4 Gratt. 235; Cresap v. Kemble, 26 W. Va. 603; Hill v. Proctor, 10 W. Va. 59.

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for taxes: but that instead of giving to the purchase its proper destination, he and his son were fraudulently combining to enable him to retain the said three hundred acres under said purchase. It is further alleged by the appellee Baker, that he is in the actual possession of but a small portion of said tracts of land; and that he does not hold that portion free from the claims of others. Conceiving that the sale of land by J. M. Steed the agent, to Henry Steed, and the sales by the sheriffs for taxes if valid, are within the covenants of A. Bauseman, the appellee Baker insists he would be entitled to an abatement of the purchase money, or a rescission of his contract of purchase; and he makes the Steeds and Bauseman parties, and asks for an injunction until Bauseman removed the liens and claims of the Steeds, and for general relief.

The Steeds answer, denying the general allegations of fraud and illegality charged in the bill; and Henry Steed relies upon his legal title, and insists that the complainant had no just cause, on his own showing, to bring him into chancery; and avers that he then held the tracts of one hundred and two hundred acres in possession.

Bauseman answers, and by his answer and the exhibits filed therewith, attempts to show that J. M. Steed was either his agent, or that he stood in such a
383 *confidential relation to him and the other heirs of Jacob Bauseman the claimants of the land, and had been guilty of such concealment as agent, as to render his purchase of the two hundred acres for taxes fraudulent; that the purchase of three hundred acres by Henry Steed for taxes was made under some understanding and arrangement with the agent, and was made for the heirs; and that the sale of J. M. Steed to the appellant of the one hundred acres and the conveyance thereof as attorney in fact of Bauseman, was without consideration and void.

At the final hearing, the court being of opinion that J. M. Steed, under the circumstances, was not entitled to hold the two hundred acres purchased at the sale for taxes against the codefendant Bauseman, and that Henry Steed occupied the place of his vendor, ordered and decreed that the deed from the clerk to Henry Steed should be canceled, set aside and annulled. And being further of opinion, that the record disclosed a state of facts which forbids the sale of J. M. Steed as attorney in fact of Bauseman, to be binding, it also annulled his deed, from the clerk to Henry Steed for the three hundred acres purchased by him at the sheriff's sale. And having thus cleared away the defects of title so far as the appellant was concerned, the decree proceeded to dissolve the injunction to the collection of the purchase money, suspending the effect of the order of dissolution, until certain deeds were properly acknowledged for record, or security for indemnity given.

The first, and as it seems to me, fatal objection to this decree, is, that it has proceeded entirely upon facts alleged in the answer of a codefendant, to which the Steeds had no opportunity whatever of responding.

The alleged fraud of J. M. Steed, owing to the fact of his agency and the supposed confidential relation in which he stood to the parties interested in the land,
384 *before the date of the power of attorney from A. Bauseman, his subsequent concealment of his purchase, and the confidential relation between him and his father, and their alleged co-operation in the supposed fraudulent arrangement to vest the latter with the legal title to the most valuable portions of the land, seem to have been the grounds of the decree.

No issues of this kind were raised by any specific allegations in the bill. The existence of these adverse claims constituted the grounds of relief on the part of Baker against his vendor. The equities between A. Bauseman and his codefendants did not arise out of the pleadings and proofs between Baker and the defendants in the court below. The claims of Henry Steed the appellant, have been finally adjudicated, and the title asserted by him under his various deeds, annulled, upon a state of facts not averred in the bill, and to which therefore neither he nor J. M. Steed have had an opportunity of responding. They were not bound under any allegation in the bill to state their own case as against the codefendant Bauseman. If a decree was sought against them upon the grounds relied on in that answer, they should have been averred either by a cross bill or an amended bill, so as to entitle the appellant and J. M. Steed to the benefit of their answers. If the appellant and J. M. Steed could be decreed against in this suit under any state of the pleadings, the decree rendered was erroneous under the authority of the case of Blair v. Thompson, 11 Gratt. 441, and the cases there cited. But it seems to me there is a fatal objection to this whole proceeding, so far as the interests of the appellant were involved. He was in possession, claiming the legal title under a deed of the clerk for land sold for taxes, and under a deed from A. Bauseman, through his attorney in fact. His deed for two hundred acres purchased at the sheriff's sale in 1835, was exe-
385 cuted on *the 22d of May 1837. His deed from J. M. Steed as attorney in fact of A. Bauseman, preceded the deed to Baker; and the second purchase at the sheriff's sale by the appellant Henry Steed was before Baker's deed; although the last conveyance to Henry Steed by the clerk was subsequent to the conveyance by A. Bauseman to Baker.

There was no privity whatever between Baker and the appellant Henry Steed. The latter is averred to be in possession of the land, claiming under conveyances purporting to vest him with the exclusive title. The appellee Baker had no equity against him; he purchased with full knowledge of the adverse claim. His equity to enjoin

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the payment of the purchase money, until his vendor complied with the covenants of his deed, gave him no equity against this adverse claimant, whatever equity might have existed in favor of his vendor, growing out of the alleged fraud of J. M. Steed and notice thereof or participation therein by the appellant.

As to the charge that the sales for taxes and the deeds from the clerk were illegal, independent of the question of fraud; such illegality would avoid them at law, and a court of law was the proper forum to test the legal validity of those deeds. It would be against all just principles to sanction a proceeding whereby a third person was permitted and encouraged to intervene in a controversy with which he had no concern; to purchase with a full knowledge of the adverse claim, that he might thereby be enabled, under pretense of having an equity against his vendor, to assert the equity of his vendor against others, and against whom the complainant himself had no equity whatever.

So far as respects the alleged illegality of the tax deed, this case cannot be distinguished in principle from the case of Lange v. Jones, 5 Leigh 192. That
386 *was a bill exhibited by the vendee against the vendor alleging a contract for the purchase of eight hundred acres of land, the payment of a portion of the purchase money, and the withholding of the residue because the vendee had discovered that a third person claimed a portion of the land under a purchase from another claiming under a different title, and had actually taken possession thereof; and praying that the rights of his vendor and the conflicting claimant might be ascertained, and if his vendor has no right to the part of the land held by the conflicting claimant, that there should be an abatement from the purchase money.

Upon hearing, the chancellor dismissed the bill as to the conflicting claimant, continuing the case as between the vendee and vendor, for further proceedings.

Judge Carr was of opinion that the case fell within the principle of Stuart's heirs v. Coalter, 4 Rand. 74, which, he remarks, was well considered, and from which, therefore, he was opposed to departing. That case decided that a court of equity has no jurisdiction to settle the title or bounds of land between adverse claimants, unless the plaintiff has an equity against the defendant claiming adversely to him: An equity against other persons will not give such jurisdiction. I have already observed that the alleged fraud upon A. Bauseman constituted no equity in favor of his vendee, purchasing under the circumstances disclosed in this case, as against the appellant. And as to the supposed illegality of the tax sales and deeds, there could, as Judge Tucker observed in the case of Lange v. Jones, have been no difficulty in having a trial of the legal title before the proper tribunal by the institution of an ejectment in the name of the vendor against the adverse claimant; until the decision of which the vendor might have been enjoined by bill in equity.

The cases of Allen v. Smith, 1 Leigh
387 231; Ruffners v. *Lewis' ex'or, 7 Leigh 720; and Wagner v. Dyer, 11 Leigh 384, were cases of the sale and purchase of mere equitable rights; of purchasers made, not by a stranger voluntarily intervening in the controversies of others, but by creditors to save themselves from loss; and under the peculiar circumstances, were sustained.

In this case the purchase was made by a stranger of the legal title to property then in the adverse possession of the appellant claiming the legal title under conveyances, the validity of which could have been readily settled in an action at law.

The case of Allen v. Taylor, referred to by Tucker, president, in Ruffners v. Lewis' ex'or, 7 Leigh 720, as decided by this court, seems, from the statement of the judge, to have resembled this case in its circumstances; and the principle of that decision was approved.

So in this case, if the legal validity of the deeds under which the appellant claims is admitted, but they are to be assailed for the alleged fraud affecting the conscience of the appellant, either upon the ground of notice, or participation therein, or want of consideration, that is an equity to be asserted by Bauseman, the party defrauded, and not by one voluntarily intervening with full knowledge of the adverse claim. Or if relief is sought upon the ground of the alleged illegality of the tax deeds, that is a question to be tried at law.

I think the court should have dismissed the bill as against the appellant and J. M. Steed, without prejudice to the right of the appellee A. Bauseman, to file a bill in equity to impeach the deeds, or any of them, under which the appellant claims, for fraud; or to the right of the appellees, or either of them, to show the illegality of said deeds, or either of them, at law. That the injunction should have been continued a reasonable time to enable the said A.
388 Bauseman to institute *proper proceedings to test the validity of said deeds; and upon his failure to institute such proceedings or to prosecute the same to a successful issue, there should be an abatement of the purchase money, or a rescission of the contract of sale, as the rights of the parties may require.

MONCURE, J. I am so well satisfied as to the justice of the decree of the Circuit court in this case, and so doubtful as to the validity of the objections made to it, that I am very reluctant in agreeing to reverse it. I cannot concur with the majority in dismissing the bill as to the Steeds. The farthest I can go for the appellant is to reverse the decree and remand the cause, with liberty to the appellee Baker to amend his bill and charge more specifically fraud and illegality in the conveyances under which the appellant claims title to the land

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in controversy, or any part thereof. I think the Steeds were properly made parties to the suit, and that the case materially differs in principle from those of Stuart's heirs v. Coalter, 4 Rand. 74, and Lange v. Jones, 5 Leigh 192, relied on by the appellant's counsel.

The other judges concurred in the opinion of Allen, P.

Decree reversed.

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389 *Hamilton v. McNeil & als.

July Term, 1856, Lewisburg.

1. **Caveat—Record of Cause—What Constitutes.**—In a case of caveat all the facts agreed by the parties, or found by the jury, or, if a jury is dispensed with, ascertained by the court, necessarily become and should be made a part of the record of the cause.
2. **Same—Evidence Certified—Procedure.**—In a case of caveat, if the court shall certify the evidence instead of the facts, yet if there is no conflict in the parol evidence, and taking the whole as true, the appellate court may proceed safely to judgment upon the same, it is the duty of such court to proceed and give judgment according to the very right of the cause.
3. **Same—Jury Dispensed with—Procedure to Obtain Appeal.**—In a case of caveat, where a jury is dispensed with and the whole cause is submitted to the court, it is not necessary for the losing party to file a bill of exceptions to the judgment of the court, or to move for a new trial, and if it is refused to except to the opinion of the court refusing it; but it is sufficient that the Circuit court shall make the facts agreed and ascertained, or the evidence, where the parol evidence is in no respect conflicting, a part of the record by its order to that effect upon rendering judgment.
4. **Same—Boundary between Counties—What Court May Look to.**—In a case of caveat upon a question involving the boundary line between two counties, the court in construing the acts in relation to their boundaries, may look to the acts forming other counties both before and subsequent, for the purpose of ascertaining the intention of the legislature as to said boundary line.
5. **Acts Forming New Counties—Construction of.***—The acts forming new counties are not to be construed with the same strictness which is to be observed in the construction of a grant or a contract between individuals affecting rights of property; but a more liberal rule should be adopted; the object being to ascertain the true meaning and intention in any given act by considering the same in connection with all others *in pari materia* and with the general policy of the legislature, and to effectuate such intention.
6. **Same—Same.**—In determining the territorial boundaries specified in said acts due weight should be given to the cotemporaneous interpretation placed upon them by the courts and other lawful authorities within the same, and by the population at large residing therein. And maps of such territory made out and published by authority of law, may properly be referred to as evidence on the question.
7. **Same—Same—Case at Bar.**—It has been the general policy of the legislature to establish and preserve the top of the Main Alleghany mountain as the line of boundary between the adjacent counties on either side: And in the construction of these acts this policy should be respected, and no intention to depart from it should be imputed to the legislature, unless it be plainly expressed, or the purpose be sufficiently manifested.
8. **Same—Same.**—To carry out this policy, a call in one of these acts which if taken literally would conflict with the intent, should be disregarded or modified, and any error in the same arising from an imperfect knowledge of the topography of the country or any other fortuitous cause, should be corrected.
9. **Same—Same.**—In the arrangement of counties it has been the policy of the legislature to avoid inconvenient elongation or awkward or undue contractions, of the territory of a county, and to preserve the same in as compact a form as practicable: and especially to keep the same in one body, not separated by the interposition of another county. And in construing such an act it should be presumed that such was the intention of the legislature, and no different interpretation should be admitted, unless a contrary intention is clearly manifest.

*The principal case is cited and approved in Shank v. Town of Ravenswood, 43 W. Va. 246, 27 S. E. Rep. 224.

This was a caveat filed by Paul McNeil and Charles C. See to prevent the emanation of a patent for a tract of land to William Hamilton. On the 10th of October 1849 the caveators entered and located with the surveyor of the county of Pendleton, three thousand acres of land as lying in that county. A part of this land had been entered and located by Hamilton with the surveyor of the county of Pocahontas, in the previous September, as lying in the county of Pocahontas. The caveators stated several objections to the entry and survey of Hamilton; but the only question considered by the Circuit court or this court, was whether the land lay in the county of Pendleton or in the county of Pocahontas. That question depended upon the construction of various acts of the general assembly forming the counties of Bath, Pendleton and Pocahontas, and fixing their boundaries.

The tract of country in relation to which this question arose, lies between the
391 Main Alleghany mountain *on the east and the Back Alleghany on the west. These two mountains run north and nearly parallel for some fifteen or twenty miles, and then the Back Alleghany turns nearly at right angles and runs to the Main Alleghany. The distance between the two mountains is about twelve miles. At the southern end of this tract the Greenbrier river forks, one branch running near the base of the Main Alleghany and having its source near the point where the two mountains approach each other, and the other branch runs near the Back Alleghany. The land in controversy lies between the latter branch and mountain, and extends nearly to the northern termination of the valley.

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This territory prior to 1796 was a part of the county of Bath. In that year, upon the petition of the people living between the two mountains, a part of it was attached to the county of Pendleton, and that part in which the land in controversy lies was afterwards recognized not only by the courts and officers of Pendleton county, but also by those of the county of Randolph, which lay west of the Back Alleghany, as belonging to the county of Pendleton. In 1822 the county of Pocahontas was formed; and after that time this territory was treated by the courts and officers of that county as being a part of it. The boundaries of these counties cannot however be understood without a map: but the principles applied to the construction of the statutes may be understood without a knowledge of the boundaries.

The cause was removed to the Circuit court of the county of Alleghany; and when it came on to be tried the parties waived a jury and submitted the case to the court both upon the law and the evidence. On the trial some of the facts were agreed by the counsel, and the parol evidence was in the form of depositions. And the court having rendered a judgment
392 for the caveators *on the ground that the land in controversy lay in the county of Pendleton, Hamilton excepted to the opinion of the court, and put into his bill of exceptions all the evidence introduced on the trial which had reference to the question of boundary; and the court made an order directing that it should be made a part of the record. And he thereupon applied to this court for a supersedeas, which was allowed.

Skeen and Fry, for the appellant.
Price and Reynolds, for the appellees.

LEE, J., delivered the opinion of the court:

The court is of opinion that in a proceeding by way of caveat to prevent the emanation of a grant for lands under the provisions of the act of March 1, 1819, or those of the Code of Virginia, all the facts material in the cause and not agreed by the parties should be found by the jury, or if a jury be dispensed with and the whole case submitted to the court upon the law and the facts, should be ascertained by the court; and that the facts so agreed, if any, and those so found by the jury or ascertained by the court necessarily become and should in every case be made a part of the record to the end that in the absence of pleadings in writing and a general verdict, the nature of the controversy and the character and effect of the judgment may distinctly appear and that the latter may be reviewed by the proper appellate tribunal.

And the court is further of opinion that if in such statutory proceeding by caveat the inferior court shall fail to certify and make part of the record, the facts proven by the evidence, but shall in lieu thereof certify the evidence itself, yet if it shall appear to the appellate court that there is no conflict in the parol evidence and that accepting the whole as true, it may
393 *proceed safely to judgment upon the same, it is the duty of such court so to proceed and to give judgment according to the very right of the cause.

And the court is further of opinion that in the parol testimony certified by the Circuit court in this cause there is no conflict nor discrepancy in any material particular, but that the same may fairly and properly be regarded as entirely consistent throughout and as devolving no duty or necessity upon the court to distinguish between the different witnesses or the different degrees of weight and credibility to which their testimony may be entitled; and that this court may safely proceed to review the judgment upon the certificate of the judge of the Circuit court together with the facts agreed in the cause, and that it is its duty so to proceed and to render its judgment between the parties upon the whole case.

And the court is further of opinion that to entitle the appellant to a review of the case upon the facts in this court, it was not necessary that he should have filed a bill of exceptions to the judgment of the Circuit court given in favor of the appellees nor that he should as upon a verdict by a jury in an ordinary action at law, have moved for a new trial of the cause, and if refused, have taken an exception to such refual; but that it was sufficient that the Circuit court should, as it did, make the facts agreed and its certificate of all the evidence documentary and parol, the latter being in no respect conflicting, part and parcel of the record (as a quasi special verdict) by an express order to that effect made upon rendering judgment, and that the same should now be considered by this court in the same manner and to all intents and purposes as fully as if such facts agreed and evidence had been made part of the record by a formal bill of exceptions signed and sealed for that purpose.

And the court is further of opinion
394 that in passing *upon the matters in controversy in this cause, it is proper to consider, in connection, the act forming the counties of Ohio, Yohogania and Monongalia, passed in October 1776, (ch. 45,) the act forming the county of Greenbrier passed in October 1777 (ch. 18), the act for dividing Monongalia county, passed May 1784 (ch. 6), the act of October 1786, (ch. 101) for dividing the county of Harrison, the act of the 4th of December 1787 (ch. 94) forming the county of Pendleton, the act of the 14th December 1790 (ch. 43) forming the county of Bath, the act of December 3, 1796 (ch. 56) annexing part of Bath to Pendleton, the act of December 21, 1821 (ch. 27) forming the county of Pocahontas, and the act of the 19th of March 1847 (ch. 56) forming the county of Highland, as being in a certain sense acts in pari materia, and aiding in the proper construction of the acts relating to Pendleton and Pocahontas counties and in defining

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the precise territory embraced within the limits of the same, respectively.

And the court is further of opinion that these acts being intended merely for the division and arrangement of the territory which they embrace for local municipal purposes and the convenient and economical administration of the government within the same should not be construed with the same strictness which is to be observed in the construction of a grant or of a contract between individuals affecting rights of property, but that a more liberal and beneficial rule should be adopted the object being to ascertain the true meaning and intention of the legislature in any given act by considering the same in connection with all others in pari materia and with the general policy of the legislature and such intention to effectuate and carry out whensoever and wheresoever the same can be discovered.

And the court is further of opinion that in determining the territorial boundaries specified in said acts *due weight should be given to the cotemporaneous interpretation placed upon the same by the courts and other lawful authorities within the same and by the population at large residing therein: and that maps of such territory made out or published by authority of law may properly be referred to as persuasive evidence in support of the pretensions of either party to have such weight as consistently with the other testimony in the cause they shall appear to be entitled to.

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And the court is further of opinion that the lands embraced by the entries of both parties in this cause were prior to the passage of the act entitled "an act adding part of the county of Bath to the county of Pendleton" passed December 3, 1796, clearly within the boundaries of the county of Bath, but that by the provisions of said act, all that part of the said county of Bath within which said lands were situate, must be held and taken to have been stricken off from the county of Bath and annexed to the county of Pendleton. For although upon the terms of said act it might appear to be doubtful whether the call for beginning "on the top of the Alleghany mountain, the northwest side of the line of the county of Pendleton," would not require that the beginning should be at some point on the Main Alleghany mountain (that lying east of the eastern fork or branch of Greenbrier river) as contended for by the appellant, or could be satisfied by beginning at a point on the mountain lying west of the north or western fork or branch of said river, (the same being from ten to fifteen miles distant from the line of Pendleton county as it then ran) as contended for by the appellees, yet considering that said last mentioned mountain was also recognized as a range of the Alleghany and was commonly known as the "Back Alleghany," and that by the cotemporaneous construction placed upon the calls of said act by the County court of Pendleton in its order directing *the running of the lines supposed to be called for in said act, and the actual running of the same beginning at letter R on the plats of surveyors Johnson and Holloway thence S 68 E, 500 poles to a chesnut oak on a mountain at the lower end of John Slaven's plantation, at the point designated by letter S, and that a report of such running was made to the said County court of Pendleton and was by said court accepted and recorded, as evidencing the true courses of the lines between the counties of Bath and Pendleton as established by said act: considering also that after the passage of said act exclusive jurisdiction over the territory in question was exercised by the courts and officers of Pendleton county without claim or contestation on the part of the authorities or people of Bath county, which jurisdiction was recognized by the court of the adjoining county of Randolph in its official acts, as within the rightful authority of the court of Pendleton county: and further, as in the acts erecting the county of Pocahontas passed on the 21st of December 1821, there is a call for a straight line from the top of the mountain between the Valley river and mouth of the Dry fork of Elk river where the road from Clover Lick to Randolph court-house crosses said mountain, to where the line of Pendleton county intersects the line of Bath and Randolph counties on the top of the mountain between Greenbrier and Cheat rivers, and a call to run thence with the top of the said mountain to where the road leading from Slaven's to Randolph court-house crosses it, which calls cannot be satisfied by running the lines of the territory annexed to Pendleton by the act of 1796 according to the pretensions of the appellant but are fully satisfied by the points R and P and the line on the top of the Back Alleghany between them, according to the pretensions of the appellees, and are therefore to be regarded as a legislative interpretation of the act of *1796 and as demonstrating that the beginning of the boundary of the territory thereby proposed to be annexed to Pendleton was and is upon the Back Alleghany and not the Main Alleghany and at or near the point R as claimed by the appellees; and, moreover, as there is no sufficient nor scarcely any conceivable reason why the legislature should have annexed that portion of the county of Bath lying south of a line running from some point on the top of the Main Alleghany mountain to the lower end of John Slaven's plantation to the county of Pendleton leaving out and retaining as part of the county of Bath though connected with the body of the county only by the narrow neck of land on the mountain from S to R, all that territory lying north of said line according to the pretensions of the appellants; and as that construction which annexed the whole of said territory to the county of Pendleton was accepted by the population within its boundaries, generally, and by the people of the adjoining counties, as expressing the true intent and

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meaning of said act, the conclusion to which the court must be brought is that the call for the northwest side of the Pendleton line must be rejected as conflicting with the intention of the legislature or that it must be so corrected or its literal meaning so modified, that the beginning of the boundary of the annexed territory must be placed at or near letter R, running thence to S, thence to Dinwiddie's gap thence with the other calls designated in the act to the Pendleton line and that all the territory north of the lines from R to S and thence to Dinwiddie's gap comprehending the whole of both forks of the Greenbrier up to the lines of Randolph county including all the lands covered by the entries of the parties in this cause was thus annexed to and made part of the county of Pendleton.

But the court is further of opinion
398 that at the time *of the passage of the act of the 21st of December 1821 for the formation of the county of Pocahontas it would appear to have been the general policy of the legislature as evinced by various acts of legislation before and after, to establish and preserve the top of the Main Alleghany mountain as the line of boundary between the adjacent counties on either side, from which policy at the date of said act there appear to have been no existing variations except in the instances of the counties of Montgomery and Monroe as to which from the depression and flattening of the Alleghany ridge in that particular section, the reasons founded on the greater convenience and accessibility to the population did not apply with equal force, and except the instances of the counties of Bath and Pendleton which latter county embraced so much territory west of the Alleghany as lay between the Main Alleghany and the Back Alleghany northwardly of the lines from R to S and from thence to the Main Alleghany in the direction of Dinwiddie's gap and which had been annexed to the said county of Pendleton by the act of 1796; and that in the construction of the various acts touching the territorial boundaries of counties, this policy should be duly considered and respected, and no intention to depart therefrom should be imputed to the legislature except it be plainly expressed or its purpose to do so be sufficiently manifested; and in the absence of such plain expression or manifest purpose the general intent to establish the top of the Alleghany as the line of county boundaries, should be effectuated, and that the calls in such acts should be reconciled and harmonized, for that purpose a particular call which taken literally would conflict with the intent of the act should be disregarded or modified and any error in the same arising from an imperfect knowledge of the topography of the country or any other fortuitous cause should be corrected.

399 *And the court is further of opinion that in the arrangements of the territory of the state for county municipal purposes, it has also been the general policy of the general assembly to avoid inconvenient elongations and awkward or undue contractions of the territory of a county, and to preserve the same in as compact a form as practicable, and especially for reasons of high public necessity and convenience, to keep the same in one body and avoid the detachment of any part of a county from the residue by the interposition of any other county; and that in the construction of such acts it should be presumed that such was the intention of the legislature and no different interpretation should be admitted unless the contrary be plainly expressed or it shall appear that the legislature did intend to depart from the policy which had hitherto prevailed upon that subject.

And the court is further of opinion that there was no sufficient or conceivable reason why the legislature in forming the said county of Pocahontas should have left that portion of territory on the head of the two forks of Greenbrier (the territory northwardly of the line P Y) within the limits of the county of Pendleton and that the reason why it is to be supposed it was the intention of the act of 1796 to annex the said territory to Pendleton comes with equal or greater force to demonstrate that it was the intention of the act of the 21st of December 1821 to embrace the same within the limits of the county of Pocahontas, thereby erected. And the court is of opinion that the legislature did intend by said act to restore to the county of Pendleton its former boundary along the top of the Alleghany mountain and to embrace all of its territory which lay west of that line within the said county of Pocahontas; and that the legislature believed it had done so is plainly inferrible from the provisions of the act forming Highland county out
400 of parts of Pendleton *and Bath counties passed March 19, 1847. This act erects the new county out of territory on the east side of the Alleghany without including any lying on the west side; and it is impossible to suppose, if a portion of Pendleton county had at that time lain on the west side of the Alleghany, the legislature would not have included it in the county of Highland but would have suffered it to remain part and parcel of Pendleton county though detached and separated from it by the intervening county of Highland when it might just as well and every consideration of public policy and convenience required that it should form part of the county of Highland which it adjoined. That such was the belief of the legislature is also apparent from the act of the 24th of March 1838 providing for a reassessment of the lands in this commonwealth; for whereas by the third section of the act of February 18, 1817, the counties of Bath and Pendleton, as well as the counties of Monroe and Montgomery, are described as lying on both sides of the Alleghany, yet after the passage of the acts forming said counties of Bath and Pocahontas, by the said act of 1838, when the legislative mind was

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directed to the very question, the counties of Bath and Pendleton are embraced in a district composed of counties lying between the Blue Ridge and Alleghany and the counties of Monroe and Montgomery, only, are still described as lying on both sides of the Alleghany. And these acts may fairly and properly be considered in connection with the act forming Pocahontas county as supplying a legislative interpretation of the meaning and intent of the legislature in the provisions of said last named act.

And the court is further of opinion that in giving locality to the points called for as corners in said act, the terminus of the line from the top of the mountain between the head of the Valley river and the
401 mouth *of the Dry fork of Elk river to where the line of Pendleton county intersects the line of Bath and Randolph counties is to be placed at or near letter R on the plats, and that of the line thence with the top of the mountain to where the road leading from Slaven's to Randolph court-house crosses it, is at letter P; but that the terminus of the line to the top of the Alleghany mountain opposite the head of the East fork of Greenbrier river is not at a point opposite the head of an eastern branch of the fork of Greenbrier known as the East or South fork as claimed by the appellees, but is to be sought on the top of the Alleghany mountain opposite to the head of the main or longest branch of said fork: that the East fork of said river intended by said act was the main fork running along the foot of the Main Alleghany, the head of which was the head of its longest branch; and consequently the boundary line between the top of the Back Alleghany or Greenbrier mountain and the top of the Main Alleghany is not the line P Y as contended for by the appellees, such line neither satisfying the literal call of the act nor in the opinion of this court being the boundary intended by the legislature, inasmuch as it would according to the appellant's pretensions entirely cut off from the body of the county of Pendleton a portion of its territory lying west of the Alleghany mountain, or if as the appellees contend, it would not entirely sever it, it would yet even according to their pretensions leave it connected with the rest of the county by a narrow neck of land not exceeding one hundred poles in width and stretching out from such neck in a southwestern direction from fifteen to eighteen miles; and if such portion were not so severed and disconnected by that line, it would certainly be so upon the formation of Highland county which took off all the southern part of Pendleton east of the Alleghany, all which would be contrary to the general policy
402 and plain intention *of the legislature. Whilst in running the boundary from P to the top of the Alleghany opposite to the head of the East or South fork of the Greenbrier, to carry out the intention of the legislature, it would seem not unreasonable, and would do no violence to the approved rules of construction to assume that one or more calls may have been omitted or that the call for a straight line from P was made in mistake arising from the very imperfect knowledge, as it is proven to have been, of the exact topography of the mountain region in question, and to supply such omitted calls or disregard such repugnant call or so correct it or modify its literal import that the said boundary might be run along the top of the Back Alleghany or Greenbrier mountain, with the Randolph county line until it reaches the top of the Main Alleghany at a point opposite to the head of the longest branch of the South or right hand fork (ascending) of the Greenbrier river, so as to embrace the whole of the territory annexed to the county of Pendleton by the act of 1796 which lay northwardly of the line from P to the top of the Main Alleghany in the direction of Dinwiddie's gap, and between the boundary of Randolph county on the Back Alleghany and the top of the Main Alleghany, within the limits of the county of Pocahontas.

And it appearing to the court that this construction of the act forming Pocahontas county is supported by the cotemporaneous exposition thereof by the courts and other authorities of Pocahontas county in exercising immediately after its passage exclusive jurisdiction over said territory without question in any quarter, by the complete surrender of such jurisdiction by the courts and other authorities of Pendleton county, by its recognition by the general assembly in repeated acts of subsequent legislation, by the representation of county boundaries on maps prepared and published under the authority of the legislature and
403 *in conformity with the provisions of laws requiring the exterior boundaries of the counties to be laid down by actual survey or by reference to one or more actual surveys and strict accuracy to be observed in denoting the true position of the corners of adjacent counties, and by its universal acceptance as the true construction by the people generally from the passage of the act until the origin of the present litigation, the court is of opinion that this construction should prevail and should be adopted by this court as the true exposition of the act in question.

And it appearing to the court that the foregoing views and opinions of the court are decisive against the pretensions of the appellees, it is deemed unnecessary to express an opinion upon any other question arising in the cause.

The judgment of this court therefore must be that the judgment of the Circuit court be reversed with costs to the appellant, and that the caveat be dismissed with costs to the caveatee in the Circuit court.

Judgment reversed.

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404 *Summers & al. v. Bean.

July Term, 1856, Lewisburg.

1. **Specific Execution — Contracts — Slaves — Proof of Peculiar Value.**—As a general rule a court of equity

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will decree the specific execution of a contract for the sale or delivery of slaves at the suit of the purchaser, without any allegation or proof of peculiar value.

2. **Same—Same—Inadequacy of Remedy at Law.***—The purchase of slaves being for the life or widowhood of the vendor, upon her refusal to execute the contract, the inadequacy of the purchaser's remedy at law will give equity jurisdiction to relieve him.

3. **Same—Same—Life Estate in Slaves—Parties.**—In a suit in equity by purchaser of slaves for the life or widowhood of the vendor, there being no controversy as to the right of the remaindermen in the slaves, they are not necessary parties.

4. **Wills—Case at Bar.**—Testator bequeaths to his widow land, slaves, &c. for her life or widowhood for the support of herself and her younger children. One of these children grows up and marries, and the widow contracts with her husband to sell him two of the slaves for her life; and these two slaves are not more than will be the share of his wife in the slaves. This is no breach of the trust of the will, and a court of equity will enforce the sale at the suit of the purchaser, with a provision that the slaves shall be surrendered for division if the widow shall marry.

Samuel Summers died prior to November 1845, having made his will, which was duly admitted to probat in the County court of Kanawha. The seventh clause of his will is as follows: "For the purpose of enabling my affectionate wife Wilelmira to rear and educate my younger children, as well as to secure to her and such of my children a comfortable home, as may remain with her after my death, after paying off my debts and the specific legacies herein before given, I give and devise to my beloved wife all the rest and residue of my estate, both real and personal, for and during her widowhood; but if my said wife shall marry again, then in that event she is to
405 have a *child's part in my estate for and during her natural life, and no more."

The property devised to Mrs. Summers consisted of a valuable farm on which the testator lived, a number of slaves and all the stock, &c. upon the land. She seems to have lived upon and cultivated the farm until 1850; when one of her daughters having married John J. Bean, in July 1850 Mrs. Summers leased to Bean for five years the farm, slaves, and every thing upon the land; for which he covenanted to pay all debts which she had theretofore contracted, to support the family in the style they had been accustomed to live, to pay for the schooling of Nancy and Blackburn, two of the younger children, as long as Mrs. Summers chose to send them to school within the said five years, and to pay over to Mordecai A. Summers, (one of the children, one-half of all the profits arising from the leased property "as long as the said M. A. Summers continued to take an interest for the family." And he bound himself to return every thing at the end of the five years in as good condition as when he took possession.

Within the first year of the lease the parties became dissatisfied; and on the 31st day of July 1851 three papers were executed. One of these was executed by Bean and Mordecai A. Summers; and it recited that Mordecai Summers had bought out Bean's lease; and provided for the division of the growing crop. Another was a bond of Mordecai A. Summers, by which he bound himself to pay to Bean on the 1st of the next September, eight hundred dollars for his interest in the real estate of Samuel Summers. And the third was a writing under seal by which Mrs. Summers and Mordecai Summers "for various considerations," bound themselves to secure to Bean the services of Caroline, a negro girl about twelve years of age, and McKendry, a black boy living with D. Surbaugh—the
406 *girl then and the boy at Christmas—the services of which two slaves the said Bean was to have during the life of Mrs. Summers.

The girl was put into the possession of Bean; but she was afterwards taken possession of by Mordecai Summers; who also took possession of the boy McKendry a few days before Christmas.

In April 1852 John J. Bean filed his bill in the Circuit court of Putnam county, against Mrs. Summers and Mordecai A. Summers, in which he set out the foregoing facts, and charged that the transfer of the two slaves to him was in consideration in part of his surrender of his lease. And he prayed that the defendants might be compelled to execute specifically their covenant, by delivering to him the said two slaves.

Mrs. Summers answered the bill. She denied that the surrender of the lease was any part of the consideration for the covenant to let the plaintiff have the two slaves. She said that the difficulties which arose in the family by the unreasonable acts and conduct of the plaintiff, rendering it impossible for them to live together, by mutual consent the lease was canceled, and plaintiff voluntarily surrendered his interest in it. That no consideration was ever asked or required for this surrender, and none was ever agreed to be given. That the covenant in relation to the two slaves was wholly independent of, and had no connection whatever with, the lease. That the plaintiff having surrendered the lease, claimed that he was entitled to a portion of the estate of Samuel Summers deceased, in right of his wife. That failing to get what he claimed he threatened that unless his demands were complied with he would sue the respondent, and would remove with his wife to a distant state; and by means of these threats and the entreaties of his wife, respondent agreed to give him the two slaves, and executed the covenant,

*Equity Jurisdiction—Inadequacy of Remedy at Law.—For the well settled proposition that the inadequacy of the remedy at law gives a court of equity jurisdiction, the principal case is cited and followed in Bumgardner v. Leavitt, 35 W. Va. 204, 13 S. E. Rep. 70.

See the principal case cited in Walker v. Hunt, 2 W. Va. 494; Baker v. Rinehard, 11 W. Va. 241.

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which the plaintiff insisted should be
407 *also executed by Mordecai A. Summers. She also objected that she had no authority to execute the contract; and that the court had not jurisdiction to enforce it.

All the three papers hereinbefore mentioned, were attested by John Bowyer, who was examined as a witness. He stated that they were all executed at the same time; and the lease was to be given up or destroyed on the same day. The consideration mentioned for the covenant as to the two slaves, as well as he could recollect, was in part the surrender of the lease, and as he supposed from the fact of Bean's wife being the daughter of Mrs. Summers. In answer to a question by defendant, whether he could state positively that a surrender of the lease was in part consideration of the aforesaid covenant, witness said, "I was under that impression, though not expressly mentioned at the time; and that the land contract, (the sale of Bean's wife's interest in the real estate,) I think, was also part of the consideration."

The defendants introduced a witness, T. R. Middleton, who testified that the plaintiff told him he had said to Mrs. Summers, that if she did not do something for him, he would rent out the farm and take the negroes off.

The cause came on to be heard in September 1853, when the court held that the plaintiff was entitled to a specific execution of the contract to the extent of the interest of Mrs. Summers in the two slaves: And it was decreed that the defendants, or whosoever of them had control of the said slaves, should deliver them to the plaintiff, to be held by him for the life of Mrs. Summers, unless she should again marry. In which last event the slaves were to be restored to her, to be disposed of as directed by the will of Samuel Summers deceased. From
408 this decree the defendants *applied to this court for an appeal, which was allowed.

Fitzhugh and Price, for the appellants, insisted:

1st. That the court would not enforce a specific execution of the contract. That slaves were personal property; and that although the courts had in some cases interposed to restrain the sale of slaves, this was on account of the relation of the parties to them, they being of peculiar value to them; and not on account of the character of the property. They referred to Farley v. Farley, 1 McCord's R. 506; Sarter v. Gordon, 2 Hill Ch. R. S. Car. 121; Horry v. Glover, Id. 515. That the courts of South Carolina had afterwards extended their jurisdiction further, in Young v. Burton, 1 McMul. Equ. R. 255, which was a case in the Court of errors; and this decision had been followed in Bryan v. Robert, 1 Strobh. Equ. R. 334. That the like rule was followed in Georgia; Dudley v. Mallery, 4 Georg. R. 52; and in the later cases in this court; Kelly v. Scott, 5 Gratt. 479; Sims v. Harrison, 4 Leigh 346; though previous cases had limited the interference of the court to family slaves. Allen v. Freeland, 3 Rand. 170; Randolph v. Randolph, 6 Rand. 194. But that all these cases put the jurisdiction on the ground of the relation; and in Virginia at least, none of them was for the specific performance of a contract.

2d. That the will of Samuel Summers deceased created a trust for the benefit of all his younger children, as well as their mother; and that Mrs. Summers had no power to dispose of the trust property. To show that it was a trust, they referred to 1 Jarm. on Wills, p. 334, 335, marg.; Malim v. Keighley, 2 Ves. jr. R. 333; Harrisons v. Harrison, 3 Gratt. 1. To show that it being a trust Mrs. Summers could not
409 dispose *of the property, they referred to Batton on Specific Performance 221, 67 Law Libr.; Nickell & Miller v. Handly, 10 Gratt. 336; Perkins' trustee v. Dickinson, 3 Gratt. 335; Markham v. Guerrant, 4 Leigh 279; Stinson v. Day, 1 Rob. R. 435; Wallace v. Dold, 3 Leigh 258.

3d. That if there was not a trust, but a simple life estate, the remaindermen should have been parties. Nickell & Miller v. Handly, 10 Gratt. 336; Code, ch. 103, § 7, 8, p. 458.

4th. That there was no valuable consideration for the covenant. That the bill only set up a valuable consideration, which was denied in the answer. The plaintiff cannot therefore rely upon a good consideration: And if he could, it is not sufficient. They referred to Batton on Specific Performance, p. 39, 67 Law Libr.; Darlington v. McCoole, 1 Leigh 36; Reed v. Vannorsdale, 2 Leigh 569; 2 Rob. Pr. 169, 170; Seymour v. Delancey, 6 John. Ch. R. 222; Cathcart v. Robinson, 5 Peter's R. 263; St. John v. Benedict, 6 John. Ch. R. 111; 1 Madd. Ch. 405.

Parks and Fry, for the appellee, insisted:

1st. That the contract was such an one as Mrs. Summers could legally make, Mrs. Bean being one of the children to be supported out of the estate left to Mrs. Summers; and there being but six children to share the property, and some nine slaves, beside a valuable tract of land, and stock upon it, the slaves contracted to be put into the possession of Bean was not more than a reasonable share.

2d. That there was both a valuable and a meritorious consideration; and that the cases cited by the other side from 1 and 2 Leigh, showed that a meritorious consideration was sufficient to sustain the contract. They also referred to Jones v. Obenchain, 10 Gratt. 259; and Ellis v. Nimmo, 10 Cond. E. C. R. 534.

410 *3d. That a court of equity would enforce a specific performance of the contract: And they referred to the cases cited by the counsel for the appellants, and insisted that they established the proposition. They also referred to Adderley v. Dixon, 1 Cond. Eng. Ch. R. 311; 2 Story's Equ. Jur. § 716 to 718 and 726. They in-

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sisted further that the will did not create a trust. 2 Story's Equ. Jur. § 1068, 1069; Lewin on Trusts, p. 77, 24 Law Libr.

MONCURE, J. The first objection taken to the decree of the Circuit court is that the appellee has an adequate remedy at law, and that a court of equity has therefore no jurisdiction of the case. In answer to this objection it is contended that he has not an adequate remedy at law, first, because of the nature of the subject of the contract, being slaves; and secondly, because of the contingent and uncertain interest contracted for, being an estate for life or widowhood. I will consider these answers in their order. And first, as to the nature of the subject of the contract.

This is believed to be the first case in which the question has been distinctly presented for decision to this court, Whether a court of equity will specifically execute a contract for the sale or delivery of slaves, unless it be shown that they are of peculiar value, or that adequate compensation for them cannot be obtained at law: Though there are several decisions of the court, which will be hereafter noticed, having an important bearing upon the question. The English books throw no light on the subject. The only English case I have seen in which the question was involved, is that of Pearne v. Lisle, Amb. R. 75; which was a suit to compel the delivery of certain negroes which had been hired by the defendant in the island of Antigua. In that
411 case Lord Hardwicke is repotted *to have said, "As to the merits, a specific delivery of the negroes is prayed; but that is not necessary, others are as good; indeed in the case of a cherry-stone very finely engraved, and likewise of an extraordinary wrought piece of plate, for the specific delivery of which bills were brought in this court, they could not be satisfied any other way; their value arose on circumstances peculiar to themselves; but in other things, as diamonds, one may be as good as another." His lordship rightly considered negroes as property; but seems not to have considered them as human beings, of greater peculiar value than "a cherry-stone very finely engraved," or "an extraordinary wrought piece of plate." Certainly that case can have no influence on the decision of this; which must be decided on principle, and with such aid as may be derived from our own decisions, and those of our sister states in which the institution of slavery exists.

How stands the case on principle? It is a general rule that a party cannot come into equity for relief if he has an adequate remedy at law; but if he has not, he is entitled, for that very reason, to come into equity. On this rule, the doctrine of specific performance rests. Courts of equity have long, if not always, exercised a general jurisdiction in the specific execution of contracts concerning real estate; "not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy." Adderley v. Dixon, 1 Sim. & Stu. 607, 1 Cond. Eng. Ch. R. 311, 2 Story's Eq. Jur. § 717. Although in some cases of contract for the purchase of real estate a party may have an adequate remedy at law, yet he is not bound to resort to it, but may, at his election, sue in equity. Where such a contract is unobjectionable, it is as much of course for a court of equity to decree a specific performance, as it is for a court of law to give damages for the breach of the
412 *contract. Hall v. Warren, 9 Ves. R. 605. The party need not show that the land is of peculiar value, or that he could not be adequately compensated in damages for the loss of it. It is enough that he so considers, and prefers to have the land in specie. And that he does so is conclusively shown by his suit for specific performance. His right to bring such a suit in all cases is founded on the nature of the subject, and on the advantage of having a general rule and the difficulty and inconvenience of forming exceptions thereto.

Generally an adequate remedy may be had at law for the breach of a contract concerning any other personalty than slaves; and therefore, as a general rule, a court of equity will not enforce the execution of such a contract. But sometimes an adequate remedy at law cannot be had for the breach of such a contract; and then, its specific execution will be enforced in equity. As, however, it would be presumed, from the general nature of such other personal property, that an adequate remedy may be had at law for the breach of a contract concerning it, the contrary ought to be made to appear in any case in which the specific execution of such a contract may be sought.

Now let us apply the test to the peculiar species of property under consideration. Are slaves, in their very nature, such property as that an adequate remedy at law cannot generally be had for a breach of a contract to sell and deliver them? If they are not, then the same principle applies to them which applies to other personal property. But if they are, then the same, or nearly the same, principle applies to them which applies to real estate; and in a suit for specific execution it will be presumed, from the very nature of the subject, and without any allegation to that effect, that an adequate remedy cannot be had at law. I am of opinion that they are. Slaves are not only property but rational beings; and are generally acquired with
413 *reference to their moral and intellectual qualities. Therefore damages at law, which are measured by the ordinary market value of the subject, will not generally afford adequate compensation for the breach of a contract for the sale of slaves. There is at least as much reason for enforcing the specific execution of a contract for the sale of slaves, as of a contract for the sale of real estate. The only difference between the two cases seems to be this, that

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while in the latter specific execution will always be enforced if the contract be unobjectionable and the suit be brought in due time, it will not in the former, if it appear that the slaves were purchased as merchandise, without reference to their peculiar value to the purchaser, or that the plaintiff is a mere mortgagee or other incumbrancer: in which case, as the slaves are to be sold at all events, damages at law assessed according to their market value, would be adequate compensation.

Thus stands the case on principle, as it seems to me. Let us now see how it is affected by any decisions in this and other southern states. And first, in regard to the latter.

In South Carolina the subject has received fuller consideration than in any other state; and the law is now firmly settled in precise accordance with what I have stated. There is some apparent contradiction in the earlier cases, as might naturally be expected in the application of principle to a new subject. The line between real and personal estate in regard to the specific execution of contracts had been so long drawn, and was so well marked in the English books, that the courts were at first inclined to apply the same rule to slaves as to other personal estate. Accordingly, Farley v. Farley, 1 McCord's Ch. R. 506, was decided on that principle. But in Sarter & wife v. Gordon, adm'r, 2 Hill's Ch. R. 121, it was laid down as a general rule that a bill will lie
414 for the specific delivery *of slaves as for the specific performance of a contract for the sale of land. In Horry v. Glover, Id. 515, the same rule is laid down, and many forcible observations are made to show the injustice, uncertainty and inconvenience of any other rule. It is also stated as an exception to the rule, that if a purchaser contract for slaves generally, with no view to any particular individuals, or as merchandise, to sell again, the remedy is at law. In Young v. Burton, 1 McMul. Equ. R. 255, the subject was fully considered by the Court of errors, and the cases of Sarter v. Gordon and Horry v. Glover were entirely approved. In reference to those cases the court say, that although they were attended with the peculiar, or rather common circumstance that the slaves in controversy were family slaves, it was the intention of the court to lay down and establish a general rule. And in reference to Farley v. Farley, and the other early cases on the subject, they say, that those cases were decided without reference to that distinction which obviously exists between slaves and other chattels, and were based on a servile adherence to the English rule, and a total disregard to the principle on which it was founded. The whole opinion of the court in that case is very able, and I think conclusively demonstrates the correctness of the principle it affirms. There is nothing in conflict with it in any subsequent case. There has been, so far as I have seen, no subsequent case on the subject in the Court of errors. There have been several in the Court of appeals in equity; but they all recognize and follow Young v. Burton, which is regarded as finally settling the law on the subject in that state. Ellis v. Commander, 1 Strobh. Equ. R. 188; Bryan v. Robert, Id. 334; Sims v. Shelton, 2 Id. 221. The same doctrine prevails in North Carolina. Williams v. Howard, 3 Murph. R. 74. Also in Tennessee. Loftin v. Espy, 4 Yerg. R. 84; Henderson v. Vaulx & wife, 10 Id. 30.
415 *Also in Mississippi. Murphy v. Clark, 1 Smeades & Marsh. 221; Butler v. Hicks, 11 Id. 78; Hull v. Clark, 14 Id. 187. In Georgia a different doctrine prevails; and it is held, in conformity with the English rule in regard to chattels, that to give a Court of equity jurisdiction to enforce a specific delivery of slaves, it is necessary to charge and prove peculiar circumstances; as that they are family servants, a carpenter, blacksmith, wagoner, hostler, &c. Dudley v. Mallery, 4 Georgia R. 52, 65. Also, it would seem, in Alabama; Savery v. Spence, 13 Alab. R. 561; though I have not seen the case itself, the volume containing it being out of place in the library. The foregoing are all the decisions of our sister states, within my knowledge, which appear to have a material bearing on the subject. There may be others: But I think it may be safely concluded that the decided preponderance of authority to be derived from that source is in favor of the general jurisdiction of equity to enforce the specific execution of a contract to sell or deliver slaves.

I will now refer to such of our own decisions as seem to me to affect the question. They are all cases in which the question was, whether a court of equity would enjoin the sale of one man's slaves under an execution against another man's goods. In Wilson v. Butler, 3 Munf. 559, the affirmative of the question was held; the court being of opinion that the remedies of the owner at law are not in exclusion of a proceeding in equity, having for its object the retention of the property in specie. The case was expressly placed on the same ground, in regard to equitable jurisdiction, with a suit for specific performance; thus admitting, as it seems to me, that in such a suit to enforce the delivery of slaves, the jurisdiction of equity exists. Scott v. Halliday, 25 Id. 103, and Sampson v. Bryce, Id. 175, were cases of the same kind, and decided in the same way. In Bowyer
416 v. Creigh, 3 Rand. *25, the plaintiff was an incumbrancer merely, and it was held that he had an ample remedy at law, and therefore no right to come into equity. What is said by Judge Carr in delivering the opinion of the court, on the general question of the jurisdiction of equity in such cases, is obiter dictum, and in conflict with subsequent decisions, which will be presently noticed. In Allen v. Freeland, Id. 170, which was decided before, though reported after Bowyer v. Creigh, the court was unanimously of opinion that the appellant claimed the slaves

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in controversy under a fraudulent sale, and therefore affirmed the decree dissolving his injunction. Three of the judges intimate their opinions on the question of jurisdiction in such cases. Judge Carr's conforms with the views expressed by him in Bowyer v. Creigh, and takes the ground that peculiar value must be shown to give the court jurisdiction. Judge Green inclined to think that slaves ought prima facie to be considered as of peculiar value to their owners, and not properly a subject for adequate compensation in damages, as land is considered to be to a purchaser; but that this presumption may be repelled, as in the case of a person purchasing slaves for the avowed purpose of selling them again. And he inclined to think it was repelled by the circumstances of that case; though he said it was not necessary to decide the case on that ground. Judge Brooke, after commenting on the peculiar nature and value of the property, said that in all such cases this court had exercised a restraining power, except a case in which, whatever may be the decision of it, the property is to be sold and the only controversy is as to the proceeds of sale; and he therefore thought the injunction was properly awarded; though upon the merits he concurred with the rest of the court in affirming the decree. In Randolph v. Randolph, 6 Rand. 194, the question, whether slaves are prima facie of such peculiar value
417 as to give a court of *equity jurisdiction to restrain a wrongful sale of them under execution, was fairly presented for decision: And four out of the five judges concurred in opinion that they are. Judge Green said, "This prima facie presumption may however be repelled by circumstances. As if the slaves were necessarily to be sold, (as in the case of their being pledged for the payment of debts,) and the question is between a creditor claiming under a specific lien, and one claiming under execution; or, if they were in the hands of the owner as a subject of traffic; in such cases the injury done to the owner by seizing and selling them, under an execution against another, would be precisely and accurately measured by their market value." Judge Cabell said, "It should be regarded as a general rule, that the courts of chancery are bound to interpose whenever the slaves of one man are about to be sold to pay the debts of another. The exceptions to this general rule, whatever they may be, are to be brought forward and established in each particular case by those who claim the benefit of them." The other two concurring judges were Brooke and Coalter. Judge Carr delivered a dissenting opinion, in which he adhered to his former views. In Sims v. Harrison, 4 Leigh 346, the case of Randolph v. Randolph was approved; and was declared as having determined, that in every case in which the owner of slaves wrongfully taken under execution applies to a court of equity to inhibit the sale of them, the court ought to award an injunction, and if the case be made out to give relief, though it be neither alleged in the bill, nor proved that the slaves have any peculiar value. The only remaining case, I believe, is Kelly v. Scott, 5 Gratt. 479, which follows the principle settled in the two cases last cited. The result of these decisions, it seems to me, is to maintain the general jurisdiction of equity to enforce the specific execution of a
418 contract *to sell or deliver slaves. There is at least as much reason for enforcing the specific delivery of slaves according to contract, as for protecting them from a wrongful sale under execution after their delivery. The reason in each case is, that the legal remedy is inadequate. But it is less so in the latter than the former case. In the latter, the party would generally have his choice of several remedies at law, as detinue or trover for the recovery of the property or its value, or an action on the indemnifying bond provided for by law in such cases. While in the former, his only legal remedy would be an action for damages. It can make no difference in principle, that in the latter he is already owner of the slaves, while in the former he has only contracted for the ownership. It is true that in the latter he may have formed an attachment to the slaves from long connection with them; but that connection may have existed only for a day. A purchaser of slaves for his own use, looks to their qualities, and generally buys such only as will suit him. In each case, peculiar value will alike be presumed.

I am therefore of opinion, both upon principle and authority, that it may be laid down as a general rule, that a court of equity has jurisdiction to enforce the specific execution of a contract for the sale or delivery of slaves, though it be neither alleged in the bill nor proved that they have any peculiar value. The exceptions to this rule, whatever they may be, (as was said by Judge Cabell in Randolph v. Randolph,) are to be brought forward and established in each particular case, by those who claim the benefit of them. It is unnecessary to define them in this case, as it falls within none of them.

I am also of opinion that the appellee has not an adequate remedy at law, because of the uncertain and contingent interest
419 contracted for. His remedy at *law is an action upon the covenant of the appellants to secure to him the services of the slaves in controversy during the lifetime of the female appellant. There is no safe or certain rule whereby the damages could be measured in such an action; and they could only be conjectured by the jury. If there were no other remedy, that, from necessity, would have to be resorted to, and the best attainable result arrived at, by the aid of tables of longevity or otherwise. After all, such result would probably be wide of the true mark. At least it must be admitted that such a remedy is inadequate; and that is sufficient reason for a suit in equity to obtain the very thing contracted for, which will do exact justice to

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both parties. If the covenant be construed to be for the use of the slaves during the widowhood of the female appellant, (which was the extent of her interest therein, and all that can be recovered of her in a suit for specific performance,) then it would be still more difficult to estimate the damages in an action at law, and there would be greater reason for a suit in equity. For the authorities on this branch of the case, see the notes to Cudder v. Rutter, in Leading Cases in Equity, 65 Law Libr. p. 529, 532-537; Batten on Contracts 234, 67 Law Libr. 138-144.

If the appellee could recover the slaves by an action of detinue, he would have an ample remedy at law and could not come into equity for relief. Armstrong v. Huntons, 1 Rob. R. 323, and cases therein cited. But he cannot maintain that action, at least for both of the slaves. The legal title was not vested in him by the covenant, which is merely executory. That he obtained, and for a short time held, possession of the girl, cannot take the case out of the jurisdiction of equity. He never obtained possession of the boy; and was soon dispossessed of the girl by the appellants, who now hold both against him. Even if
420 *he could maintain detinue for the girl, (which, from the peculiar terms of the contract, may be doubtful,) he cannot for the boy, and may therefore sue in equity for both. The covenant is joint, and a court of equity having jurisdiction of the subject may give complete relief.

The jurisdiction of a court of equity being maintainable in this case on the ground of specific performance, and the party having a remedy at law though inadequate, the application, as in every such case, is addressed to the sound discretion of the court, which will enforce the contract if no good cause be shown or appear to the contrary. It was insisted, in behalf of the appellants, that the contract in this case ought not to be enforced for several reasons. The first of which is, want of consideration. The appellee contends that the contract was founded both on valuable and meritorious consideration, and that either is sufficient to authorize the specific enforcement of a contract. The valuable consideration relied on is, the surrender of the lease. The appellants do not deny that this would be a valuable and adequate consideration, supposing that the female appellant had authority to make it—a question which will be presently considered; but they deny that the contract was founded on that consideration, and aver that the lease was voluntarily surrendered. The lease was for the term of five years, and was surrendered at the end of one year. The surrender and the contract for the services of the two slaves in controversy bear date on the same day, and were executed at the same time. The inference from this fact, in the absence of any evidence to the contrary, is almost irresistible that the two instruments were dependent upon and in consideration of each other. The inference is supported and not opposed by other evidence. At the same time with the execution of the
421 said surrender and contract two *other instruments were executed by the parties or some of them; one of the said instruments being the obligation of the appellant Mordecai A. Summers for the purchase money of the appellee's interest in the real estate of Samuel Summers; and the other, an agreement between the said M. A. Summers and the appellee in regard to the crop on the demised premises. The latter recites that M. A. Summers, (who was evidently acting for his mother,) had bought out the appellee's lease, which was then surrendered. This shows that the surrender was not voluntary, and no other consideration appears than the cotemporaneous contract for the services of the two slaves. The contract itself recites that it was executed "for various considerations." Being under seal, it would be an estoppel at law to a denial of the consideration; and though not an estoppel in equity, it is yet prima facie evidence of the fact it recites against the parties thereto. In addition to all this, Bowyer the attesting witness to all these instruments, and who was present at their execution, being asked what were the various considerations mentioned in the covenant, said in his deposition, "The consideration mentioned, as well as I can recollect, was in part the surrender of the lease agreement, and I supposed from the fact of said Bean's wife being the daughter of Mrs. Summers." And being asked by the appellants whether he could state positively that a surrender of the lease was part consideration of the covenant, said, "I was under that impression, though not expressly mentioned at the time, and that the land contract I think was also a part of the consideration." Upon the whole, I think it manifestly appears that these acts and instruments were all parcels of one family arrangement; and mutually dependent upon, and in consideration of each other; and that the appellee would not have surrendered the lease but for the exe-
422 cution of the covenant. *I am therefore of opinion that the covenant was founded on valuable and adequate consideration: Which renders it unnecessary to consider the question, whether it is founded on meritorious consideration; or such as would authorize a court of equity to decree its specific performance.

Another reason assigned for not enforcing the specific execution of the contract is, that it would be a breach of trust; and that a court of equity will not aid any person in obtaining the performance of an agreement, which, if executed, would be a breach of the trust reposed in the other party. Batten 221, 67 Law Libr. 132. The supposed trust is created by the 7th clause of the will of Samuel Summers. It was contended in behalf of the appellee that this clause creates no trust; or at least none that can be enforced; and only indicates the motive of the testator for giving the residuum of his estate to his wife during her widowhood;

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and Wallace v. Dold's ex'ors, 3 Leigh 258, and Stinson, ex'or, v. Day & wife, 1 Rob. R. 435, were relied on to sustain this view; while Markham v. Guerrant, 4 Leigh 279; Perkins' trustee v. Dickinson, 3 Gratt. 335; Nickell v. Handley, 10 Gratt. 336, and 1 Jarm. on Wills 334-5, were relied on by the counsel for the appellant to sustain the contrary view. But I think it will be unnecessary to decide this question; being of opinion that another position taken on behalf of the appellee is sustainable, to wit, that even if the supposed trust exists, it would not be violated by the specific enforcement of the contract. The testator certainly intended to give his wife a considerable personal interest in the residuum of his estate during her widowhood—more then a child's part, for life, to which he limits her interest in the event of her marrying again. And he certainly intended to give her during that period, if not the uncontrolled disposition, at least a very large discretion in the management of the
423 subject*—as large as possible, consistently with the declared purposes of the supposed trust. It does not appear that the execution of the lease was a violation of the trust; but rather that it was reasonably supposed to be a convenient mode of executing the trust. The trustee was not bound to keep the property together, and cultivate the land herself; but might, if it was the interest of the parties concerned to do so, rent out the land and hire out the negroes. She might have leased out the trust subject for a term of years, even to a stranger. She leased it for five years to the appellee, her son in law, whose wife was one of the four children who were living with her, and one of the objects of the supposed trust. In consideration whereof, he stipulated to pay all her debts, to support the family, to pay for the schooling of the two younger children, and provide them with books; in fine, to fulfill all the purposes of the trust during his term, and at the end of it to restore the subject in as good or better condition than when he received it. He also stipulated to pay to M. A. Summers, another and the oldest of the said four children, one half of all the profits arising from the subject, as long as he continued "taking an interest in the family." It is not pretended that the consideration thus stipulated for, would have been an ample rent for the property; and supposing the stipulations to be faithfully performed, it is impossible to regard the arrangement as a beach of trust. On the contrary, it seemed to be the best mode of effectuating the trust. All the family continued to live together in the mansion-house of the testator; the property was kept together, and under the management of the son in law; and, if there should be any profits, after paying the expenses of the operation and supporting the family, they were to be equally divided between the son and son in law. It turned out, however, that some dis-
agreement arose between the parties;
424 *and they found it necessary to make a different arrangement. The consequence was, that about a year after the execution of the lease it was surrendered, the appellee sold his wife's interest in the real estate to the appellant M. A. Summers, and the appellants executed the covenant in regard to the two slaves in controversy. The question now is, Was the execution of that covenant a breach of the supposed trust? If the trustee has a right to make the lease, she had a right to accept its surrender, and to pay a reasonable consideration therefor out of the trust subject, if required by the interest of the beneficiaries. It does not appear that the use of the two slaves for her life or widowhood, was an unreasonable consideration to pay for the surrender of the lease. But whether it was or not, the covenant was not a breach of trust, if the remaining trust subject, retained in the hands of the trustee, is ample for all the purposes of the trust; for the use during her widowhood of all beyond that, certainly belongs to her. It is not pretended that the remaining trust subject is not ample for those purposes. It would be strange, indeed, if she had so little individual interest in the subject, and so little power over it, that she could not part with the use during her widowhood of a boy and girl, 11 and 13 years of age, when she retained, subject to the purposes of the trust, all the other personal estate, including nine slaves and all the real estate. And that too when her son, one of the beneficiaries, joined in the act of alienation, and the husband of another was the alienee; thus leaving only two of the beneficiaries who could have any cause to complain, and they, only if the subject retained should be inadequate to their support. It is not pretended that, if there had been no other consideration for the covenant than to make an advancement out of the personal estate to the wife of the appellee, the two slaves in controversy would
have been an excessive advancement,
425 *or such a one as it was not altogether proper to make, under the circumstances. She was one of the children for whom a comfortable home was provided by the trust, if trust it was. And when she married and left the maternal roof, it was nothing more than meet and right, and seems to be consonant with the purposes of the trust, that her mother, if she chose to do so, should make her a fair and reasonable advancement out of the trust subject; taking care to do no injustice to the remaining beneficiaries. In no view of the case, therefore, can the covenant be regarded as a violation of the supposed trust.

Another reason assigned for not decreeing the execution of the covenant is, that it was extorted from the appellants by the use of harsh and unjust means. The only foundation for this objection in the record is the evidence of Middleton, who testifies that the appellee said he had told the appellant Mrs. Summers, that he would rent out the farm and take the negroes off if she would not do something for him. This must have occurred while he held the lease;

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and the only tendency of the evidence is, to show that the covenant was executed in consideration, in part at least, of the surrender of the lease. The evidence is inconsistent with the answer of Mrs. Summers, who says the lease was voluntarily surrendered, and that the means by which the covenant was obtained were used after the surrender of the lease; although the surrender and covenant bear date on the same day, and it is proved were executed at the same time. It is not pretended that any other means were then used than the cotemporaneous execution of both instruments; and it appears that none other were, from the evidence of the attesting witness. This objection therefore is unsustained.

I have noticed all the reasons assigned for not enforcing the specific execu-
426 tion of the covenant; and *considering them insufficient, I think the appellee is entitled to have that mode of relief.

Before closing this opinion it is necessary to notice an objection taken to the decree for want of parties. It was contended that the persons entitled in remainder to the slaves in controversy on the death or marriage of the appellant Mrs. Summers, are proper parties to this suit. I do not think so. The estate in remainder is not in controversy in this suit, and cannot be affected by the result of it. The rights of the remaindermen will be the same, whether the particular estate be held by the appellants or the appellee, and are amply protected by law in either case. A court of equity will interpose for their protection whenever they are endangered by the act of the particular tenant, in attempting or threatening to remove the subject out of the state or otherwise. But, consistently with those rights, the particular tenant has the same right of enjoyment of his estate that any other has, including the right of alienation. Otherwise, it would always be necessary for remaindermen to join the particular tenant in an act of alienation of his estate.

I think the decree ought to be affirmed.

ALLEN, P., and DANIEL and LEE, Js., concurred in the opinion of Moncure, J.

SAMUELS, J., dissented.

Decree affirmed.

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427 *Wickham and Goshorn v. Lewis Martin & Co.

July Term, 1856, Lewisburg.

1. **Deeds of Assignment—To Secure Creditors—Trustee a Purchaser for Value.***—An insolvent merchant purchases goods not intending to pay for them, and after getting possession of them he conveys them and all his other estate in trust for the payment of his debts, the trustee having no notice of the fraud. The trustee is a purchaser for value without notice.

2. **Same—Same—Conflict of Laws—Case at Bar.**†—In such a case the grantor and trustee live in Virginia, the goods were sold in Baltimore, and were sent by the purchaser to Ohio apparently for the purpose of concealing them; and the seller of the goods there gets possession of them after the trustee had taken possession; and trustee sues the seller in Virginia for the goods. The deed is to be construed according to the law of Virginia.

3. **Same—Same—Case at Bar.**‡—The deed after conveying the debtor's property, describing it by its location, which does not include the goods in controversy, and after stating the trusts upon which it is conveyed; in the conclusion of the deeds says, "And it is further expressly understood, that if through accident or forgetfulness or inadvertence the said M G (the grantor) may have omitted to mention any claim or property that the same shall be understood as being conveyed hereby to the said trustees, to all intents and purposes as fully as if specifically mentioned." The goods in Ohio passed by the deed.

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*Deeds of Assignment—To Secure Creditors—Trustee a Purchaser for Value.—For the proposition that, a trustee in a deed of trust is a purchaser for value, the principal case is cited and approved in the following cases: Gordon v. Rixey, 76 Va. 698; Williams v. Lord, 75 Va. 404; Cammack v. Soran, 30 Gratt. 395, and *note*; Old Dominion Steamship Co. v. Burckhardt, 31 Gratt. 660, and *note*; Antoni v. Wright, 22 Gratt. 873; Exchange Bk. v. Knox, 19 Gratt. 747, and *note*; Evans v. Greenhow, 15 Gratt. 157; Fidelity, etc., Co. v. Shenandoah Val. R. R. Co., 32 W. Va. 259, 9 S. E. Rep. 185; Weinberg v. Rempe, 15 W. Va. 858; Duncan v. Custard, 24 W. Va. 737; Lamb v. Pannell, 28 W. Va. 667; Farmers' Bk. v. Willis, 7 W. Va. 47; W. M. & M. Co. v. Peytona, etc., Co., 8 W. Va. 441; Kimmins v. Wilson, 8 W. Va. 591, and cases cited; 2 Va. Law Reg. 716; Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464, and cases cited; Lewis v. Glenn, 84 Va. 965, 6 S. E. Rep. 866, and cases cited; Long v. Meriden, etc., Co., 94 Va. 596, 27 S. E. Rep. 499; Oberdorfer v. Meyer, 88 Va. 887, 13 S. E. Rep. 756; Chapman v. Chapman, 91 Va. 400, 21 S. E. Rep. 813; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 368.

See, on the subject of assignments for benefit of creditors, Paul v. Baugh, 85 Va. 955, 9 S. E. Rep. 329; Siter v. McClanachan, 2 Gratt. 280; Tate v. Liggat, 2 Leigh 84; Lewis v. Caperton, 8 Gratt. 148; Phippen v. Durham, 8 Gratt. 457; Skipwith v. Cunningham, 8 Leigh 271; McCullough v. Sommerville, 8 Leigh 415; Jones v. Christian, 86 Va. 1017, 11 S. E. Rep. 984. See Gordon v. Cannon, 18 Gratt. 387, and *note*.

†**Same—Same—Conflict of Laws.**—For the proposition that, a transfer of movable property, good by the laws of the owner's domicil, is valid wherever else the property may be located, and should prevail, the principal case is cited and approved in Bockover v. Life Ass'n, 77 Va. 90. See, in accord, Kirkland v. Brune, 31 Gratt. 126, and *note*.

‡**Same—Same.**—In Lewis v. Glenn, 84 Va. 965, 6 S. E. Rep. 866, it is said: "The language employed in the deed is apt and sufficient to pass everything the company owned, and clearly embraced the uncalled and unpaid subscriptions in the hands of its stockholders. See Maitland v. Newton, 3 Leigh 714, citing Comegy v. Vasse, 1 Peters 193; Mundy v. Vawter, 8 Gratt. 518; Griffin v. MaCauley, 7 Gratt. 477; *Wickham v. Lewis Martin & Co., 13 Gratt. 427;* Milner v. Metz, 16 Peters 221." See also, the principal case cited in Chapman v. Railroad Co., 26 W. Va. 831.

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4. **Fraud of Purchaser—Quære.**—QUÆRE: What fraud in the purchaser of goods will authorize the seller to reclaim them whilst in the possession of the purchaser.

5. **Case Submitted to Court—Form of Bill of Exceptions—Quære.**§—QUÆRE: What should be the form of a bill of exceptions to the refusal of the court to grant a new trial, where the whole case has been submitted to the court.

This was an action of trover in the Circuit court of Ohio county by Wickham and Goshorn against Lewis Martin & Co. The parties agreed, and entered of record, to waive a trial of the issue in the cause by a jury, and to submit the same to the court, who was to determine all matters of law and fact, and to give judgment accordingly.

Upon the trial, beside the documen-
428 tary evidence, *there was a large mass of parol evidence submitted in the form of depositions on the part both of the plaintiffs and the defendants, but no witnesses were examined before the court. The plaintiffs claimed under a deed bearing date the 19th of November 1851, executed by Marx Graff, late a merchant in Wheeling, by which, reciting that he is largely indebted to various firms and individuals, and is desirous to provide a fund for the payment of his said liabilities, and for this purpose to devote all the property of every kind he possesses or is entitled to possess to the creation of such fund, he conveys to William S. Wickham and William S. Goshorn all the stock of dry goods, fixtures and store furniture now in and about his store on the east side of Main street in the city of Wheeling; also all the bonds, notes, accounts, books of account, evidences of debt, and choses in action of every description, due or coming due to the said Marx Graff from any and all persons or corporations whatsoever; also all the household goods and furniture in and about his dwelling-house, and the unexpired lease of his store and dwelling-house: Upon trust to take immediate possession, and sell the goods either at public or private sale, for cash or on credit, as they shall deem it expedient and proper. To collect the debts and also to compromise or compound disputed or doubtful claims. That the said Graff was to be allowed to occupy the dwelling-house and use the household and kitchen furniture until the 1st of the next April, when he was to surrender it to the trustees, and they were to sell it for cash or on credit, as they should think best. That out of the proceeds of sale, after paying the expenses of executing the trust, including a commission of seven per cent. to themselves, the trustees should disburse the residue in the payment pro rata of all the just debts due or coming due from the said Graff to any creditor who
429 should within six months from the date of the *deed assent to the terms thereof, by subscribing a release of all further claim against Graff or his representatives on account of said debt.

In the conclusion of the deed followed the following provision: "And it is further expressly understood, that if through accident or forgetfulness or inadvertence, the said Marx Graff may have omitted to mention any claim or property, that the same shall be understood as being conveyed hereby to the said trustees, to all intents and purposes as fully as if specifically mentioned."

This deed was admitted to record on the day of its date, in the clerk's office of the County court of Ohio county, upon the acknowledgment of the grantor.

The subject in controversy in this cause was seven boxes of goods, which had been sold in August 1851 by the defendants, who were merchants in Baltimore, to Graff, and forwarded to him to Wheeling. It was

§**Case Submitted to Court—Form of Bill of Exceptions.**—In Nutter v. Sydenstricker, 11 W. Va. 541, it is said: "In this case, the law and the facts were both submitted to the court. There was a judgment for the plaintiff and the defendant moved for a new trial, which was overruled. The evidence is certified to this court. There has been much doubt and controversy upon the powers and duties of the appellate court in such cases: Pryor v. Kuhn, 12 Gratt. 615; *Wickham v. Lewis Martin & Co., 13 Gratt. 427, 444;* Rep. Rev. 816. But, finally, in Mitchell v. Baratta, 17 Gratt. 445, the court settled the practice, and announced the law as follows:

"1st. That in such cases the evidence, and not the facts proved, should be certified.

"2d. That the case should not be reversed by the appellate court, unless it is plainly erroneous, particularly if the evidence, or a part of it, be oral, especially if it be conflicting.

"3d. That the whole case, being before the appellate court, it would not remand the case for a new trial, but enter final judgment upon the law and the evidence. Harrison v. Farmers' Bank, 6 W. Va. 1.

"Under these decisions, this court will not consider objections to the admissibility of evidence; but it will simply inquire whether or not there is sufficient competent evidence in the record, treating the appellant as a demurrant to the evidence, to sustain the judgment of the court below; and unless the judgment is plainly erroneous, it will affirm it: Claflin v. Steenbock, 18 Gratt. 842; Wright v. Rambo, 21 Gratt. 158; Newlin v. Beard, 6 W. Va. 110."

The principal case is also cited in Ramsburg v. Erb, 16 W. Va. 783; Mitchell v. Barrata, 17 Gratt. 463, and *note*; Baltimore, etc., R. R. Co. v. Faulkner, 4 W. Va. 188; Griffie v. McCoy, 8 W. Va. 208. And in Joslyn v. State Bk. of Hartford, 86 Va. 289, 10 S. E. Rep. 166, it is said: "Properly speaking the appeal is always from the judgment of the court and not from the verdict of the jury. Wickham & Goshorn v. Lewis Martin & Co., 13 Gratt. 446. In each case there must be a bill of exceptions pointing out the alleged error, and a certificate of evidence showing what testimony was before the court or jury. Paul v. Paul, 2 H. & M. 525; Lee v. Boak, 11 Gratt. 182; Bart. Chy. 857 *et seq.*"

As to whether the evidence or the facts proved should be set out in the bill of exceptions, where a jury has been waived and the cause heard by the court, see a review of the Virginia decisions in Western Union, etc., Co., v. Powell, 94 Va. 275, 26 S. E. Rep. 828, where the principal case is cited. See also, monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

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proved by both parties that these boxes of goods, with others, were sent by Graff to a commission merchant in Steubenville in the state of Ohio; who gave a receipt for them, and that they remained in his possession until the execution of the deed to Wickham and Goshorn. That on the next day Wickham went to Steubenville, and producing and delivering to the commission merchant his receipt, he had obtained possession of the goods, and they were in the act of being transported to the boat which was to carry them to Wheeling, when the sheriff of the county in which Steubenville is located, took possession by virtue of an attachment which issued at the suit of the defendants, and the goods were returned to the possession of the commission merchant, who, upon being indemnified by the defendants, delivered to them the seven boxes of goods which they had sold to Graff.

These goods the defendants took back
430 to Baltimore, where they were *sold, after having been opened, examined and valued by merchants called in for the purpose; and the valuation amounted to three thousand two hundred and ninety-four dollars and twenty-two cents. The other facts in the cause which are of any importance will be found stated in the opinion of Judge Daniel; except the fact that all but two of the creditors of Graff executed the release required by the deed.

The court below rendered a judgment for the defendants; and the plaintiffs excepted; but instead of stating the facts proved on the trial, the bill of exceptions gave all the evidence introduced by both parties. From this judgment the plaintiffs applied to this court for a supersedeas, which was allowed.

Russell and Fry, for the appellants.

SAMUELS, J. I am of opinion that it is not necessary for the decision of this case, to determine what manner of fraud practiced by a vendee in obtaining goods on credit, will justify the vendor in retaining the goods and annulling the sale thereof. Whether a purchase by an insolvent vendee without intention to pay will justify reclamation by the vendor, or whether the vendor must have industriously used artifice and stratagem in the purchase to warrant such reclamation, are questions which become immaterial in this case from the fact that the goods were subsequently sold by the vendee Graff to Wickham and Goshorn, purchasers for value without notice. If therefore, whether Graff had been guilty of no fraud in buying the goods, or had bought them, knowing his own insolvency, and without the purpose of paying for them, or had industriously used devices to deceive the sellers, still Wickham and

Goshorn, subsequent purchasers for
431 *value without notice, have a title better than that of Martin Lewis & Co. the original sellers. See Williams v. Given, 6 Gratt. 268.

I am further of opinion that the case of Pryor v. Kuhn, 12 Gratt. 615, was correctly decided, and should be followed in all cases in which it applies. That the rule of Bennett v. Hardaway, 6 Munf. 125, as modified by Ewing v. Ewing, 2 Leigh 337, Green v. Ashby, 6 Leigh 135, Rohr v. Davis, 9 Leigh 30, and Pasley v. English, 5 Gratt. 141, should give the rule in cases wherein the courts perform the functions of a jury, as well as in those wherein juries are impanelled. Ascertaining the facts of this case by the rule prescribed by these cases, I am of opinion that the deed of trust given in evidence by the plaintiffs, the making of which is not questioned, and the proof offered by the defendants admitting it to be all true, fully establish the plaintiffs' right to recover. I therefore concur in the judgment to be rendered.

LEE, J. I concur in these results of the opinion delivered by Judge Daniel and in much of the reasoning by which he is brought to his conclusions. I do not think it necessary however in this case to review the decision of this court in the case of Pryor v. Kuhn, 12 Gratt. 615, or to determine what must be the frame of the exception or certificate which shall enable this court to review the action of a Circuit court in a case in which the parties have waived a jury and submitted the whole matter of law and fact to the judgment of the court. For if in such a case the same rule be adopted which has obtained in cases where there is a general verdict and a motion for a new trial upon the ground that the verdict is contrary to the evidence, and the exception or certificate in general, be required to set out the facts and not the evi-

dence merely, the same modification
432 should be also *adopted which has prevailed in the latter case; and if in a given case the evidence only and not the facts has been certified, yet if this court looking to the documentary evidence and the parol evidence of the party prevailing only, rejecting that of the party excepting, can see enough to enable it to say that the judgment of the court below is erroneous and to render judgment for the party excepting, I think it is its duty to reverse the judgment and to render judgment for the plaintiff in error. And as I think that in this case rejecting all the parol evidence offered by the plaintiffs and taking the documentary evidence and the parol evidence of the defendants alone, the proof is abundant to show the plaintiff's right to recover and also what should be the amount of their recovery, I consider it unnecessary to consider the frame of the bill of exceptions because in any view the reversal of the judgment and final judgment for the plaintiffs in error are inevitable.

There is another question discussed by Judge Daniel which I think not necessary to be decided in this case. It is as to the nature and character of the circumstances attending a sale and purchase of goods which shall so vitiate the same as to enable the vendor to avoid the transaction on the ground of fraud in the vendee and reclaim the property. For although there may have

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been such fraud in the conduct and representations of the vendee inducing the vendor to part with the goods as will enable the latter to avoid the transaction and reclaim the property from the vendee, yet if the goods have gone into his possession as upon a sale in the regular course of business, and have since come to the hands of a purchaser from the vendee without notice of the fraud, such purchaser will not be affected by the vice in the former sale; and as in this case the plaintiffs representing the creditors provided for by the deed of
433 the 19th of November 1851 *under the terms and conditions of that deed, are to be regarded as purchasers of the goods for value and no notice to them or to the creditors of any fraud in the purchase of the goods by Graff is proved or alleged, they cannot be affected by the alleged vice in the transaction between Graff and the defendants. Upon this question therefore I decline to express any opinion.

DANIEL, J. In this case the parties, after making up the issue, availed themselves of the provisions of the 9th section of chapter 162 of the Code, and by consent entered of record, "agreed to waive a trial of the issue by a jury, and to submit the same to the court, who was to determine upon all matters of law and fact, and to give judgment accordingly." And the court having found the issue for the defendants and given judgment accordingly, the plaintiffs excepted to the judgment, and moved the court to set aside the judgment and enter the same for the plaintiffs, or to award them a new trial on the ground that this judgment was contrary to the law and the evidence. But the court adhering to its judgment, and refusing to grant a new trial, the plaintiffs again excepted, and prayed the court to certify all the evidence; which the court accordingly did.

In this state of things the question has been raised here as to what ought to be the character of the certificate to be made by the court when the trial has been had, and the judgment rendered, under the provisions of the section just mentioned, viz: Whether it ought to be a certificate of the evidence or of the facts.

In the view I have taken of the case, the decision of this question is not essential in enquiring whether the circuit court was correct in its judgment. For if we wholly disregard all the evidence adduced by the plaintiffs except the deed, and give full credit and weight to all the evidence adduced by the defendants, certain
434 *propositions of law are presented by the case so made, the decision of which will show either the error or correctness of the judgment. In other words, all the elements material to determine the question of the right of the plaintiffs to recover, appear as fully from an inspection of their documentary evidence, the deed and the parol evidence of the defendants, as they do on looking also into the parol evidence of the plaintiffs. If the plaintiffs are entitled to recover at all, they must, in the view I have taken of the case, recover by force of the deed of trust, or of the transaction with Myerson, proved by himself on his examination as a witness by the defendants, and possession of the goods in controversy, acquired under the circumstances detailed in depositions taken by the defendants. No fact is deducible from the parol testimony of the plaintiffs, (which is not also found in that of the defendants,) furnishing any additional support to the grounds of their claim above indicated.

In opposition to these grounds, the defendants say that Graff the grantor in the deed acquired the goods by a purchase from them, which was made under such circumstances of fraud, on his part, as gave them a right, on the discovery of the fraud, to cancel the sale, assert their original ownership, and reclaim the goods. And they also assail the title of the plaintiffs as defective, for reasons which will be hereafter noticed.

It is proved that the goods were purchased of the defendants; and it becomes necessary at the very threshold of the case to enquire whether Graff by virtue of said purchase acquired a title to the goods which he could pass to third persons.

That fraud, practiced by the vendee in the procurement of the sale, may so far vitiate it as to confer on the vendor a right, on the discovery of the fraud, before the rights of innocent third parties have
435 intervened, *to avoid the sale and demand restitution of the property, is a proposition well established by decisions in England and in this country. 2 Rob. Pr. 499, and cases there cited. There is, however, much conflict of authority as to the nature of the circumstances, the character of the elements, essential to the constitution of such fraud. Where the fraud to be enquired into is of the character alleged in this case, numerous decisions may be found, in which it has been held that the insolvency of the vendee, at the time of the sale, known to himself and not disclosed to the vendor, accompanied by a design on the vendee's part not to pay for the property, is sufficient to constitute the fraud, whilst in some of the more recent cases it has been held that conscious insolvency, though not disclosed, and an intention not to pay, on the part of the buyer, at the time of the contract, are not of themselves sufficient to vacate a sale, on the score of fraud: But that in order to justify the rescission of the sale, it is essential to be shown that the dishonest purpose of the buyer was consummated by some artifice, contrivance or false representations, intended and calculated to deceive. I do not deem it necessary to decide in which of these two lines of conflicting authorities the best exposition of the law is to be found, inasmuch as the application to this evidence, of the rules most favorable to the rights of the vendee, will, I think, result in showing that the sale was procured by fraud. The embarrassed pecuniary condition of Graff; his practice before and

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after and about the time of the sale, of purchasing goods in the northern cities on credit for the Wheeling market, and after they reached Wheeling, having the goods immediately sent to Pittsburg and Steubenville, and probably other places, to be sold at auction for cash—first effacing his own name from the boxes in which they were contained, and marking in the place thereof the name of an irresponsible
436 *person; his purchasing from other merchants, about the time of his purchase from the defendants, large quantities of goods, constituting in the aggregate an amount of stock wholly disproportioned to the ordinary and legitimate demands of the business in which he was engaged; his getting the same kinds of goods from different merchants, (or as, in the language of one of the witnesses, the duplicating of his goods,) without any apparent motive connected with the style, quality or price of the goods, are circumstances which, taken in connection with the representations made by him to one of the defendants at the time of the sale, in respect to the flourishing state and prospects of his business, and the proof of his real pecuniary condition at the time and shortly after, would have well warranted a jury in finding that the defendants were defrauded in the sale. And if they had pursued the goods and reclaimed them (as it seems some other merchant from whom he bought goods about the same time, did) before there was any intervention of the rights of third persons, I know of no legal impediment that could have been placed in the way of their obtaining restitution. It is, however, well settled in England, that fraud in a sale does not absolutely avoid the contract, but only renders it voidable at the option of the party defrauded; that though the fraud gives a right to rescind, the property, in the subject matter, passes in the first instance to the vendee. And that an innocent purchaser from the vendee may acquire an indisputable title to the property. Stevenson v. Newnham, 16 Eng. L. & Eq. R. 408. And such was the decision of this court in the case of Williams v. Given, 6 Gratt. 268.

There is some contrariety in the decisions of other states as to whether a deed of trust, by the vendee, for the security of pre-existing debts simply, places the assignees in any better position to dis-
437 pute the *claim of the cheated vendor than the fraudulent vendee had, at the date of such assignment. In most of the cases, however, I think it will be found that the question turned on the further question, whether the trustees or creditors ought to be treated as purchasers for value; and that when the latter question has been decided in favor of the assignees, they have been generally protected against the claim of the original vendor.

And I think it has been the constant course of the courts in this state to regard the creditors in a deed of trust, made by their debtor, bona fide for their indemnity, in the light of purchasers for value.

The judgment which has been obtained by the defendants cannot be vindicated, therefore, unless it can be shown that the conveyance under which the plaintiffs claim labors under some defect or vice which prevents its operating, or destroys its validity, as a deed of trust. And in anticipation of such a difficulty in the way of their success, the defendants have contended here that the goods in controversy are not embraced in the deed, and that they are not brought within its operation by force of the transaction between the plaintiffs and Myerson. They also assail the deed because of certain provisions which it contains, which, they say, if not by the laws of Virginia, at least by the laws of Ohio, in which state the goods were at the date of the conveyance, render it fraudulent and void, and therefore inoperative against their claim. I shall proceed to examine each of these positions in the order in which they have been mentioned.

It is conceded that the goods in controversy do not pass by the first clause of the deed, which conveys only certain property, rights and interests therein, specifically mentioned and described. But in the clause next to the last it is provided, that "if through accident, or forgetfulness, or inadvertence," the said Marx Graff may have omitted to mention any claim
438 *or property, the same shall be understood as being conveyed to the trustees, as fully as if specifically mentioned. It is perhaps difficult to believe that so large and valuable a portion of his property as these goods constituted, (supposing them his,) could have been omitted by Graff, through "accident, forgetfulness or inadvertence;" and it is thence argued that they should not be held to be embraced in and conveyed by the deed. Such a construction would, however, it seems to me, be plainly at war with the leading intent of the parties and the obvious scheme of the deed, to be derived from an inspection of the instrument taken as a whole. For in the commencement of the deed the grantor, after reciting his indebtedness to "various firms and individuals, expressly states his desire, by the execution of the deed," to provide a fund for the payment of his said liabilities, and for this purpose to devote all the property of every kind, which he possesses, or is entitled to possess, to the creation of such fund. He then proceeds to convey all his stock of goods in Wheeling, all his household and kitchen furniture, all his bonds, notes, accounts and evidences of debt, and also an unexpired lease of his dwelling and store-house. And then, after setting out the trusts upon which the property is conveyed, he makes provision, in the manner already mentioned, for any of his property which may have been omitted.

It is I think manifest, from an examination of the whole instrument, that the scheme proposed was a dedication by the grantor of his entire property of every description to the payment of his debts, on

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the condition that his creditors should release him from any balance that might remain due to them after receiving respectively their pro rata shares of the proceeds of his estate.

Expressions in the deed of an equivocal character should receive such a con-
439 struction as will support *rather than one which might defeat the scheme. And under such a rule of interpretation there is, I think, no serious difficulty in holding that the words in question were designed not to control or limit the operation of the other words in the clause, but simply to indicate some of the cases through which the grantor may have failed to mention, specifically, property that might thereafter be found to have belonged to him at the date of the deed; and that the true meaning and effect of the whole clause was so to extend the deed as to make it embrace all of the grantor's property, whether specifically mentioned or not, and thus to carry out fully the purpose declared in the recital. The determination therefore of the question whether these goods are conveyed by the deed, must properly be the result of the simple enquiry, whether at the date of the deed the grantor had any property in or right to them, which he could convey, uninfluenced by any speculation as to how or why, or whether through "accident, forgetfulness or inadvertence," or otherwise, there was a failure to mention them in the first clause of the deed.

The purchase of the goods by Graff has been already examined and commented on, and there is no evidence tending to show that he had divested himself of the property therein, so acquired, at any time previous to the date of the deed, unless he parted with them by force of the transaction of September 1851, between him and Myerson, disclosed in the deposition of the latter, on his examination by the defendants. But if, as argued here, the legal effect of that transaction was so to devest Graff of title to the goods, and to vest Myerson with it, as that a conveyance of the goods thereafter to his creditors by Graff, would not pass them, I do not see how the claim of the plaintiffs is in any regard impaired thereby.

For it is, I think, obvious that the
440 same rule of law which, in *the view of the case taken by the defendants. would give to the transaction the force of depriving Graff of the right thereafter to assign or convey the goods, would at the same time give effect to the transfer and assignment of the note, which was given by Myerson on receiving the goods. Graff acquired, by the colorable sale or arrangement between him and Myerson, a title to the debt evidenced by the note, in all respects equal, in force and extent, to the title vested in Myerson to the goods. The deed, as we have seen, assigns, with specific mention, all of the grantor's bonds, notes, &c.; and confers on the trustees not only the power to collect them by suit or otherwise, but also full authority to compromise and compound disputed or doubtful claims, and to take such sum of money for the same or receive any other thing in lieu or exchange therefor as they might deem for the interest of all concerned. And as by the arrangement by the trustees with Myerson, the latter, on the terms of getting back his note, surrendered, or (to use his own language) disclaimed all right or claim to the goods, and delivered to the trustees the ware-house receipt which he had obtained for the same, the goods were, it seems to me, as fully covered by the deed as if there had never been any arrangement between Graff and Myerson respecting them, and they had been specifically mentioned in the first clause of the deed.

No question under the recording acts, or as to notice whether actual or constructive, by the defendants of the rights of the plaintiffs, arise in the case, inasmuch as it is shown that the plaintiffs had obtained the actual possession of a part of the goods, and the virtual possession of the whole, before the occurrence of any active interference with their rights by the defendants; it being proved by Doyle, on his examination by the defendants, that Wickham had delivered up to him the ware-house
441 receipt, (which embraced *also twenty other boxes of goods,) had commenced hauling the goods to the river to be transported to Wheeling; and had carried about half of them to the wharf when he was arrested in his proceedings, and the goods were ordered back to the ware-house by the sheriff.

The plaintiffs having thus shown a complete and perfected title to the goods, it remains to be considered whether the deed under which they claim is void because of the provisions in it objected to by the defendants.

It appears, from the report of the decision of the Supreme court of Ohio in the case of Atkinson & Rollins v. Jordan Ellis, &c., 5 Ohio R. 294, which was given in evidence by the defendants on the trial, to have been decided by that court, that an assignment of effects by an insolvent debtor to trustees for the benefit of preferred creditors, with a clause that those who do not within a time specified release the debtor on account of what may be received from the proceeds of the assignment, is void as against other creditors: And that the effects assigned may by proper process be subjected in the hands of the assignee. And it must be conceded that the provisions of the deed under consideration would seem to fall fully within the principles declared by the court in announcing their decision. It does not appear from the report of the case, however, where the creditors or debtors resided, where the deed was made, or where the property was at the date of the deed; but the fair inference is, that the controversy was between citizens of that state, in respect to the operation of a deed made in that state, and purporting to convey property there situated; inasmuch as there is no reference in the opinion of the court to any question of conflict of law which would

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show that the forum, the domicil, the place of the contract, and the situs of the property, were not all the same.

442 *The defendants also gave in evidence an act of the general assembly of Ohio, passed in 1838, by the 3d section of which it is declared, that "all assignments of property in trust to trustees in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, shall be held to enure to the benefit of all the creditors in proportion to their respective demands; and such trusts shall be subject to the control of chancery as in other cases; and the court, if need be, may require security of the trustees for the faithful execution of the trusts, or remove them and appoint others, as justice may require." It is to be observed that the act does not in terms avoid the assignments therein mentioned, but only declares that they shall enure for the benefit of all the creditors. And the provision in respect to the control of the trustees, by requiring security of them, &c., would seem to favor the view of the plaintiffs' counsel, that the effect of the statute is not to invalidate the legal title of the trustees, but simply to provide for and insure an equitable distribution of the fund.

I do not deem it necessary, however, that we should construe this statute, or determine the effect which it ought to have on the previous decision of the Supreme court of Ohio, already mentioned; inasmuch as I have been unable to perceive how such decisions or statutes of that state can be made to bear on the controversy. For it is well settled, as a general rule, that a transfer of movable property, good by the laws of the owner's domicil, is valid whereever else the property may be situate. It is true that this rule is liable to exceptions; one of which is, that where the transfer is opposed to the laws of the country where it is sought to be enforced, the courts of such country are not bound to give it effect against the conflicting rights of its own citizens. Black v. Zacharie & Co., 3 How. U. S. R. 483, 514; Story on Conflict

443 of Laws, § 383 to 390, inclusive; *1 Rob. Pr. (1854) 156. In the cases of Burlock v. Taylor, 16 Pick. R. 335, and Ingraham v. Geyer, 13 Mass. R. 146, cited by the last mentioned author, may be found appropriate illustrations as well of the rule as of the exception. In the last mentioned case an assignment of his effects by a debtor in Pennsylvania in trust for such of his creditors as should within a specified time release all their demands against him, the surplus to be distributed pro rata among his other creditors, and the remainder, if any, to be paid over to the assignor, was holden to be void as against a creditor, a citizen of Massachusetts, who had acquired a lien after the assignment. The court said that such an assignment, if made within the state of Massachusetts by parties residing there, and with a view to be there executed, could not have been supported, chiefly on the ground of its excluding such creditors as would not give a discharge of their debts; and that though such an assignment might be good in Pennsylvania, there was no comity which would require the court to give it validity against the rights of the citizens of Massachusetts. But in the first mentioned case, an assignment in New York, which was valid by the laws of that state, was sustained against the subsequent attachment of a citizen of New York of property in Massachusetts belonging to the debtor, although such assignments were, under the laws of Massachusetts, invalid. If this suit, therefore, had been brought in Ohio, there is nothing to show that the courts in that state would have been justified in departing from the general rule. None of her citizens are parties to the controversy, and no decision or law of Maryland, in which state the goods were bought, and in which the defendants reside, has been given in evidence to show that bona fide purchasers from the vendee are not protected from the claim of the vendor to rescind the sale of the goods for fraud in its pro-

444 curement, or that parties *standing in the attitude of the plaintiffs, do not occupy the position of bona fide purchasers.

In such a state of things an Ohio court, having no motive to make an exception to the general rule, would have yielded to it, and would have adjudged the question as to the validity of the deed of trust by reference to the laws of Virginia, where the deed was made. Let this be as it may, however, the plaintiffs, in the prosecution of their rights, have not found it necessary to invoke the aid of the courts of Ohio. They have instituted their suit in Virginia; and it would involve an entire departure from all rule on the subject, to hold that a court of Virginia, in passing on a deed of trust made in this state, upon trusts to be performed here, the grantor and the trustees being all citizens of Virginia, is to be controlled, not by its own laws and decisions, but by the laws of another state, merely because the property in controversy was at the date of the deed in such other state, and because the trustees perfected their legal title to the property, by reducing it to their possession within the limits of said last mentioned state. And it is well settled in Virginia, that clauses, such as the one objected to, in deeds of trust conveying all of the debtor's property for the security and satisfaction of his creditors, do not invalidate the deeds. Skipwith v. Cunningham, 8 Leigh 272; Phippen v. Durham, 8 Gratt. 457.

The title of the plaintiffs is, therefore, as it seems to me, free from any vice or defect, and was complete when the tort complained of was committed by the defendants. And I think that the Circuit court erred in rendering a judgment for the defendants, and that said judgment should be reversed. The enquiry now arises as to the judgment to be rendered by this court.

If the proceedings are to be regulated by

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the rules prevailing in writs of error and supersedeas founded on exceptions taken to an erroneous refusal of the court
445 *below to set aside a general verdict on the ground of its being contrary to the law and the evidence, all we can do, after reversing the judgment, is to send the cause back for a new trial. If, on the other hand, we are to be governed by the rules prevailing in cases of appeals from erroneous judgments on the merits, rendered in cases of mills, wills, roads, and of motions, where the courts below have acted as judges of both law and fact, it is our duty to render a judgment in behalf of the plaintiffs for such sum as they have shown themselves entitled to. The latter of the two views is that which was contemplated by the revisors, and by them presented to the legislature in their report. In their note to the section under which the proceedings and judgment in question were had, they say, "This privilege (in the first part of the section) is given in the case of a will offered for probat by the law at present; and in all cases of motion the whole case of law and fact may be and generally is determined by the court. There are many cases in which the parties would prefer, for the purpose of saving expense and avoiding delay, that the court should decide the whole case. The right of exception to the judgment of the court will be preserved; it will merely be to the judgment of the court, instead of being, when the trial is by jury, to the admissibility of evidence, or to instructions given or refused, or to the decision on a motion for a new trial. One great advantage when the parties waive the trial by jury, will be, that when the court above reverses the judgment of the court below, either for matter of law or fact, there will be no necessity to send the case back for a new trial." Rep. of Rev. 816.

In the case of Pryor v. Kuhn, 12 Gratt. 615, decided at the last session of the court in Lewisburg, the character of the certificate to be made by the judges of the Circuit courts in cases of exceptions to their
446 judgments *under this section, was discussed and considered by the court; and I concurred in the opinion of the majority of the court holding that the bills of exceptions in such cases should so far conform to the practice regulating exceptions to the action of the courts below in overruling motions for new trials, as to contain a statement by the judge, not of the evidence, but of the facts proved on the trial. In that case, however, the evidence was conflicting and contradictory, and the majority of the court, as also the judge who dissented on the question of practice in respect to the certificate, all concurred in the opinion that under the application of either rule of practice the case could not be reversed. There was, therefore, nothing in the state of the case making it necessary to decide the question which arises in this as to the nature of the judgments to be rendered here in reversing judgments of the Circuit court obtained under this section; and this is therefore the first occasion on which the precise question has been distinctly presented to the consideration of the court for its decision.

A single view of the difference between the two proceedings, where in the one case the judgment of the court follows as the legal consequence of the verdict of a jury, and where in the other it is the decision of the court on its own view, as well of the facts as the law, has sufficed to convince me that it is our duty to render a final judgment for the plaintiffs instead of remanding the cause for further proceedings. There is, properly speaking, no such thing as an appeal from the verdict of a jury. Though the court which presides at the trial of a case before a jury, has a right, for certain causes, to set their verdict aside, it cannot give a decisive expression of its views of the merits of the controversy, in the shape of a judgment, until there is a verdict on which to found such judgment.

However manifest may be the error of
447 the jury, and *however satisfactory and complete the elements out of which to make the verdict which in the opinion of the court ought to have been made by the jury, all the court can do is to set aside the verdict and award a new trial before another jury. And when an appeal is taken from an erroneous judgment of a court refusing to award a new trial, as the appellate court, after reversing, is to render the judgment which the inferior court ought to have rendered, it can, necessarily, give no further judgment than to award the new trial. But when the parties waive a trial by the jury, and agree that the court may act as judge both of the law and the fact, the court is vested with the power and charged with the duty of making a complete decision by its judgment. If upon appeal from such judgment the appellate court perceives error in it and reverses it, there is no necessity for, or propriety in, sending the cause back in order that the error may be corrected in the court below. To award a new trial before a jury is to render a judgment which the inferior court could not have rendered without violating the agreement of the parties that the matter should be determined by the court without the intervention of a jury. And to remand it that the court below may make up and pronounce a new judgment, such judgment as in the opinion of the appellate court it ought to have given before, is simply to require of the inferior court to do what the law makes it the duty of the appellate court to do itself.

I have already expressed the opinion and endeavored to show that the plaintiffs have proved their case by their deed and the defendants' evidence, and that the case therefore would come within well recognized exceptions, even on the concession that in cases of this kind the general rule, applicable to bills of exceptions to judgments refusing new trials, requiring the facts to be certified, should prevail. It is

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448 not, *therefore, essential to the decision of the case that an opinion should be expressed as to the practice which should govern the Circuit courts in making their certificates. The question is, however, as I conceive, closely connected with the character of the judgment to be rendered by the appellate court, a question which it has become necessary for me, in the view I have taken of the case, to consider. And as the examination of the last mentioned question has resulted in satisfying me that the opinion, in respect to the first, which I entertained and united with the majority of the court in Pryor v. Kuhn, in expressing, is erroneous, I deem it proper to avail myself of the occasion to declare the change of opinion. The reference to the comments of the revisors on the section of the Code under consideration, already cited, to which my attention was for the first time called on reading the opinion of the dissenting judge (Moncure) in the case just mentioned, (which owing to the late period of the session at which the case was decided, was not reduced to writing till after the close of the session,) and the more special enquiry which I have been led by such reference and the demands of the present case, to make as to the purpose and object contemplated in the enactment of said section, have convinced me that it was the design of the legislature to conform the course of the court below in such cases, as well in passing on the case as in furnishing to the defeated party the means of testing the correctness of its judgment in an appellate court, as also the action of the latter court in reviewing the judgment—all—to the practice prevailing in cases of wills, mills, roads, and motions on the merits generally, and not to that which has been adopted in cases of motions to set aside verdicts and grant new trials. That the judgment of the appellate court when it reverses, is to be thus regulated, I have already at-

449 tempted to *show, and there seems to be a want of consistency in holding that the proceedings in the previous stages are to be governed by a different practice. When the parties expressly waive the trial by jury and agree that the court shall act upon and determine the case as judge both of the law and the fact, what grounds have we for supposing that the legislature, in providing the privilege, or the parties in accepting it, did not mean that their rights in the case should thenceforward be regulated and determined in all respects, by the rules governing in other cases where the court acts as judge both of law and fact? What is there in the terms of the section to show the propriety of placing the defeated party in the predicament of one whose pretensions have been condemned by the verdict of a jury as well as the judgment of the court below, when there has not only been no verdict, but it has been expressly dispensed with by the assent of his adversary, entered of record?

Whilst the course of this court has been uniform in discountenancing the practice of the courts below in certifying the evidence instead of the facts on motions for new trial, it has been just as uniform in allowing such certificates in cases where the court below has rendered judgment on the law and the facts without a jury. In the vast number of appeals which have come up to this court from judgments in controversies respecting the probat of wills, the establishment of roads and mills, in motions on forthcoming bonds, and against sheriffs and their deputies and sureties, and in motions by corporations against delinquent shareholders, and in many other classes of cases where the judgments have been rendered by the courts below on the whole case, I have seen none in which this court has refused to look into the bill of exceptions, simply because of its containing a statement of the evidence. The difference of practice prevailing in the

450 two classes of cases was *well known to the legislature, and the inference seems to my mind a necessary one, that in providing for dispensing with the jury and submitting the case to the judge, they would have said otherwise, if they did not mean to subject the proceedings to the rules governing in all other cases where the court is allowed or required to act as judge both of law and fact. This view, it seems to me, derives support from the consideration that the legislature were, at the very period of the enactment of the section under review, engaged in greatly extending the remedy by motion. Without adverting to other instances, it is sufficient to notice a striking illustration of the change of policy in this regard, apparent in the fifth section of chapter 167, in which it will be seen that any person entitled to recover money by action on any contract, may, on motion before any court which would have jurisdiction in an action, obtain judgment after sixty days' notice, &c. It is true that in the seventh section it is provided that on a motion where an issue of fact is joined and either party desire it, or where in the opinion of the court it is proper, a jury shall be impanneled, &c.

What is the character of the proceeding in the particulars we are considering, in cases arising under this law, where neither party shall call for a jury? Is a defeated party in such case to occupy the attitude of one seeking to set aside a verdict? Is he to ask the court to set aside its judgment and grant him a new trial? And if refused, is he bound to procure a certificate of the facts; or did the legislature mean that the proceedings should be of the same character with the proceedings that the practice of the courts has sanctioned in other motions on the law and facts? What warrant have we for saying to a party appealing from a judgment of the court below, rendered under this law, upon a bill of exceptions setting out the evidence, that we will not enquire into the alleged injustice,

451 *because he has not procured such a certificate of the facts as has been heretofore required only in cases of unsuc-

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cessful motions to set aside verdicts? The answer seems to my mind obvious. If the legislature had designed to except the proceedings, in any particular, from the operation of the well known practice prevailing in other cases of motions in which the whole case is decided by the court, on the law and the evidence, they would have used some express declaration to indicate such purpose. If in the case of a motion neither party desires a jury, or if in an action the parties waive a jury and submit the whole case to the court, in either case it would seem to me fair to infer, in the absence of all declaration by the legislature to the contrary, that they intended the practice in motions on the merits to govern. And in such cases, if the defeated party excepts to the judgment and spreads out the evidence in his bill of exceptions, he does all that it is incumbent on him to do in order to prepare the case for the appellate court. Where the case turns on the credibility of witnesses, or, as it did in Pryor v. Kuhn, on the weight of conflicting and contradictory evidence, an appeal to the court can be of no avail to the defeated party. For in such case, acting on the rule announced in Dudleys v. Dudleys, 3 Leigh 436, 445, and constantly adhered to, this court will presume that the inferior court that saw and heard the witnesses, has decided correctly. But in cases where the reversal of the action of the court below does not involve this court in the necessity of deciding on the credibility or weight of evidence impeached or contradicted in the inferior court, I should not feel warranted in refusing relief on the score that the defeated party brought up, in his bill of exceptions, the evidence of the witnesses instead of a certificate of the facts.

I still think that the decision in Pryor v. Kuhn was right; but, in expressing
452 the opinion that the practice *in cases of this kind should be regulated by the rules governing bills of exceptions to judgments of the courts below, refusing to set aside the verdicts of juries, I think we mistook the intention of the legislature. I have deemed it my duty to take this the earliest occasion to state the change of opinion which my mind has undergone on the subject, and to set out some of the reasons that have induced that change. I forbear making any further statement of the arguments which might be advanced in support of my conclusions, as I should have to extend this opinion to an unreasonable length, and to present views which have been already clearly and fully stated in the opinion of Judge Moncure, before mentioned.

The amount for which the judgment of this court ought to be given, remains to be briefly considered. It appears from the testimony that the goods in question were appraised in Baltimore on the 5th of December 1851, by experienced merchants, at the sum of three thousand two hundred and ninety-four dollars and twenty-four cents. And the evidence clearly shows that the goods would have probably sold for more at Steubenville. There is some conflict in the testimony of the defendants' witnesses as to the sum which should be added to the value of the goods in Baltimore in December, in order to show their probable value in Steubenville on the 20th of November previous, the date of the conversion. Some of the witnesses fixing such further sum at ten per cent. on the value aforesaid, ascertained in Baltimore; and others at a higher rate. I think that the former is that best established; say three hundred and twenty-nine dollars and forty-two cents. The aggregate of these two sums, viz: three thousand six hundred and twenty-three dollars and sixty-four cents, to carry interest from the 20th day of November 1851, the
date of the conversion, furnishes, I
453 think, the true measure *of the recovery to which the plaintiffs should be adjudged entitled in this case.

MONCURE, J., concurred in the opinion of Daniel, J.

ALLEN, P., concurred with Judge Samuels in his opinion as to the questions presented by this case, and in his views upon them; and therefore concurred in the judgment to be entered.

Judgment reversed, and judgment rendered for the plaintiffs for the value of the goods at the time of the conversion, with interest from that date.

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454 *Lewis v. Arnold.

July Term, 1856, Lewisburg.

(Absent, LEE, J.)

1. **Sales—When Title Passes—Case at Bar.**—N is the lessee of L of a salt property the rent of which is reserved in salt. N in July sells to A all his salt then on hand, or which he shall make before the 1st of the next January, except what may become due to L for rent. A sends his boat early in December to N's wharf for a load of the salt and the salt is put on the boat: but after the boat is loaded and whilst the boatman is fixing his oars to start, L comes to the place and forbids him to take the salt away, saying he has a landlord's warrant or would get one, to take the salt for rent. Soon afterwards the deputy sheriff comes also and forbids the boatman removing the salt, saying he had a landlord's warrant or notice, though he does not appear to have had such a warrant; whereupon the boatman leaves the boat, and L takes possession of it and sends it down the river, and it is wrecked. In trover by A against L. HELD:
   1. **Same—Same—Same.**—The salt having been delivered by N to A's boatman and by him received and put into his boat, it was A's salt.
   2. **Same—Same—Same.**—The boatman had no authority to abandon the salt to L.
2. **Action for Tort—Interest—Statutes.**—Upon a judgment in an action for a tort depending when the act, Code, ch. 177, § 14, p. 673, went into operation, it is proper to charge interest from the date of the verdict.*

*See the opinion of JUDGE DANIEL for the statute.

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3. **Appeal—Judgment for More Than Declaration Claims—Correction of.**—Upon appeal from a judgment rendered for more than the amount of damages laid in the declaration, the appellate court may correct and affirm the judgment.

This was an action in the Circuit court of Kanawha county instituted in April 1848, by Enos S. Arnold against John D. Lewis. The declaration contained five counts, four of which were in case, and the fifth in trover; and the damages were laid at $800. The defendant appeared and demurred to the declaration and each count thereof, and also pleaded "not guilty:" And the court sustained the demurrer to the second count, but overruled it as to the others.

455 *The object of the suit was to recover the value of a parcel of salt which the plaintiff claimed to have purchased of George Neville, and of which possession was taken by Lewis. On the trial the plaintiff introduced in evidence a lease from Lewis to Scott & Neville, bearing date on the 24th of July 1844, by which he leased to them a salt property on the Kanawha river, for six years from its date, reserving an annual rent of seven thousand five hundred bushels of salt, payable quarterly. He also introduced a deed bearing date the 17th of July 1846, by which Scott, with the assent of Lewis, assigned his interest in the lease to Neville, who undertook to pay the rent reserved to Lewis, and also to pay Scott two thousand barrels of salt in certain payments of five hundred barrels each, and also to pay the debts of the partnership due in Virginia. He also introduced an agreement under seal, bearing date the 22d of July 1846, between Neville and himself, by which Neville contracted to sell to him all the salt Neville then had on hand at his furnace, supposed to be about eight hundred barrels, and all the salt he should make at said furnace until the first day of the next January; except that after Neville has delivered the eight hundred barrels of salt to Arnold, he may in the next place deliver the five hundred barrels then due to Scott, after which he was to deliver to Arnold all the salt made at his furnace up to the first of January 1847, (except what may become due to Lewis for rent,) the said salt to be of first quality, well packed in merchantable barrels, weighed, inspected according to law, and delivered at the salt yard of said Neville. And Arnold was to pay twelve and a half cents per bushel for the salt, and settlements were to be made on the 1st of November and the 1st of January, when he was to give his notes at ninety days for the amount found due on these settlements.

456 *The plaintiff also introduced as a witness James Howery, a flat boat steersman, who stated that early in December 1846 he was employed by the plaintiff to take plaintiff's flat boat to Neville's furnace, and there load it with salt and take it to market for the plaintiff. That in loading said boat for plaintiff he was engaged three days, and finished it on the evening of the third day. That after he had finished loading the salt and was preparing his oars to start down the river with it, Lewis came to the landing and forbade him to take the salt away, saying he had a landlord's warrant, or would get one, to take the salt for rent. That soon afterwards Robert H. Early, a deputy sheriff for Kanawha county, came also to said landing and forbade him from removing said salt so loaded as aforesaid, stating that he had a landlord's warrant or notice, or something of that kind. That at this time as well as when Lewis was there, the witness was on said boat preparing his oars to start as aforesaid, and in consequence of what was said by the sheriff witness left the boat; and it was then taken possession of by some hands employed by the defendant for the purpose, taken away, and accidentally sunk by them. Witness also stated that Arnold had paid him for his services in loading the boat. The plaintiff also introduced evidence as to the value of salt at the time.

When the plaintiff had introduced his evidence the defendant demurred to it: And the jury having found a verdict for the plaintiff for eight hundred and thirty-three dollars and forty-nine cents damages, subject to the opinion of the court on the demurrer to evidence, the court afterwards rendered a judgment in his favor for that sum, with legal interest thereon from the 10th day of November 1852, the date of the verdict, until paid. Whereupon Lewis applied to this court for a supersedeas, which was allowed.

457 *Fry, for the appellant, insisted:

1st. That the whole of the salt made by Neville was not sold to Arnold; but that there was an express reservation of so much as was necessary to pay the rent reserved to Lewis. And that upon the claim by Lewis of the salt loaded on Arnold's boat it had been abandoned by the latter; and had not been claimed for two years. That Arnold therefore could not recover for the salt as his property.

2d. That the damages claimed in the declaration being but eight hundred dollars and the judgment having been rendered for eight hundred and thirty-three dollars and forty-nine cents, this was error.

3d. That it was error to render a judgment for interest. That the action having been brought and pending when the act authorizing a judgment for interest on a tort, that act did not apply to the case. That this was not a clerical error. Bent v. Patten, 1 Rand. 25, Campton v. Cline, 5 Gratt. 137-70, show that it was error to give a judgment for interest on damages. He referred to Brough v. Shanks, 5 Leigh 598; Gibson v. Governor for, &c., 11 Leigh 600; Commonwealth v. Winstons, 5 Rand. 546, 562. That this being a pending suit, it is excepted out of the act, Code, ch. 216, § 1, 2, p. 800, by the operation of the act, ch. 16. § 18, p. 101; and should be excepted out of the act, ch. 177, § 14, p. 673. He

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referred to The Commonwealth v. Hewitt, 2 Hen. & Munf. 181; Elliott v. Lyell, 3 Call 269, marg. and especially to the opinion of Roane, J., and the cases he there cites; Couch v. Jeffries, 4 Burr. R. 2460. And he insisted that neither this or the error in rendering a judgment for more than the damages laid in the declaration, could be corrected under the act, Code, ch. 171, § 5, p. 681. That this act was in substance the same as the act of 1819, 1 Rev. Code, ch. 128, § 108, 109, p. 512, 513; and that the cases before cited show that these
458 errors *could not be corrected under the act of 1819. As to the case of Hepburn v. Dundas, supra 219, the point was not made, nor was the bearing of the different provisions in the Code considered.

McComas and B. H. Smith, for the appellee, insisted:

1st. That on a demurrer to evidence the proof was certainly sufficient to prove a delivery of possession of the salt by Neville to Arnold; and that there was no intention to abandon the possession of, or the right to, the salt. The boatman supposing that the sheriff had authority to take possession of it, went off the boat to inform his employer of what was doing; but certainly he never intended to give up the boat on which Lewis had no claim of any kind.

2d. That the act, Code, ch. 177, § 14, p. 673, directs that in all cases thereafter, in which a verdict is rendered not allowing interest, the sum thereby found shall bear interest, and the judgment shall be accordingly. And they referred to the case of Hepburn v. Dundas, supra 219.

3d. That as to the excess of the judgment over the amount of the damages laid in the declaration, the judgment might be corrected in that respect and affirmed. Code, ch. 171, § 5, 6, p. 681.

DANIEL, J. The full delivery of the salt in controversy by Neville or his agents, to Howery, the person authorized by Arnold to receive it, is clearly established by the testimony of Howery. Possession of the salt was acquired, and its removal from the demised premises into the boat of Arnold, effected in an open and public manner; Howery, according to his statement, having been engaged three days in loading the boat with it. The inference is irresistible that it was delivered by Neville, in pursuance of the written agreement between him and Arnold of the 22d of July
459 1846. *This agreement was thus completely executed, so far as the salt in question was concerned, and nothing remained to be done in order to perfect the transfer of full ownership in it.

It is true that in this agreement there is full recognition by Arnold of the relation of landlord and tenant subsisting between Lewis and Neville, and an express exception out of the contract by the latter to deliver Arnold all the salt he should make during the year, of so much as might become due to Lewis on account of his rent. And if, therefore, such a transaction as that which occurred between Lewis and Howery, had occurred between Lewis and Arnold, and the conduct of the latter had been in all regards the same with that of Howery, I am not prepared to say that there would not have been much show of force in the position taken by the counsel of Lewis here. In such a supposed state of things the inference would have been strong, that Arnold, whatever might be his strict legal rights in the controversy, had acquiesced in the claim of Lewis; and in such a case there might have been an apparent injustice in allowing him afterwards to visit Lewis with a loss that might not have occurred but for his seeming acquiescence. But I can see no ground for holdng that Arnold is to be held bound by the conduct of Howery. The agency of the latter was of the most special and limited character. He was the mere servant or hireling of Arnold, charged with the simple duty of receiving the salt, loading the boat with it and carrying it down the river to market for Arnold. He was clothed with no powers which could make his admissions, express or implied, of the justice of Lewis' claim, binding on Arnold. If, therefore, from his statement that he left the boat in consequence of what was said by the sheriff as he was on the eve of starting with his boat, it is to be inferred that he believed in the statements made by Lewis and the sheriff, and ac-
460 knowledged *their right to take the salt for rent, it is difficult to perceive by what rule of law it is to be maintained that such inference can be brought to bear on the rights of Arnold.

Let it be that Howery had full faith in the declaration of Lewis, that "he had a landlord's warrant or would get one to take the salt for rent," and in the announcement made by the sheriff on his arrival soon thereafter, that "he had a landlord's warrant, or notice, or something of the kind;" and that in leaving the boat he designed a surrender of his charge to the challenge of what he supposed to be a rightful claim and a lawful authority, still it is obvious that such conduct cannot stand in a controversy between Lewis and Arnold, as the substitute for proof, by Lewis, of the justice of his claim, nor dispense with the exhibition by him of the process by means of which he threatened to enforce it.

There is nothing in the exception or proviso to the agreement between Arnold and Neville, from which to infer a duty on the part of the former to see, on every occasion of receiving salt from the furnace, that a sufficiency of salt was left to discharge the rent to be paid by Neville. The whole effect of the reservation was to give Neville the right to retain, out of the whole quantity made during the year, a sufficiency for that purpose. There is no proof of any specific amount of rent due to Lewis; no proof that he or the sheriff was armed with any legal authority to make a levy on the salt; no proof that the salt in controversy had been

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set apart by Neville for the purpose of satisfying the rent, nor that a sufficiency to pay the rent was not left on the leased premises; no proof of collusion between Neville and Arnold in fraud of the rights of Lewis. But we are called on to infer all that is essential to show a superior right in Lewis, from the exhibition of the lease between him and his
461 *tenant, the agreement between Arnold and Neville showing that the former had notice of the terms of the lease, and from the fact that Lewis took possession of the salt with the assertion of a lawful right to take it to satisfy his demands as landlord. We should have to reverse all the rules applicable to demurrers to evidence before we could allow a defense constructed out of such elements alone, to stand in the way of the plaintiff's recovery. The Circuit court therefore did not err, as it seems to me, in rendering a judgment on the verdict for the plaintiff. It is contended, however, that the judgment was wrong in allowing interest on the damages, conditionally assessed by the jury, from the date of the verdict.

By the 14th section of chapter 177 of the Code of 1849, p. 673, it is declared that the jury in any action founded on contract may allow interest on the princpal due, or any part thereof, and fix the period at which such interest is to commence. And in any action for a cause arising thereafter, whether from contract or from tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the said interest shall commence. And if a verdict be rendered thereafter, which does not allow interest, the sum thereby found shall bear interest from its date, whether the cause of action arose theretofore or shall arise thereafter; and judgment shall be entered accordingly.

It is conceded by the counsel of the plaintiff in error, that the terms of the last clause of this section are sufficiently broad to cover the case; and he also concedes that the judgment is, in the particular in question, in conformity with the judgment rendered by this court in the case of Hepburn v. Dundas, supra 219. He contends, however, that the terms of said clause, if sought to be applied to verdicts rendered in actions pending at the date of the act, must
462 be controlled by *the provisions of the 18th section of chapter 16, p. 101, and the first and second sections of chapter 216, p. 800, the last chapter of the Code. He calls attention to the fact that in the petition for the appeal in the case just mentioned, no such question is presented, and also to the further fact that in the written opinion of the court no reference is made to these provisions; and he insists that under such circumstances the question should not be regarded as concluded by the decision made in that case.

The provisions of the section to which the counsel first refers us are, that no new law shall be construed to repeal a former law as to any offence committed against the former law, nor as to any acts done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offence or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the law in force at the time of such proceedings. And by the first and second sections of the last chapter of the Code it is declared, that all the provisions of the preceding chapter shall be in force upon and after the first day of July next (after the passage of the act); and that all acts and parts of acts of a general nature in force at the time of the passage of the act, shall be repealed from and after the said first day of July next, with such limitations and exceptions as are already in the previous provisions of the Code, or in the said chapter thereafter expressed; and that such repeal is not to affect any offence or act committed or done or any penalty or forfeiture incurred, or any right established, accrued or accruing before the said first day of July, on any prosecution, suit or proceeding pending on that
463 day, *except that the proceedings thereafter had shall conform, so far as practicable, to the provisions of the act.

There is no conceivable reason why the legislature should have made any distinction in the particular under consideration, as affecting the parties thereto, between actions pending and actions thereafter to be brought on causes of action already existing; inasmuch as it is obvious that this new incident to, or consequence of, the verdict could be as effectually avoided by a defendant in the one case as in the other. The true point of objection (if any) to the clause in question is, that it attaches to a cause of action already existing, a consequence which under the former law did not belong to it, the defendant not being compellable by any former law in case of a verdict for damages assessed in actions for tort, to pay interest thereon from the date of the verdict. But I do not think that in this respect the clause stands in any respect opposed to the spirit of these general regulations.

No one who has inflicted injury by the commission of a tort can be properly said to have an established right to withhold for any space of time the measure of reparation ascertained by the verdict of a jury to be due to the injured party. The justice of requiring the prompt payment of the sum which may be assessed by a jury in such case, and of allowing the party injured to receive, and of compelling the party withholding to pay, a fair compensation for retaining it, is just as clear as it is to make a similar requisition of one who is found to be the debtor of another by contract. And when it is entirely within the power of the wrongdoer wholly to avoid

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the new consequence which the clause in question attaches to the verdict, (as it is, by the prompt discharge of the damages,) I cannot see how the law can be said to be objectionable as being of a retrospective character.

It is to be observed further that the
464 act existing at *the date of the Code in respect to the allowance of interest by the jury, embraced only actions founded on contracts, and directed that the jury should, after ascertaining the principal sum due, fix the period at which interest should commence, if interest should be allowed by them; and that judgment should be rendered accordingly, carrying on the interest till the judgment should be satisfied. This provision though repealed, by the general repeal of all acts then in force, in the last chapter of the Code, is, as we have seen, in effect substituted by the first clause of the 14th section of chapter 177. In respect to actions founded on tort, there was, at the date of the passage of the Code, no act of assembly either directing or forbidding the jury to allow interest on the damages, or prescribing whether interest should or should not go on the damages assessed by the jury in such cases, where the verdicts did not allow interest. These matters were regulated by the common law. In respect to them there was, therefore, no act of assembly to be repealed: And consequently, the clause in question does not come within the terms of the last chapter of the Code declaring the repeal of "all acts and parts of acts" of a general nature.

So far as the said clause declares a new rule in conflict with the common law, it does so in terms definite and precise, leaving nothing for a general rule of construction to operate upon. It ascertains clearly the right to the interest as an incident to every verdict to be thereafter rendered, which does not allow interest, whether the cause of action arose theretofore or shall arise thereafter; makes no distinction between suits pending or thereafter to be brought; fixes the date of the verdict as the period from which the interest is to run, and declares that judgment shall be rendered accordingly. It neither needs nor admits of a reference to any general provision
465 to explain or declare on what *rights it was designed to operate, or what suits it was designed to affect. It carries with it its own construction. And to bring the general regulations in question, understood as they are by the counsel of the plaintiff in error, to bear upon it, would be to make the law contradict itself in some of its most important provisions; provisions in which it has used language of the most positive and unequivocal character. On the operation and effect of such a law it is plain these general regulations can, from the very nature of the subject and the objects contemplated, have no control.

There is, however, a plain mistake or error in the verdict and judgment, to the prejudice of the plaintiff in error, to the extent of thirty-three dollars and forty-nine cents; the amount of damages claimed in the declaration being eight hundred dollars, whilst the verdict and judgment have been rendered for eight hundred and thirty-three dollars and forty-nine cents. By the sixth section of chapter 181 of the Code of 1849, it is made the duty of the Court of appeals in cases of this kind to amend the judgment in such particular, and then to affirm the judgment, if there be no other error. Under the former law, § 110, ch. 128, Rev. Code, it was the duty of this court in such case to reverse the judgment of the court below on account of the error, and then to proceed to give such judgment as the court below ought to have given. And here again the counsel for the plaintiff in error insists that under the requirements of the general provisions of the Code already commented on, we ought to conform our judgment to the requirements of the former law. The want of any applicability of these provisions, and the absence of all right in the plaintiff in error to ask their application, is, if anything, more obvious in this enquiry than they were in the one just disposed of.

466 *If the writ of error had been pending when the Code took effect, there would be a show of propriety in contending that the plaintiff should not by the new law be burdened with the costs of correcting an error which, as the law stood when he sued out the writ, he had a right, an inchoate right, to have corrected at the costs of his adversary. But his position is just the reverse of that supposed. The writ of error, his (the plaintiff's in error) own suit, has been instituted since the Code took effect. Not only so; but the cause of action on which it is founded, viz: the error committed in the verdict and judgment rendered in the Circuit court, did not arise till after the new law came into operation. The new law does not sanction this error, nor give to the plaintiff in the original action, which was pending when the new law took effect, a right to recover of the plaintiff in error larger damages than he had a right to recover by the former law. So far from it, whilst it repeals (as is true) the former laws regulating the correction of such errors, it at the same time substitutes in their place new provisions equally efficacious; and in fact gives to the plaintiff in error an additional means of obtaining relief, viz: by motion to the Circuit court. By pursuing that remedy, instead of the one selected, he might have saved himself as well as his adversary the expense and delay that have been encountered in this court. Having refused to avail himself of the cheaper remedy, he ought not to be heard to complain of the rule which requires him to pay the expenses of the more costly one of which he has chosen to avail himself.

No precedent can be found going to the length of condemning, as retrospective, laws which merely change the remedies for existing rights. And it would be carrying the doctrine of the inviolability of vested rights to an extent far beyond the

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467 real purpose of any *constitutional provision, and the true object and scope of the general regulations in question, to hold that a party to a pending suit has such an established right to the then existing remedy for the correction of errors, as that an error which may be committed thereafter in the progress of the suit, cannot be made the subject of a new law regulating the costs of the proceedings to correct the error in the appellate court.

It is not necessary to consider the questions which were raised in the Circuit court by the demurrer to the first counts in the declaration, inasmuch as the evidence obviously applies only to the case stated in the last count, which, it is conceded, is in all respects good.

There is, I think, no error in the judgment, except that which was committed in rendering judgment for a sum exceeding that laid in the declaration. This error ought to be corrected, and the judgment of the Circuit court then affirmed.

The other judges concurred in the opinion of Daniel, J.

Judgment amended and affirmed, with costs and damages.

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468 *Clements v. Kyles.

July Term, 1856, Lewisburg.

1. **Caveat—What It Should State—Objections.***—In a case of caveat the caveator should state in his caveat the grounds on which he claims to have the better right to the land in controversy. And if this is not done the caveatee may either move the court to dismiss the caveat, or to require the caveator to file a specification of the alleged better right on which his claim is founded. But after the jury is sworn to ascertain the facts, it is then too late to object to the form of the caveat.

2. **Same—Evidence—Books of Surveyor to Show That Patent Founded on Survey.**—In a case of caveat the caveator claims under a patent issued to W in 1756, which does not refer to any survey. In order to show that the patent was founded on a survey, the caveator offers in evidence a copy from the books of the surveyor of Augusta county, of a certificate of a survey and plat made for W, dated in November 1749. The certificate itself does not contain the calls for course and distance or other marks, but these are given on the plat, and they agreed with the grant in its general and locative calls. It is competent evidence for the purpose for which it is offered.

3. **Same—Same—Witnesses—Case at Bar.**—To prove the boundaries of W's patent the caveators offer the deposition of a witness who had purchased a part of the land included in that patent from a party claiming under it, but not any part of the land claimed by the caveators. The witness then had a controversy with a third person in which it was important to him to establish the boundaries of said patent. The deposition had been taken in a caveat between the ancestor of the caveators and the same caveatees, in relation to the same land, in which the said caveator had suffered a nonsuit. HELD:

1. He is a competent witness.
2. The deposition is competent testimony.
3. **Evidence—Ancient Boundaries—Declarations—Whose Admissible.**†—The statement of a person living on the land at the time, made many years before the trial, at which time he was dead, pointing out to the witness two of the corners called for in W's patent, is not competent evidence; he not having been the surveyor or chain carrier at the making of the survey, or owner of that or adjoining lands calling for the same boundaries, or having any motive or interest to enquire and ascertain the facts.

469 *4. **Same—Surveys—Case at Bar.**—Surveys made many years after W's survey, and by a different surveyor, are not competent evidence as to the boundaries of W's survey.

5. **Same—Boundaries—Ascertained Points—Course and Distance.**‡—Three or four corners of a large survey are ascertained; but between these ascertained

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*Caveat—What It Should State—Objections.—In Beckwith v. Thompson, 18 W. Va. 123, the court said: "If the caveator fails to state in his caveat the ground, on which he claims to have the better right, he will still be permitted to file a specification of the alleged better right, on which his claim is founded, but this he must do, before the jury is sworn to ascertain the fact; but if the caveatee does not object to such a failure of the caveator to specify the grounds of his claim, before the jury is sworn, he cannot afterwards object to the caveat on that account. Clements v. Kyles, 13 Gratt. 468."

†Evidence—Ancient Boundaries—Declarations—Whose Admissible.—In Fry v. Stowers, 92 Va. 14, 22 S. E. Rep. 500, the court said: "The law is well settled in this state that evidence is admissible to prove the declaration of a deceased person as to the identity of a particular corner, tree, or boundary, provided such person has peculiar means of knowing the fact in question, as, for instance, the surveyor or chain carriers who were engaged upon the original survey, or the owner of the tract, or of an adjoining tract calling for the same boundaries; and so of tenants, processioners, and others whose duty or interest would lead them to diligent enquiry and accurate information of the fact; always, however, excluding those declarations which are liable to the suspicion of bias from interest. Harriman v. Brown, 8 Leigh 697; Clements v. Kyles, 13 Gratt. 477-8."

The principal case is also cited and followed in Reusens v. Lawson, 91 Va. 232, 21 S. E. Rep. 347; High v. Pancake, 42 W. Va. 609, 26 S. E. Rep. 538; McMullin v. Lewis, 5 W. Va. 154, 155.

See, in accord, Hill v. Proctor, 10 W. Va. 59; Smith v. Chapman, 10 Gratt. 445.

In Crothers v. Crothers, 40 W. Va. 176, 20 S. E. Rep. 929, it is said: "To exclude the witness, he must have an interest to be affected by the result of the suit by force of the adjudication, and though he may feel a bias in the struggle, and may even be interested in the question litigated, and may have to litigate the same question in future litigation of his own, that does not exclude him. Gilmer v. Baker, 24 W. Va. 72; Masters v. Varner, 5 Gratt. 168; Clements v. Kyles, 13 Gratt. 477, 1 Greenl. Ev. § 389."

‡Same—Same—Ascertained Points—Course and Distance.—In Teass v. St. Albans, 38 W. Va. 16, 17 S. E. Rep. 406, it is said: "The known, unquestionable

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corners, the patent calls for several lines and courses. In fixing the boundaries of the land, the lines calling for these ascertained corners must be run thereto, though this may require a variation of both course and distance; but where a corner is called for which is not found, the course and distance called for in the patent must govern; and an average allowance of variation in each course and line called for between the ascertained corners is not to be made.

6. **Boundaries of Land—Instructions—Case at Bar.**—The land in controversy lying in the western part of a large survey, it is error to instruct the jury that if they are satisfied that certain specified corners of the survey are established, and the courses of the patent between these corners are correctly laid down upon the plat of the survey made in the cause, it is all that is necessary for them to ascertain in this suit; as it is in that portion of said patent that the survey of the caveatees lies, as appears by the plat, and it is only to that portion of said land that they have set up title.

7. **Wills—What Lands Pass.**—The will of W having been made in 1746, before the survey or patent to him, the land embraced in said patent did not pass by his will to Mrs. W. but descended to his heir at law.

8. **Case Sent Back—Case at Bar.**—A case in which the cause was sent back to the court below to have a more perfect finding of the facts upon which the rights of the parties depend.

In April 1849 William Kyle and others, devisees of James Kyle deceased, filed with the register of the land office a caveat to prevent the issue of a patent to Orville Anderson and Franklin Clements for a tract of land of one thousand acres in the county of Carroll. The only ground stated in the caveat on which they opposed the issue of the patent is that they claimed to hold the land by an older and better title.

The caveatees without making an objection to the manner in which the caveators had set out the grounds of their objection to the issue of the patent, went to trial; and the jury found the facts on which the caveators rested their title. These are stated by Judge Lee in his opinion.

470 The caveators claimed the legal *title to the land in controversy under a patent issued to James Wood on the 16th of August 1756. This patent gave the location and boundaries of the land, but did not refer to any survey on which it was founded: And the caveatees having stated that they should, from the facts and circumstances which would appear in evidence, insist that no actual survey of the land granted to James Wood had ever been made, the caveators offered in evidence the copy from the surveyor's books of Augusta county of a certificate of a survey made for James Wood, and of the plat of the survey. These, in the location and boundaries, agreed with the patent, and it bore date the 20th of November 1789. The certificate of the present surveyor of Augusta county followed the copy of the original certificate of survey, and was followed by the plat. The caveatees objected to the evidence; but the court overruled the objection; and the caveatees excepted.

In the progress of the cause the caveators offered in evidence the deposition of William Kenny, which related to the boundaries of Wood's patent. He had purchased a part of the land included in that patent from a party claiming under it, but not any part of the land claimed by the caveators. He was interested to establish the boundaries of the patent; and then had a controversy with a third person in which the establishment of these boundaries was important to him. This deposition had been taken in a caveat case between James Kyle, under whom the present caveators claimed, and the same caveatees, in relation to the same land, in which the caveator suffered a non-suit. The caveatees objected to the evidence because it was not taken in the same cause, and on the ground that the witness was interested, and thus incompetent. They also objected to the answers given to the second, thirteenth, fifteenth and sixteenth questions. But the court overruled the first and second objec-

471 tions, and *the objection to the answer to the second question, and sustained it as to the others. Whereupon the caveatees again excepted.

The second question and the answer to it are as follows:

"Are you acquainted with any of the corners and lines of the said survey?" (the Wood survey said to have been granted to James Wood).

Answer. "When we moved here" (witness had said he had been living on the Wood survey forty-five years) "or some time thereafter John Cock" (who had left the country for Kentucky between forty and fifty years since, then a middle aged man, and it had been reported for a number of years that he was dead), "who was then living on the same land, took me and my father to the dug corner, and then to the burnt corner, and told us they were both corners to Wood's land."

After the caveators had introduced in evidence the patent to Wood under which they claim, and the report and plat of the surveyor, made in the cause; and had also introduced evidence tending to prove that certain lines on the plat were the true boundaries called for in the patent; and that most of the original corner and line

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monuments of boundary must govern, although neither courses nor distances nor computed contents correspond. Pernam v. Wead, 6 Mass. 131; *Clements v. Kyles, 13 Gratt. 468-490.* Where the boundaries of land described in a survey cannot be established by reference to known monuments, and the courses and distances cannot be reconciled, there is no universal rule which requires that one of these should yield to the other; but either may be preferred, as shall best comport with the manifest intention of the parties, and with the circumstances of the case. Ruffner v. Hill, 31 W. Va. 426-436, 7 S. E. Rep. 13."

The principal case is also cited in Ruffner v. Hill, 31 W. Va. 436, 7 S. E. Rep. 18.

See also, *foot-note* to Marlow v. Bell, 13 Gratt. 527.

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trees of said land had been destroyed some years previous to the survey of the caveatees, to prevent the identification of the corners and lines of the land embraced in the patent, offered in evidence, as tending to establish the true boundaries of said land, a patent dated the 30th of August 1796, to Nathaniel Frisbie, for two thousand two hundred acres lying in the county of Grayson. This patent called for streams called for in Wood's patent, and one of its corners was called for as on the side of a hill near Wood's line. They also offered in evidence, for the same purpose, a patent bearing date the 21st of June 1813, to Churchill Jones, for two hundred acres
472 of land in the county of *Grayson.

The caveatees objected to the introduction of this evidence but the court overruled the objection; and they again excepted.

After the jury had retired to consider of their verdict, they returned into court and enquired what it would be proper for them to do if they should be of opinion that three or four corners of the survey were established? In reply to this question the court said, it could only say, that if they should be satisfied that particular corners of the survey of twenty-eight hundred acres made for James Wood and patented to him, were established by the evidence, that the lines must be so run as to go to said corners, although to run them thereto might require a variation in the course and distance: That in making said variation there ought to be a fair allowance made in each line and course if necessary.

The court further instructed the jury by reference to the plat made in the cause by the surveyor, that if they should be satisfied from the evidence that certain specified corners were established as corners of the twenty-eight hundred acre survey, and that the surveyor had laid down the courses of Wood's patent therefor in his plat between these specified corners as designated by certain lines, correctly, it was all that was necessary for them to ascertain in this suit; as it was in that portion of said patent that the survey of the caveatees lay, as appeared by the plat, and it was only to that portion of said land that the caveatees had set up title. And that it was not necessary for them to ascertain whether the courses of Wood's patent were properly designated by certain lines upon the plat on another specified part of the survey, as the title to that portion of the land and its boundaries were not in controversy in this cause. To this opinion of the court the caveatees again excepted.

Upon the facts found by the jury,
473 which are stated *in the opinion of Judge Lee, the court rendered a judgment for the caveators; and thereupon Clements applied to this court for a supersedeas, which was allowed.

William H. Cook, for the appellant.
B. R. Johnston, for the appellees.

LEE, J. If it could be considered an open question whether a party claiming a perfect legal title under a grant from the commonwealth can maintain a caveat against one seeking to obtain a new grant for the same land, under the provisions of our act of assembly, I should have little difficulty in holding that the remedy is inappropriate to such a case, thinking as I do that the argument to show that it is a proceeding for the discussion of equitable rights merely and not intended to draw an equitable right into comparison with an alleged perfect legal title, has never been answered and is in truth conclusive. But under the influence of the cases of Preston v. Harvey, 3 Call 495; Tanner's adm'r v. Saddler, 2 Hen. & Munf. 370; and Hardman v. Boardman, 4 Leigh 377; in all of which the caveat was sustained on the basis of a complete legal title in the caveator, either actually shown or presumed in his favor, and of the settled and long continued practice during a period within which there have been two revisals of our statute law without any change upon this subject, I must regard it as no longer a debatable matter and hold it as now fully settled that a party may well enforce a complete legal title by caveat against another seeking to obtain a new grant for the same land however inexpedient it may be in many cases in which he has the actual possession also to forego the advantage of his position as defendant and take that of an assailant in exercising his right so to do.

The act of 1819 provides that a ca-
474 veat on the ground *of better right in the caveator shall express therein the nature of the right on which the plaintiff claims the land. 1 Rev. Code, ch. 86, § 38, p. 330. The present Code contains the same provision. Code of Virginia, ch. 112, § 24, p. 483. The object is to apprise the caveatee of the grounds on which the caveator claims the better right that he may come prepared to controvert it. Harper, &c., v. Baugh, &c., 9 Gratt. 508. And it has been held in Kentucky upon the construction of a similar provision in their Code, that the plaintiff can only rely on the grounds of better right set forth in his caveat. Justices of Allen County v. Allen, 2 A. K. Marsh. 30. The caveators in this case contented themselves with saying in their caveat that they claimed to hold the land by an older and better title. The nature of their right is in no manner expressed except that they claim as devisees of James Kyle deceased and, in part, as trustees of Sarah McDowell. This is plainly no compliance with the requirement of the statute and the caveat is defective upon its face. But if the caveatees desired to take advantage of this defect, it was their duty to make the objection at a proper stage of the proceeding by a motion either to dismiss the caveat or to require the plaintiffs to file a specification of the alleged better right on which his claim is founded. After the jury have been sworn to find the facts, the objection would come too late and it cannot

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therefore be the subject of consideration here.

These points being disposed of, we come to the questions upon the merits. And the first of these is as to the admissibility of the survey from the surveyor's book of Augusta county bearing date on the 20th of November 1749, as evidence for the caveators. The caveatees in stating their case had said that they should insist upon the evidence, as it would appear, that no actual survey of the land described in the grant to Wood under whom the caveators
475 claimed had *ever been made; and to repel such a presumption, the Circuit court permitted the caveators to read the survey to the jury. That the official survey upon which a grant has issued under the provisions of our act of May 1779 may be used as presumptive testimony before the jury with a view to identify the calls of the patent subject to be repelled by other evidence of identity either derived from the grant or extrinsic thereto, has I believe never been questioned. Even the original entry may be used for that purpose. Camden v. Haskill, 3 Rand. 462. And so other surveys made by the same surveyor about the same time or recently thereafter and upon which grants have issued from the commonwealth, are proper evidence upon the question as to the locality or boundary of a coterminous or neighboring tract although such grantees may be strangers to the parties to the controversy. Overton's heirs v. Davisson, 1 Gratt. 211. The same reasons would apply with equal force in the case of a grant under the colonial government. In June 1666, and again in October of the same year, the grand assembly declared that the grants of lands within the colony appertained only to the governor and council. 2 Hen. St. 253. In October 1705 (4 Anne) an act was passed providing the mode of obtaining grants for lands upon importation rights as well as for lands generally. It authorized a party not possessing any importation right, to pay to her majesty's receiver general at the rate of five shillings for every fifty acres he desired to take up and upon certificate of such payment, any sworn surveyor to whom it should be produced was authorized and required to survey the quantity paid for and to make return of such survey into the secretary's office to the end that a patent might issue thereupon. 3 Hen. St. 305, et seq. And the form in which the patent was to issue was provided in the act. Ibid. p. 308. By the act
476 of *1748, § 46, surveys of lands intended to be patented were required to be made by a sworn surveyor duly commissioned for that purpose and the breadth of every survey was required to be at least one-third of its length except where the courses were interrupted by rivers, creeks, impassable mountains and swamps or the lines of other lands previously taken up. 5 Hen. St. 424. It appears that James Wood paid to the receiver general the sum of fourteen pounds entitling him to have surveyed twenty-eight hundred acres of land; and on the 20th of November 1749 he procured the surveyor of Augusta county to survey the same for him: and upon that survey manifestly the patent issued to him in 1756. For although the patent does not describe the survey by its date as does a grant under our act of 1779, nor indeed refers in terms to any survey, yet as the description of the land imports that a survey was made and as in the due course of obtaining a grant, a survey was necessary, the presumption is that one was made; and as this survey exactly agrees with the grant in the general and locative calls for the land described and in all the courses and distances of its lines of boundary, the conclusion is irresistible that it was the survey on which the grant was founded. That the surveyor's certificate does not embody the courses and distances of the lines and that they are only appended in the form of a plat of the survey, is a matter merely formal: they are as much a part of the description as if set out in hæc verba in the body of the certificate. I think it clear the Circuit court properly permitted the survey to be read in evidence to the jury.

Next is the question as to the competency of the witness Kenny. And upon this there can be no doubt. He had purchased a portion of the land embraced by the grant to Wood of parties claiming under that grant and he claimed that the Wood survey
477 should be located *in the same manner as the caveators claimed in this proceeding. But the land claimed by the caveators was no part of that which he had purchased nor was there any privity between them which could render the judgment in this case evidence for or against him in any other action. True, he admitted that he felt an interest in the "establishment" of the Wood survey as claimed by the caveators, but this was an interest in the question, and not in the event of the suit; going to his credibility, but not to his competency. He was therefore properly held to be a competent witness. Richardson v. Carey, 2 Rand. 87; Masters v. Varner's ex'ors, 5 Gratt. 168.

But although Kenny was clearly a competent witness, I do not perceive on what just ground the court overruled the objection to his answer to the second interrogatory. It gave but the unsworn statements of Cock that two certain corners designated were corners of the Wood survey. It is true Cock was living on the same land at the time, and he had left the country many years before the trial and was at that time no doubt dead. Nor is it denied that upon questions of boundary in Virginia, not only general reputation, but also hearsay evidence as to particular facts may under certain circumstances be properly received as evidence. Thus the declarations of a deceased person as to a particular corner tree or boundary may be given in evidence provided such person had peculiar means of knowing the fact. Harriman v. Brown, 8

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Leigh 697. In Kentucky the rule would seem to be different. For although evidence of reputation or common tradition will be admitted as to an ancient boundary, (Smith v. Norvells, 2 Litt. R. 159,) yet evidence of hearsay as to particular facts to prove such boundary will be excluded unless perhaps in cases where the name of a water course or some other object which commenced by parol be necessary to
478 be established. *Cherry v. Boyd, Litt. Sel. Cas. p. 8. But although as stated in the opinion of the court in Boardman v. Reed, 6 Peters' R. 328, and approved in Harriman v. Brown, (above cited,) from the perishable character of the land marks in this country, evidence of hearsay as to particular facts may under proper restrictions be received upon a question of ancient boundary, yet such evidence should be carefully watched because from its very character it may in many or most cases be utterly impossible to meet or disprove it. There must always be some peril in departure from the broad general rules of evidence, and it should not be carried farther than required by the absolute necessities of the case. I think the rule is laid down sufficiently broadly in Harriman v. Brown and I am not disposed to extend it in the least beyond the very terms in which it is there expressed.

In this case Cock the person whose statements were allowed to be proven, was neither surveyor nor chain carrier at the making of the original survey, nor was he the owner of the tract or of any adjoining tract calling for the same boundaries. He had never been engaged as a processioner of the land nor was his situation such in reference thereto as to render it his duty or interest to make diligent enquiry and obtain accurate information as to the facts. It is said he was living on the land at the time, but in what character is not stated. It is not said that he was there as tenant under the Wood title or as a claimant for himself under any title. For aught that is shown in regard to his occupation, it may have been that of a mere squatter. Certainly nothing is shown from which it is to be inferred that Cock had that peculiar means of knowing the facts which would impress upon his unsworn statements the character of evidence in a subsequent controversy between others to whom he was entirely a stranger about the title to the land.
479 *That his living within the bounds of the survey gave him the opportunity to see trees marked as corners of some survey, found accidentally or otherwise, would surely not be sufficient unless some duty or interest can be traced to him by which he would have been prompted to make diligent enquiry and to obtain accurate information within the meaning of the rule as propounded in Harriman v. Brown.

I think the Circuit court should have excluded the answer to the second interrogatory as it properly did those to the thirteenth, fifteenth and sixteenth interrogatories to the same witness.

I think the Circuit court erred also in permitting the grants to Frisbie and Jones to go to the jury as evidence upon the question of the identity of the Wood survey. In Overton's heirs vs. Davisson, 1 Gratt. 211, it was held that in a controversy concerning boundary or locality of land granted by the commonwealth pursuant to a survey, another survey made by the same surveyor about the same time or recently thereafter, of a coterminous or neighboring tract, upon which also a grant had issued whether to a party to the controversy or to a stranger, is proper evidence upon the question of identity unless plainly irrelevant; and accordingly it was decided that the Circuit court had erred in rejecting the surveys for Thomas and Lewis which the demandants had offered in evidence. Those surveys were dated on the 28th and 29th days of April 1785, respectively. The date of the survey on which the grant to Overton was founded does not appear in the report of the case, but the grant was dated on the 23d of May 1786, and all three surveys were doubtless made nearly about the same time and by the same surveyor. In this case, the survey for Frisbie was made on the 31st of October 1795, nearly forty-six years after the Wood survey, and the survey for Jones was made on the 15th of March
480 1809 nearly sixty years after the *Wood survey. The surveys for Frisbie and Jones were made by the surveyor of Grayson doubtless a different person from the surveyor of Augusta in 1749. They could not therefore come within the rule of Overton v. Davisson. They were clearly res inter alios, and I am aware of no principle on which their admissibility as evidence in this case can be sustained. Any call which they might contain for "Wood's line" without further explanation, would be at best the mere declaration of a party having no peculiar means of knowing the fact and whom neither duty nor interest would so far as is shown, have prompted to make the necessary enquiry with a view to obtain accurate information. It would be but his supposition where the line was, having nothing of the only elements which could render it evidence in a controversy between third persons. And it is exactly one of those calls which we are told are often mere matters of conjecture and always liable to be mistaken. Harriman v. Brown, 8 Leigh 697, 705, per Tucker, president.

We come next to the instructions given by the court to the jury.

In telling the jury that if they should be satisfied particular corners of the Wood survey had been established by the evidence the lines must be so run as to go to those corners notwithstanding it might involve a variation in both course and distance, the court certainly committed no error. It was only the familiar proposition that natural objects or other proven corners will control course and distance. But I do not perceive clearly what was intended by the addition made to this instruction "that in making said variation there ought to be a

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fair allowance made in each line and course, if necessary." The idea would seem to be that if variations of course and distance were found necessary for the purpose indicated, there should be something in the nature of an average established
481 *by assigning to each line a just proportion of such variation. This certainly cannot be correct. The course and distance of a line cannot be determined upon any such principle. The true principle is that the course and distance called for in the grant must govern in respect of each line except so far as they may be controlled by calls for natural objects or artificial monuments proven to have been made or adopted for the survey itself, and in fixing those of any one line no reference can legitimately be had to the variation from the patent calls that may be found necessary in determining the course and distance of any other line according to natural or other controlling objects found upon the ground.

I think the Circuit court also erred in instructing the jury that if they were satisfied certain corners specified were established by the evidence as corners of the Wood survey and that the surveyor had laid down upon his plat the intermediate courses correctly, it was all that was necessary to be done, because it was in that (the western) portion of the Wood survey, the caveatees' survey embracing the land they claimed title to was found to lie, and that it was not necessary for them to ascertain whether the courses of the intermediate lines on the other or eastern portion of the Wood survey were correctly designated or otherwise because the title and boundaries of that portion of the survey were not in controversy in that case. It was not sufficient that the jury should have been satisfied that the courses of the intermediate lines around the western part of the survey had been laid down correctly, because the true length of each of those lines was quite as important as the course, and this was to be determined not by making a fanciful allowance in order to preserve a general average of variation but by the patent call for distance unless the same were controlled by a call for some natural object or some
482 artificial *monument sufficiently established, in which case the distance should be shortened or lengthened accordingly. And although the land covered by the caveatees' entry lay in the western part of the Wood survey and within the compass of the intermediate lines running around that portion from what is called the "burnt corner" to the "beginning corner" and a line connecting those two corners, yet it by no means follows that the title to the residue of the Wood survey and its boundaries were not also drawn into controversy. A survey upon which a grant has issued is an entire thing, and if its identity be contested, the title to the whole and all its boundaries become more or less matter of dispute. It may very well happen and in many cases must be that the locality of the boundary lines of a survey in a particular part depends upon the calls in an opposite and extreme portion of the survey; and although there may be intermediate calls, yet if there should be any repugnancy between them or any of them, it would be for the jury to say which are to be observed and which to be disregarded upon the principle that those which are more certain and important shall control those which are less so.

I think therefore the court unduly restricted by its instruction, the enquiry which the jury had to make; and that in answer to their enquiry they should have been told, that it was their duty to consider the evidence offered as to all of the corners and lines of the survey: that where a corner was established to their satisfaction, the lines appearing to radiate from such corner should be so drawn as to converge at the same, and course and distance should both be changed so far as necessary for that purpose; and where no corner was found the patent calls for course and distance must be their guide and must supply such lines as were not established by the
483 proofs on the ground; *that any conflict that might be found among the different calls was to be reconciled by them upon the principle above indicated and in this manner that they should give location to the entire survey, and determine for themselves whether it embraced the whole or any part of the land within the survey of the caveatees.

I proceed to consider briefly the facts of the case as ascertained by the finding of the jury.

The caveators claimed under the grant to James Wood dated the 16th of August 1756. To connect themselves with this grant they introduced the will of Col. Wood, dated the 8th of September 1746 and admitted to probate in the County court of Frederick in February 1760, by which he devised all his estate real and personal to his wife Mrs. Mary Wood subject to certain pecuniary charges in favor of children: they then produced a deed from Mrs. Wood by which she conveyed (in 1791) parcel of this land by metes and bounds containing seventeen hundred and eighteen acres, to Robert Wood a son of Col. James Wood, and also another deed of the same date by which she conveyed the residue of said land by metes and bounds supposed to contain one thousand and eighty-two acres to Mrs. Susannah Wood widow of Dr. John Wood another son of Col. Wood, for life and after her death, to Fanrose and Stanhope Wood two sons of Dr. Wood: Robert Wood in his lifetime sold and conveyed a portion of the land conveyed to him by his mother to one John Kenny, and after his death by deed dated the 16th of April 1833, his widow and heirs conveyed the residue to James Kyle under whose will the caveators claimed as devisees: Stanhope Wood by deed dated the 9th of August 1821, conveyed one moiety of the land conveyed to him and his brother Fanrose Wood by Mrs. Wood in 1791 to the same James Kyle, and Fanrose Wood by deed of the 16th

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484 of May 1823 released *his interest in the moiety so conveyed. The will of James Kyle was then found by which he devised his estate to the caveators subject to a provision in favor of his wife. The jury also find that the land in controversy is embraced by the conveyances and wills under which the caveators claimed title, and that after the purchase of the same by James Kyle the taxes on the land had been regularly paid.

The foregoing is in substance all the facts found by the jury and no other facts appear to have been agreed by the parties.

Now at the date of the will of James Wood and until the act of 1787, it is clear that after acquired lands would not pass by a devise in the most general terms of all of a testator's lands, tenements and estate whatsoever of which he was or at the time of his decease might be possessed. Brunker v. Cook, 11 Mod. R. 121; S. C. on appeal, 1 Bro. P. C. 19; 1 Wms. Saund. 277, n. (e.); 3 Lom. Dig. 19. And as the grant did not issue, nor was even the survey made until some years after the date of the will, and no interest shown in Wood of any kind either legal or equitable, at that date, the land did not and could not pass by the devise to Mrs. Wood, but upon the death of the testator descended to his oldest son as his heir at law, the Virginia statute of descents not having been enacted till 1785. But although the caveators failed to connect themselves with the grant to Wood through his will, still such a succession might be shown to the right which descended to the heir at law as would be sufficient to maintain this proceeding. Or if the better right cannot be deduced by descent from the patentee, yet the possession of those claiming under the deeds from Mrs. Wood might have been under such circumstances as would itself invest the caveators with such a title or such an interest in the premises as would authorize them to interpose and prevent the

485 *emanation of a grant to the caveatees. But upon these subjects the finding of the jury is wholly silent. It is not found who was the heir at law of James Wood nor what may have been the course of descent from him nor whether any interest in this land was vested in those or any of them under whom the caveators claim. It is not found how many sons James Wood had, nor which of them survived him, nor which was the oldest. Nor is any thing found as to the possession of the land; whether the same was ever taken by any one claiming under the Wood grant, and if so, when taken and how long continued. It may be there has been such possession under claim of title as would itself suffice to vest a perfect legal title in the caveators, or with the other circumstances shown in the case would authorize the jury to presume an abandonment of his claim or some family arrangement amounting to a conveyance or release of the right of the heir of James Wood whoever he may have been, to those under whom the caveators now claim.

I think the finding of the jury is so defective that the court could not understandingly and safely undertake upon the facts which are found to adjudicate upon the rights of the parties, and that therefore the appellants are not entitled to have final judgment pronounced here in their favor, but that the cause should be sent back to the Circuit court for a more full and perfect finding of the facts upon which the rights of the parties may essentially depend. See Cropper v. Carlton, 6 Munf. 277; McNeel v. Herold, 11 Gratt. 309.

I am of opinion to reverse the judgment and remand the cause for a new trial.

The other judges concurred in the opinion of Lee, J.

486 *The judgment of the court is as follows:

The court, for reasons stated in a written opinion filed with the record, is of opinion that the said Circuit court did not err in permitting the copy of the survey dated the 20th of November 1749 mentioned in the first bill of exceptions to be read as evidence to the jury nor in admitting as evidence the deposition of William Kenny mentioned in the second bill of exceptions, the court being of opinion that the said William Kenny was not shown to be incompetent as a witness in this cause. But the court is of opinion that the Circuit court did err in permitting the answer to the second interrogatory to the said Kenny upon his examination in chief to be read as evidence this court being of opinion that the statements and declarations of John Cock which were given in that answer were not evidence against the caveatees, and that the same should have been excluded from the jury as well as the answers to the thirteenth, fifteenth and sixteenth interrogatories which were properly excluded by the court. And the court is of opinion that the objection to the said second interrogatory and the answer thereto should have been sustained.

And the court is further of opinion that the Circuit court erred in permitting the patents to Frisbie and Jones mentioned in the third bill of exceptions to be read as evidence to the jury, this court being of opinion that the said grants were not evidence against the said caveatees upon the question of the identity of the Wood survey or any other matter in issue between the parties in this cause.

And the court is further of opinion that in so much of the instructions given by the court to the jury mentioned in the fourth bill of exceptions as informed them that if they should be satisfied that particular corners of the Wood survey were established by the testimony, the lines must be run so as to go to said corners although

487 *so to run them might require a variation both in course and distance, there is no error, but that the rest and residue of said instructions was erroneous, this court being of opinion that in lieu thereof and in answer to the question propounded by the jury, the court should have instructed them that it was their duty to

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consider the evidence offered as to all of the corners and lines of the survey; that if there should appear to be any irreconcilable conflict or repugnancy between the different calls or any of them, they were to hold to and be governed by those which were most certain and important rejecting those if any which were less so: that if any corner or corners should be established to their satisfaction, the lines radiating therefrom were to be so run as to converge at the same upon the ground and that course and distance should both be changed so far as necessary to make them so converge; that where no corner could be found, the patent calls for course and distance must be their guide and must supply such lines as could not be established by the proofs of such corner or of the lines themselves intersecting thereat; and that in this manner they were to give location to the entire survey and to determine for themselves whether it covered the land embraced by the caveatees' survey or any part thereof.

And the court is further of opinion that the finding of the facts by the jury sworn in the cause was imperfect and insufficient and that the court could not understandingly and safely undertake to pronounce final judgment thereupon between the parties; that the same does not ascertain who was the oldest son and heir at law of the said James Wood or whether there was any succession on the part of those under whom the caveators claimed title to the rights of such heir at law, and if any what was the character of such succession and to whom it applied; nor does it find that there was any family arrangement between said
488 *parties either proven in fact or to be presumed from the long continued claim of those under whom the caveators claimed and the acquiescence of those who may have been entitled by descent from the said James Wood and the other circumstances of the case; nor does it find whether possession was ever taken and held under the Wood title and if so, when taken, by whom, and how long continued.

The court is therefore of opinion that final judgment ought not now to be pronounced upon the finding aforesaid, but that the same ought to be set aside and a new trial had upon the principles herein before declared.

Therefore reversed, &c., and cause remanded for a new trial upon which if the same questions shall arise as those upon which the opinion of this court has been herein before expressed, the rulings and opinions of the Circuit court shall conform to the views and principles above declared. Which is ordered. &c.

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489 *Middleton for Warren's Heirs v. Arnolds.

July Term, 1856, Lewisburg.

(Absent, ALLEN, P. and LEE, J.)

Bonds—Conveyance of Pretensed Title.*—A conveyance of a pretensed title to land is not void; and the bonds given for the purchase money for the same are valid.

This was an action of debt in the Circuit court of Lewis county, brought in 1846 by Henry O. Middleton, for the use of John Warren's heirs against George Arnold and others, upon four single bills for one hundred dollars each, given for the purchase of the right of John Warren's heirs to a certain tract of land in the county of Lewis. The issues were finally made up upon five pleas field by the defendants in September 1854. The first was the plea of payment, on which the plaintiff took issue. The other four pleas were in substance the same, and alleged that the single bills declared on were given for a pretensed title to a tract of land, purchased of Warren's heirs through their agent Middleton, and negativing in their plea all the exceptions in the statute against buying pretensed titles. To these pleas the plaintiff demurred; and the court overruled the demurrer, and rendered a judgment thereon for the defendants. Whereupon Middleton applied to this court for a supersedeas, which was allowed.

Robert Johnston and Fry, for the appellant.

Hoffman, for the appellees.

MONCURE, J., delivered the opinion of the court:

It is certainly true, as a general
490 rule, that a contract *founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so; and that no action lies to enforce it. It is also true, that if such void contract be by deed, the parties thereto are not thereby estopped from showing the illegality of the act which makes the contract void. The numerous authorities cited by the counsel for the defendant in error abundantly sustain the verity of these propositions. The main question arising in this case is, Whether a conveyance of a pretensed title comes under the general rule, and was made void by the operation of the act passed December 6, 1786, entitled "an act against conveying or taking pretensed titles?" 1 Rev. Code 1819, ch. 103, p. 375.

That act does not declare the conveyance

*Act Prohibited by Statute—Penalty—Validity of Contract.—For the proposition that, a contract founded on an act forbidden by statute under a penalty, is void, but that it does not necessarily follow that the unlawfulness of the act was meant by the legislature to avoid the contract made in consideration of it, the principal case is cited and approved in the following cases: Yates v. Robertson, 80 Va. 482; Neimeyer v. Wright, 75 Va. 246.

In Isaacs v. City of Richmond, 90 Va. 31, 17 S. E. Rep. 760, the principal case is cited with approval, but the case is distinguished on the ground that the act tended to impair the supremacy of the constitution and was void.

See, in accord, with the ruling in the principal case, Duval v. Bibb, 3 Call 362; Tabb v. Baird, 3 Call 475, 481; Allen v. Smith, 1 Leigh 231, 254; Williams v. Snidow, 4 Leigh 16, 17.

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void, but prohibits it under the penalty of forfeiture, both by the vendor and vendee, of the value of the land conveyed; one moiety to the commonwealth and the other to him who will sue as well for himself as for the commonwealth; unless the vendor, or those under whom he claims, shall have been in possession of the same, or of the reversion or remainder thereof, one whole year next before; though it provides that any person lawfully possessed of land, or the reversion or remainder thereof, may take, or bargain to take, the pretensed title of any other person, so far, and so far only as it may confirm his former estate.

Not long after the passage of the act, and as early as 1802, its construction and effect were considered by this court in the case of Duval v. Bibb, 3 Call 362; and the court were of opinion that the act imposed a penalty, but did not avoid a conveyance. That such was the opinion of the court, does not appear from the case itself; but the fact is so stated by Judge Roane in Tabb v. Baird, Id. 476, 481, decided in the following year. Judge Carrington, in the last case, also declared that the act merely creates a penalty, and does not affect the right.

491 The same opinion has *been expressed by some of the judges in several subsequent cases; as by Brooke, P., in Allen v. Smith, 1 Leigh 231, 254, and by Tucker, P., in Williams v. Snidow, 4 Id. 16, 17. No judge, so far as I have seen, has ever expressed a contrary opinion. The law is so laid down in our text books. 2 Tuck. Com. book 2, p. 215; 2 Lom. Dig. p. 10; and has been so uniformly and universally regarded in Virginia. It has been approved by the legislature, as is shown by the fact that no law has ever since been passed to the contrary, although there have been two general revisions of the laws since this opinion has been thus authoritatively promulgated. In the latter of these revisions, that of 1849, the propriety of this opinion was strongly indicated, not only by the omission of the act of 1786, but by the adoption in the Code, ch. 116, § 5, p. 500, of a provision, that "any interest in or claim to real estate may be disposed of by deed or will." After all these judicial and legislative recognitions of this opinion, and after it has so long and universally been regarded and followed as a correct exposition of the act of 1786, it is now too late and would be attended with wide spread evil, to reverse it; and it must therefore be regarded as the settled law of the land: especially as its propriety is now for the first time questioned, after the act itself has been repealed, and one of an opposite nature adopted in the Code.

But even if the subject were res integra, we think the opinion would be reasonable. The act of 1786 is substantially a re-enactment of the statute, 32 Hen. 8, c. 9, § 2 and 3. That statute was passed for a different age and country, and never suited the state of things existing here. It is justly characterized by an eminent law writer as a "severe statute," even without reference to any effect it might have in avoiding the contract of the parties. 4 Kent's Com. 447.

And President Pendleton speaks of it
492 in the same way in *delivering the resolution of the court in Duval v. Bibb. Its literal import has been much restricted by subsequent decisions, even in England; one of which is the case of Partridge v. Strange, Plowd. R. 77, in which the subject was very fully argued and considered in the Court of common pleas a few years after the statute was passed. It has been held that the statute does not extend to a conveyance of an equitable title or estate; Lord Eldon in Wood v. Griffith, 1 Swanst. R. 43, 55; Allen v. Smith, 1 Leigh 231; nor to judicial or official sales; Frizzle v. Veach, 1 Dana's R. 216, 2 Id. 325; Jarnett v. Tomlinson, 3 Watts & Serg. 114; nor to mortgages or other securities. The state of things which occasioned the passage of the statute has long since ceased even in England, where it has in effect been repealed by 8 and 9 Vict. c. 106, § 6, which authorizes the alienation of rights of entry and other rights of action before inalienable. Reports of revisors, p. 602, § 5, and note ‡. It was no doubt embodied in our original Code out of abundant caution, in copying such of the old English statutes as were supposed to be applicable to our country. But it remained almost a dead letter upon the statute book until it was repealed, and a wholly different provision adopted in its stead in the present Code. We therefore consider it a reasonable construction of the statute which limits its effect to the penalty thereby expressly denounced, and leaves the conveyance to have such legal effect as it would have at common law. That legal effect is that a conveyance of land in the adverse possession of another is void as to that other and all persons claiming under him, but valid between the parties. The law is so laid down in 2 Kent's Com. 448; where it is said that this is the language of the old authorities, even as to a deed founded on champerty or maintenance. See these authorities cited in note (a,) and the cases there cited from 9 John. R. 55, and 9 Wend. R. 516. See
493 also the case of Livingston v. *Proseus, 2 Hill's (N. Y.) R. 526. The law may have been differently expounded in some of the states; but it will be found that in some of them, as in Kentucky and Tennessee, a conveyance of land in the adverse occupancy of a stranger to the contract, is expressly declared by law to be void. Chamberlin v. Steuart, 7 Dana's R. 36; Wintersides v. Martin, 7 Yerg. R. 384. And it will probably also be found, that whenever a conveyance of land has been held to be void because it was of a pretensed title, the land was, at the time of the conveyance, in the adverse possession of a stranger.

The conveyance in this case not being void, it follows, as a necessary consequence, that the bonds given for the money which was the consideration of the conveyance, are not void. If the statute avoids

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any thing, it is the conveyance which it expressly prohibits, and not the bonds for the purchase money which it does not so prohibit. If the conveyance is valid, a fortiori are the bonds. It would be to the last degree unreasonable and unjust if the purchaser, who is generally at least as guilty as the vendor and often more so, and on whom the statute imposes the same penalty that it does on the vendor, should have and hold the land conveyed without paying any thing for it. This would be not to vindicate the law and effectuate its policy, but to give a premium to the chief offender, and to encourage dishonesty and fraud. It is not pretended in this case that there has been any failure of consideration; that the purchasers did not get precisely what they contracted for, and in consideration of which, they bound themselves to pay the money; but they place their defense upon the ground that they and their vendors have violated the statute against conveying and taking pretensed titles. The answer is, "The law you have violated leaves the conveyance to have its legal effect. You have got what you bargained for, and every principle of law as well as honesty requires you to pay what you agreed to pay for it."

494 *The view which has been taken of the case renders it unnecessary to decide any other question arising therein. It was maintained by the counsel for the plaintiff in error, that as the statute did not declare the conveyance of the land, much less the bonds for the purchase money, void, the obligors in the bonds could not defend themselves against their enforcement upon the ground that, ex æquo et bono, they did not owe them; but only upon the ground that it would be against the policy of the law to enforce them, and that in pari delicto potior est conditio defendentis: that if any such policy ever existed, it ceased by the repeal of the statute and the adoption of a new and different provision on the subject in the Code: that the pleas in which the defense was set up in this case, not having been filed until after the Code took effect, then showed no good cause for not enforcing the payment of the bonds: that it was competent for the legislature to authorize such enforcement; and a law to that effect, operating on the remedy and not upon the right, would not interfere with vested rights, nor impair the obligation of a contract, but on the contrary tend to enforce the contract: And that a law to that effect, is to be found in the provision adopted in the Code in lieu of the former statute against conveying or taking pretensed titles. We think there is great strength in this position; but whether it be sustainable or not, is a question which we need not now decide. We are of opinion, for the reasons stated, that the Circuit court erred in not sustaining instead of overruling the demurrer to the pleas numbered 2, 3, 4 and 5; and that the judgment must therefore be reversed with costs, the demurrer sustained and the cause remanded to the Circuit court, to be tried upon the issue joined on the plea of payment.

Judgment reversed.

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495 *Cribbins v. Markwood.

July Term, 1856, Lewisburg.

[67 Am. Dec. 775.]

1. **Sale of Reversion—Mere Inadequacy of Price—Case at Bar.***—A sale of a reversion in real estate by a young man who had just arrived at the age of twenty-one years, there having been no fraud or imposition on the part of the purchaser, and no confidential relations between the parties, will not be set aside for mere inadequacy of price.
2. **Same—Vested—English Doctrine—Not Applicable.**—The English doctrine in relation to the sale of expectant interests, so far as it relates to vested interests, held not to be law in this state.

This was a bill filed in the Circuit court of Augusta county by Francis M. Markwood against Patrick Cribbins for the purpose of setting aside a sale and conveyance of an interest in real estate in the town of Mount Sidney in that county, on the ground of fraud and of gross inadequacy of price; the sale having been made by a young man soon after coming of age, and the subject being the one-third of a house and lot and out lot adjoining the town, in which his mother was entitled to dower, and of the whole of which she had possession. The facts are stated in the opinion of Judge Allen.

When the cause came on for hearing, the court below declared that there was no ground for imputing to the defendant actual fraud or imposition; but upon the ground that it was in effect the sale of a reversion at half its value, by an inexperienced youth, the court decreed the rescission of the contract and a reconveyance of the property. From this decree Cribbins applied to this court for an appeal, which was allowed.

496 The case was argued by Baldwin, for the appellant, *and Michie, for the appellee; but authorities are referred to by the judge, and it would be useless to give them here.

ALLEN, P. It appears from the pleadings and proofs in this cause, that the father of the appellee departed this life intestate about fourteen years before the institution of this suit; that he owned at the time of his death a house and lot in the

*Sale of Reversion—Inadequacy of Price.—For the proposition that, a sale of a vested reversion by one who is of age, where the dealings are fair, will not be set aside for mere inadequacy of price, the principal case is cited and followed in Mayo v. Carrington, 19 Gratt. 107, and *note*.

And in Hale v. Wilkinson, 21 Gratt. 86, and *note*, the principal case is relied upon as authority for the proposition that specific performance will not be refused on the grounds of mere inadequacy of price. See *note* to principal case in 67 Am. Dec. 775.

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village of Mount Sidney, Augusta county, and an out lot containing about eleven acres, adjoining the village. He left four children, (all infants,) one of whom died under age. The appellee was the eldest child; and when he attained his full age on the 24th of November 1851, he was the owner of an undivided one-third of said property, subject to the dower interest of his mother. The estate was a vested interest, two-thirds a present, and one-third an interest in reversion; the whole was in the occupation and possession of his mother, to whom dower had not been assigned. Immediately after arriving at full age, the appellee offered his interest in the property for sale to sundry individuals. In less than two months after he attained his majority, he made sale of it to the appellant for one hundred and sixty dollars, of which one hundred dollars was to be paid down, and sixty dollars to be paid in nine months, in paper. On the 16th day of January 1852 the appellee conveyed the property to the appellant: on the tenth of March thereafter his mother died with pulmonary consumption, after a confinement to her bed of about a month. The appellee instituted this suit on the 20th of March 1852 to set aside the sale, and to annul the deed, upon two grounds: First, of actual fraud, circumvention and imposition on the part of the appellant; and second, of constructive fraud, supposed to be imputed by the policy of the law to such a bargain, growing out of the mere inadequacy of price. The evi-

497 dence shows *that the appellee had not actually resided with his mother for several years before he attained full age; and that for some years he had been doing business for himself, uncontrolled by his mother, or any other person. But as he was a frequent visitor at her house, he had better opportunities than the appellant of informing himself of the condition of her health. There is no allegation in the bill, or any thing in the proof to show, that the appellee was not fully acquainted with his rights and the extent of his interest in the property when he contracted to sell it. He seems to have been a young man of at least ordinary intelligence, and as he had been doing business on his own account for some years, he must have had some experience in dealing. At the time of the sale he was indebted in a sum not exceeding fifty dollars, but no portion thereof was due to the appellant; and it is not proved that there was any relation of confidence between the parties. The proposition to sell appears to have been made by the appellee to the appellant, and this after he had been offering his interest in the property for sale to others. Upon the facts in the record the court below held, and as I think correctly, that there was not the least reason for imputing any actual fraud to the appellant in this transaction.

In view of the facts that the property was undivided; that dower had not been assigned; that the widow, from the death of her first husband, had been, and at the time of the sale was, in the actual possession of the whole thereof, the court below seems to have considered that the interest sold by the appellee was merely reversionary. So regarding it, the question is presented for the first time in this court for direct adjudication, How far it is incumbent on the party dealing with the seller of such an expectant interest to establish, not only that there was no actual

498 *fraud, but that he had agreed to pay a fair and adequate consideration?

In reference to expectant heirs, and those sustaining that character, the doctrine seems now to be fully established in England that they are entitled, for mere inadequacy of price, to have the contract rescinded upon the terms of refunding the money and interest received. In Edwards v. Burt, 15 Eng. Law & Equ. R. 434, decided in 1852, the Lord Chancellor observes, that "it is unnecessary to canvass or discuss the principles on this subject, for the rule on it was finally and distinctly established by the house of lords in the case of Lord Aldborough v. Frye; and that case following several of the previous authorities, clearly establishes that the purchaser of a reversionary interest, or, at all events, the purchaser of such an interest from an expectant heir, or from a person standing in the situation of an expectant heir, (and the plaintiff Mrs. E. clearly sustained that character,) is bound, if the transaction is impeached within a reasonable time, to satisfy the court that he gave the fair market value for what he purchased."

In that case property had been bequeathed to the mother of Mrs. E. for life, with remainder to Mrs. E. for life. At the time of the sale, the mother was seventy-four years of age, and Mrs. E. was thirty-eight. So situated she clearly sustained, according to this opinion, the character of one standing in the situation of an expectant heir.

After this recent and unequivocal recognition of the rule as finally established, it is unnecessary to review the long series of cases upon this subject. They will be found, and the substance of them set out and commented upon in the note to the case of Lord Chesterfield v. Janssen, in White & Tudor's Selection of Leading Cases in Equity, p. 344, 393. See also Davis v. Duke of Marlborough, 2 Swanst. R. 113, 147, n. a.

499 *Contracts with persons, sustaining the character of expectant heirs, entered into during the lifetime of the parent or relation standing in loco parentis, for the purchase of interests dependent upon the bounty of such parent or relation, may be obnoxious to the imputation of fraud on the rights and interests of the parent or relation. In Chesterfield v. Janssen, 2 Ves. sen. 125, 156, Lord Hardwicke said, "A fraud may be collected or inferred in the consideration of this court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement." Under this head he enumer-

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ates marriage brocage contracts, in which neither of the contracting parties are deceived, but they tend to deceive others; contracts to return a part of the portion of the wife; contracts by some creditors, to secure a larger portion of their debts, before they will unite in a deed of composition with other creditors; and in the same class he mentions catching bargains with heirs, reversioners and expectants, in the lifetime of the father, &c. "The father, ancestor, or relation from whom was the expectation of the estate, is kept ignorant, and is so misled and seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand."

In conformity with this rule, it was held in Boynton v. Hubbard, 7 Mass. R. 112, that a contract made by an heir to convey, on the death of the ancestor living the heir, a certain undivided part of what should come to the heir by descent, devise or distribution, was a fraud upon the ancestor. This deceit, says Parsons, C. J., is relieved against as a public mischief, as being a deceit on the father or other relation, who is thus influenced to leave his fortune to be divided amongst a set of common adventurers, and because it is destructive of all well regulated control
500 or authority *of persons over their children or others having expectations from them.

The rule, when limited and restricted to the sale of expectancies of the above description, may be sustained by principles applicable alike to all well regulated communities. It is the policy of every well constituted society to protect against fraud, and to suppress vice. Contracts with young heirs for mere expectancies dependent upon the bounty of the relation, tend to encourage both. They are most generally entered into for the purpose of ministering to some secret, vicious indulgence. A deceit is practiced on the owner and disposer of the property, and the necessity of concealment subjects the expectant heir, generally young and inexperienced, to oppressive sacrifices.

In the note to Davis v. Duke of Marlborough, 2 Swanst. R. 113, 147, the annotator states that the principle laid down in some of the cases as that on which the doctrine is in part founded, would seem to comprehend every person dealing for a reversionary interest; yet he raises the question, Whether, in order to constitute a title to relief, the reversioner must not combine the character of heir? He remarks, that the reversionary interests, the sale of which has been rescinded from mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor in every instance, except in a few cases which he enumerates, in all of which the sales have been made while the vendors were in distress, and so the transactions were affected with actual fraud.

The doctrine of imposing upon a purchaser from a reversioner who does not sustain the character of an expectant heir, the heavy burden of showing, in all cases and at all times, that he has paid a full and adequate consideration, has not
501 always been acquiesced *in as correct. In some of the earlier cases an opposite rule has been acted on. Thus, in Nichols v. Gould, 2 Ves. sen. 422, Lord Hardwicke refused to set aside the purchase of a reversion at an under value, there being no fraud. He observed, "there is no proof of any fraud, or imposition on the vendor; nothing but suspicion; and therefore it is too much to set aside the purchase merely on the value." In Griffith v. Spratley, 1 Cox's Cas. 383, the subject of sale consisted in part of a reversion. Lord Chief Baron Eyre remarked, "that the case had been much rested upon this, that the satisfaction received was so inadequate in value that it was impossible to resist the inference of fraud which arises from such inadequacy; or if possible, to make inadequacy itself a distinct principle of relief in equity. But that he knew of no such principle, and the common law knows of none such; that he would never agree that inadequacy of consideration is in itself a principle upon which a party may be relieved from a contract he has wittingly and willingly entered into. But it may be a strong evidence of fraud when the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs." In Wood v. Abrey, 3 Madd. R. 417, the vice chancellor, Sir Jno. Leach, in reply to the argument, that the party was entitled to relief on the ground of the purchase being of a reversion, unless the purchaser could show that the consideration was adequate, observed, "That the policy of this rule as to reversions may be well doubted, and if the cases were looked into it might be found, that the rule was originally referred only to expectant heirs, and not to reversioners." In Shelly v. Nash, 3 Madd. R. 232, the same judge questions the principle and the policy of the rule, arguing to show that sellers of reversions were not necessarily in the power of those with whom they contract; and that persons who sell their
502 reversions *from the pressure of distress, are thrown by the rule into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them. Sir Wm. Grant, in Peacock v. Evans, 16 Ves. R. 512, says, that the tendency of this doctrine is to render all bargains with such persons very insecure, if not impracticable. And again, in Gowland v. De Faria, 17 Ves. R. 20, the same judge speaks of the rule requiring such a purchaser to show that a full and adequate consideration was paid as imposing a heavy burden upon him; but that his case is an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. In Jeremy's Equ. Jurisdiction 398, the writer draws a distinction between contracts with expectant heirs, and contracts with the actual owner in remainder or reversion; and conceiving

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that contracts of the latter class are not necessarily of a nature to excite suspicion, he classes them with bargains to be set aside on account of fraud, and not merely on the ground of inadequacy of price.

The rule, therefore, if distinctly settled in England, as being applicable to contracts with reversioners who do not combine the character of expectant heirs, has only been so established within a recent period, and not without serious doubts as to its propriety. The authorities referred to show that it could not be regarded as a settled principle of equity jurisprudence at the date of American independence.

The subject was alluded to in the case of McKinney v. Pincard, 2 Leigh 149. The case was, however, decided on other grounds; the judge who delivered the opinion of the court, remarking that it was not necessary in that case to decide whether every seller of an expectant interest is to be treated as an expectant heir;
503 *and therefore he gave no opinion on that point. The question has not been adverted to in any other case, and is therefore one of the first impression in Virginia.

There would seem to be no greater reason for restricting the right of the owner of a reversion or vested remainder than of property in his actual possession. A reversion is an interest of value. It has its market price; it may be subjected to the claims of creditors; and the owner himself may make a valid sale at public auction, according to all the authorities. Yet, according to the doctrine of the recent English cases, every person entitled to such reversion or remainder is treated as an expectant heir, and in the language of Lord Thurlow in Gwynne v. Heaton, 1 Bro. C. C. 1, 9, "There is a policy in justice, protecting the person who has the expectancy, and reducing him to the situation of an infant, against the effects of his own conduct." It becomes, therefore, important to enquire into the principle upon which this doctrine, as applied to reversions and vested remainders, is supposed to rest, and to ascertain how far the policy on which it is founded is applicable to the condition of this country. If the doctrine grows out of a policy hostile to our system of government, and incompatible with the habits of our people, there can be no propriety, when not controlled by binding authority, in our following the more recent English cases.

The case of Twistleton v. Griffith, 1 P. Wms. R. 310, contains the first enunciation of a policy which at length has prevailed in the English courts. In that instance a vendor thirty-four years of age, married and the father of a family, was the owner of a remainder in tail after his father's death, who was old, and died two years after the sale. Lord Northington denied relief, yet upon a rehearing before Lord Jeffries, relief was granted; the chancellor declaring such bargains tended to the destruction of heirs sent to town
504 *for education, and to the destruction of families. That he saw no inconvenience in the objection, that at this rate an heir could not sell his reversion. This might force an heir to go home and submit to his father, or bite the bridle and endure some hardships; and in the mean time he might grow wiser and be reclaimed. This, which seems to be the leading case, was one in which the reverisoner occupied the position of heir, his father the owner of the life estate, being regarded as the head of the family.

In the next case, Cole v. Gibbons, 3 P. Wms. R. 290, where the policy of the rule was expounded, the plaintiff claimed a reversion by a bequest of his uncle: Lord Talbott said the cases of heirs were not in point; and because no heir was concerned, and he afterwards confirmed the sale, relief was denied. But the chancellor said, that as to the cases of expectant heirs, it was the policy of the nation to prevent a growing mischief to ancient families, that of seducing the heir apparent from a dependence on his ancestor, who would probably have supported him, and by feeding his extravagancies, tempting him in his father's lifetime, to sell the reversion of the estate which was settled upon him, for as much as it tended to the ruin of families.

Throughout the whole series of cases the policy announced in the two foregoing cases, of maintaining a due subordination to the head of the family and preventing the breaking up of family estates, seems to be the main foundation to the doctrine. Any person having a reversionary interest to dispose of, has, irrespective of his age, come to be classed with an expectant heir, and in the language of Lord Thurlow above quoted, reduced to the situation of an infant against the effect of his own conduct. This no doubt has arisen, in a great degree, from the situation of real property in England. Owing to their practice of
505 strict *settlements and the laws of entail, the parent or ancestor is generally a life tenant, and the expectant heir, a reversioner. Thus combining both characters, the courts for reasons of policy have applied principles adopted to protect the young and inexperienced expectant heir to the owners of reversions and remainders. The reasons of policy which have influenced the English courts, have but little application to this country. That due subordination to the head of the family upon which such stress is laid, and which the courts seek to enforce long after the heir has arrived at years of discretion, grows out of the division of ranks which prevails in that country. The political and social pre-eminence of the governing class must be maintained; and deference to the head of the family in all the relations of life, is one of the means by which a distinction of classes and gradation in society is kept up and preserved. The same consideration has operated to prevent the breaking up of estates. Titular rank, without wealth or position, soon ceases to command the respect of the community. To keep property in a particular

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line, restrictions are imposed upon the free alienation of real estate through the operation of their system of primogeniture, entails, and strict settlements; one of the consequences of which is to combine in almost every instance the character of reversioner with expectant heir; and hence the courts have assumed the extraordinary power to continue such reversioner in a state of pupilage long after he has arrived at years of discretion.

No such reasons exist for the recognition of such a doctrine here. The authority of the parent whilst the child is disabled to contract for himself, should be enforced by law; for the best security for the morality of the citizen is to be found by preserving unimpaired the family relations. But when legal control ceases the young man is
506 called upon by the habits of our *people, and his duty to the public, to act for himself in all the most important relations of life, uninfluenced by an abject deference to the opinions of others occupying no higher position in society than himself. Proper reverence is due at all times to the parent from the child; but when the latter has arrived at years of discretion, that respect becomes a moral obligation, which courts are not called upon to enforce. It will be more readily and cheerfully fulfilled when left to the free will of the child and the silent influence of a healthy public opinion, unaffected by legal restrictions upon his dominion over his property.

The policy of our country favors the free alienation of property, is adverse to large accumulations descending in a particular line, and by abolishing entail and primogeniture, encourages an equal distribution amongst all standing in the same relation to the common ancestor. As one of the consequences of our system, it is rarely the case that the reversioner combines the character of expectant heir. Such combination, we have seen, is the rule in England, which has led the courts to confound the reversioner with expectant heir, and to apply the same doctrine to both. In Virginia such combination is the exception. It is not often that the child under the control of the parent or ancestor, has a vested interest in his estate. Reversions usually arise after the death of the parent intestate, and most generally grow out of assignment of dower to the widow; and most remainders are created by the will of the parent making provision for his widow for life. A young man on attaining full age, frequently finds himself the actual owner of a vested remainder or reversion expectant on a life estate, and constituting the most valuable property belonging to him. A sale in such cases, in the dawn of manhood, for a moderate consideration, is most generally for the interest of the owner.
507 Judiciously invested, *or well improved in a country where the field for enterprise is so wide and inviting, it may lay the foundation of a fortune far exceeding the value of the whole fee simple when the life estate terminates.

By the English rule the owner of a reversion or vested remainder cannot derive benefit from his property by negotiating a private sale. He must either sell at public auction or hold on to the dry reversion until perhaps the decline of life. Unable to deal with it as with his other property, he is thrown into the hands of the speculator, who will indemnify himself for the hazard he runs in being called upon at some future day to show, by the vague opinion of witnesses, (whose testimony of former value will be insensibly influenced by the actual condition of things when they testify,) that the price was adequate at the time of the purchase.

Whatever principle may be adopted in reference to contracts with expectant heirs, secretly selling the chance of a parent's or some relation's bounty; it seems to me that the actual adult owner of a vested interest in property, whether in reversion or remainder, should not be reduced to the condition of pupilage from regard to any supposed rule of public policy, or for the purpose of extending to him any particular protection. No such rule of public policy exists in this country; and all attempts to fetter the action of the owner by restricting his power of alienation, operate injuriously to him. They lessen competition, and so depreciate the market price of his property. There is no valid reason for making this an exceptional case. The contracts of such reversioners or remaindermen, like all other contracts, if made by those competent to contract, if they are not gained by ill practice, nor made against the laws, should be kept.

This court in several instances has repudiated the doctrine of imputing fraud
508 as a matter of law. Davis *v. Turner, 4 Gratt. 422; Hutchison v. Kelly, 1 Rob. R. 123; Bank of Alexandria v. Patton, 1 Rob. R. 499. And the enquiry in reference to sales by reversioners or remaindermen, should be whether in the particular case actual fraud existed. Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to and weighed in determining whether the bargain in the particular instance is not so unconscionable as to demonstrate some gross imposition, circumvention, or undue influence; and so to justify relief on the ground of fraud. In the absence of such proof of actual fraud, I do not think it is incumbent on the purchaser of such an expectant interest to make good the bargain, by showing that a full and adequate consideration was paid.

With respect to the consideration in contracts of this kind; it was observed by Lord Hardwicke, in Nichols v. Gould, 2 Ves. sen. 422, "That every purchase of this kind must be on the foot of great uncertainty as to the value." And he asks, "Will a court of equity, after the contingency has fallen out one way, enter into the consideration of the value?" Or, as was said by the Chief Baron in Griffith v. Spratley, 1 Cox's Cas. 383, "The value of a thing is what it

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will produce, and it admits of no precise standard. One man may sell his property for less than another would. He may sell under the pressure of circumstances, which may make a smaller price more beneficial than a greater price would have been under different circumstances. If courts of equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind."

In the case under consideration, many of the witnesses deposed that in their opinion the price agreed to be paid was adequate. The testimony on both sides shows that about one thousand two
509 hundred dollars *would have been the full market price for the whole fee simple, if sold upon the usual terms of credit. Deducting one-third, four hundred dollars, the value of the widow's dower, and eight hundred dollars remain to be divided amongst the three heirs. A present interest of two hundred and sixty-six dollars and sixty-six and two-thirds cents to each, with a reversion in four hundred dollars, the one-third expectant on the widow's life estate. This estimate, however, is made upon the market price of the property, supposing the whole fee simple could have been sold. But it was undivided, and from its nature probably not susceptible of equal division. The consent of the dowress would have been necessary to a sale of the whole, out and out. If she refused, and elected (as in all probability she would) to have her dower laid off, the assignment of dower in such a property would necessarily have materially impaired the market price of the residue.. Under such circumstances, the value of the interest sold by the appellee is at best conjectural. And therefore we need not be surprised that many of the witnesses examined, looking to the mere money value of the interest sold, thought the price to be adequate. The most that can be said is, that perhaps at the time of the sale the price was a low one; and in the event which has happened, that the purchaser has made a good bargain. The inadequacy is very far from being so gross as to shock the moral sense; and it has uniformly been held, that inadequacy of consideration between persons who stand upon precise and equal footing is in equity of no account, unless from its grossness it is of itself evidence of fraud.

As to the allegation that the appellant has withheld a portion of the hand payment, it might constitute an objection to the specific execution of the contract at the suit of the appellant, if the same had not been executed; but in this case the
510 contract has been executed *by the conveyance. And besides, the retention of a portion of the hand payment is satisfactorily accounted for. The proof shows that it was withheld with the consent of the appellee until some enquiry could be made into the condition of the intestate's estate.

Regarding the case as if the whole interest sold was reversionary, the most favorable aspect for the appellee under which it can be contemplated, he has, in my opinion, failed to make out a claim to relief either upon the law or the facts of the case. In reality, however, the bulk of the property sold was a present interest in the undivided two-thirds. The reversionary interest embraced only the one-third to which the widow would be entitled for life. The doctrine of the English courts as to sales of reversionary interests did not apply to the most valuable portion of the property. Even if the English rule were recognized as obligatory, it might still be questionable whether it should be extended to the purchase of such an interest, the larger portion of which was a present interest in the seller. But resting my judgment upon the broader ground before discussed, that the purchaser of such an expectant interest is not bound to show that the price given was adequate, when no fraud is imputed or proved, I do not deem it important to pursue this latter branch of the enquiry any farther.

I think the decree was erroneous, and should be reversed, and the bill dismissed. But as the case was one of the first impression, I think it should be dismissed without costs.

The other judges concurred in the result of the opinion of Allen, P.

Decree reversed.

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511 *Harnsbarger's Adm'r v. Kinney.

July Term, 1856, Lewisburg.

1. **Chancery Practice—Relief from Judgment—After-Discovered Evidence.***—In an action at law on a bond against the surety, he defends it on the ground of usury; but there is a judgment against him. The surety then files a bill for relief against the judgment, on the ground of after-discovered evidence. But there was evidence to the same point before the jury. The after-discovered evidence being merely cumulative, it is not ground for relief.

***New Trial—After-Discovered Evidence.**—For the proposition that a new trial will not be granted on the grounds of newly-discovered evidence when the evidence is merely cumulative, the principal case is cited and followed in Brown v. Speyers, 20 Gratt. 308, and *note*.

Principal and Surety—Discharge of Surety.—In Poling v. Maddox, 41 W. Va. 786, 24 S. E. Rep. 1002, it is said: "Nor is the promise of Poling to put no more collections in the hands of Maddox binding, as he had the right to do so, and his promise was based on no consideration, and is like the promise of a creditor not to make his debtor pay, or like a promise to a surety to exonerate him, which does not bind. An agreement without consideration is no bar to legal rights. Mosby v. Leeds, 3 Call 439; Herm. Estop. § 1093; *Harnsbarger's Adm'r v. Kinney, 13 Gratt. 511.*"

The principal case is also cited in Coffman v. Moore, 29 Gratt. 248, and cases cited; Sayre v. King, 17 W. Va. 574; Glenn v. Morgan, 23 W. Va. 469.

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2. **Same—Same—Defence Allowable at Law.**—In such a case the surety seeks relief on the ground that the principal obligor had sold to the obligee a tract of land for three thousand dollars, which was to be credited on the bond, but that only two thousand five hundred dollars had been so credited. This defense might have been made at law, and is no ground of relief.
3. **Same—Same—Case at Bar.**—The surety further charges that the obligee agreed upon the sale and purchase of said land, to release the sureties; but although there is proof that pending the negotiation, the obligee said he would take a bond for the balance from the principal obligor with his sons as sureties, and would wait with him for the money during his life, upon his paying the interest, and it was also proved that the principal obligor was anxious to relieve his sureties, yet in the final execution of the contract nothing having been provided to carry out the arrangement, and the obligee retaining the old bond, credited with the price of the land, and obligor paying interest upon it, there is no ground for relief on that account.
4. **Same—Same—Same.**—The principal obligor having been remiss in paying the interest upon the bond promptly, as he was required to do, on two occasions when he sent an agent to pay the interest due, directed him to pay the interest up to the period when the interest would next become due. This, however, was voluntary on his part, and not required by the obligee; but endorsements of the payments were made upon the bond. This is no ground of relief to the surety.

This case is a sequel to that of Harnsbarger's adm'r against Kinney, reported 6 Grattan 287. When the cause went back, Kinney filed his bill in the Circuit court of Augusta county, to enjoin the judgment upon various grounds; the first of
512 which was of after discovered *evidence. After stating the execution of the bond of April 1821, by Moses McCue and John H. Hyde to Addison Hyde, and its assignment to Harnsbarger, he charged that Harnsbarger knew that it was an accommodation bond, and that with that knowledge he discounted it at ten per cent. by the assignment of other bonds to Addison Hyde, which, at the same time and in his presence, were assigned by Hyde to McCue; and that Harnsbarger knew that Hyde had no right to them, but that they were intended to be assigned to McCue. He stated that since the last trial of the cause he had discovered most important evidence, which by no diligence could he have discovered before; since he had knowledge of no fact or circumstance to direct enquiry to it. That on the trials at law it was clearly proved by Addison Hyde that the said bond was an accommodation bond, and that Harnsbarger knew this at the time of the assignment to him; "but there was a failure of proof satisfactory to the court or jury, as it would seem from the result, to show that he gave less for it than its par value, which if proved would have made the transaction clearly usurious and void." That soon after the decision of the cause in the Court of appeals he had discovered for the first time, that a certain Overton Gibson would have been a material witness for him on the trial, to prove that the transaction out of which the bond grew was usurious. That said Gibson was frequently at the house of Harnsbarger about the date of the old bond from McCue and John H. Hyde to Addison Hyde, of the 30th of April 1821, in consideration of which the bond on which the judgment was rendered was given; and often heard from Harnsbarger the history of the circumstances connected with the execution of said bond. That Harnsbarger had informed Gibson that McCue had applied to him for a loan of money; that McCue had agreed to take bonds, and allow Harnsbarger to
513 shave his bond at a *large discount, and pay for it in bonds. And that Harnsbarger had informed said Gibson that he made by said exchange some three or four hundred dollars; which he said was a good day's work.

Other grounds for the injunction were, that the land sold by McCue to Harnsbarger and conveyed to Hamilton, was extorted from McCue at about half its value, under the pressure of his embarrassments, and when he was in a state of mind which partially if not entirely incapacitated him for the transaction of business. That there was an actual contract on the sale of said land, that if McCue would let Harnsbarger have it at a certain price Harnsbarger would release his securities; which condition was performed, and the contract of release thereby consummated. That Harnsbarger also agreed that if the interest on the balance of the debt remaining after the sale of the land, was punctually paid, he would indulge the said McCue, without the privity or consent of said securities; which latter condition was also performed for many years afterwards, whereby said securities were deprived of their bill quia timet. The prayer of the bill was for an injunction to the judgment; for a new trial; and for general relief. And the injunction was granted.

Harnsbarger's administrator answered, denying all knowledge of the usury, extortion or agreements for release of the securities or for delay, charged in the bill. The facts stated in the bill as to Harnsbarger's statement of the circumstances attending the execution of the first bond, and the profit which Harnsbarger made on the discount of the bond, were testified to by Overton Gibson; and his statement of the discount of the bond at ten per cent. was also testified to by Richard Gibson. There was also evidence as to the sale and purchase of the land, and the condition of McCue at the time.

514 *The cause came on in February 1853 upon a motion to dissolve the injunction, when the court declining at that time to express any opinion as to the claim of the plaintiff to the relief prayed for on any of the four grounds stated in his bill, nevertheless rejected the motion to dissolve the injunction, and gave the

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plaintiff leave to amend his bill, and put in issue another ground of relief appearing from the endorsements on the bond.

In pursuance of the leave given, the plaintiff filed an amended bill, in which he charged that Harnsbarger on the first of April 1833, did for a valuable consideration, contract and agree with McCue the principal debtor, to receive the interest in advance upon the bond upon which the judgment had been obtained against the plaintiff as surety for McCue; and that in pursuance of that agreement said Harnsbarger did on that day actually receive from McCue the sum of one hundred and eighty dollars which would have fallen due on said bond on the last day of April next thereafter. And in like manner said Harnsbarger did, on the 20th of November 1834, make another agreement with said McCue based upon valuable consideration, by which he agreed to receive from said McCue payment on account of interest not then due upon said bond; and accordingly he did on that day receive the sum of one hundred and twenty-seven dollars from McCue, that being the amount of interest on said bond to the 10th of April next thereafter; both of which payments said Harnsbarger caused to be endorsed on said bond. And the plaintiff averred that all this was without his knowledge or consent; and that in pursuance of said agreements said Harnsbarger did extend the day of payment to McCue from the dates of said payment up to the periods when the interest so paid in advance fell due; and that this giving time was without the consent of the plaintiff.

515 *The administrator answered the amended bill. He denied that any contract for indulgence or stay of suit was made between Harnsbarger and McCue, at the time the endorsements referred to in the bill were made on said bond. He said that the endorsements were made by Moses H. McCue, the son and agent of Moses McCue; that on neither occasion was there any contract for further indulgence on the bond; and that the bond was at the time due, and both the principal and interest were demandable of all the obligors in the bond. He alleged further that Harnsbarger was particular in requiring prompt payment of interest due him; and that McCue having been in arrear in that respect, when Moses H. McCue was sent to make said payments he was instructed, in consideration of the previous long delay in paying interest, to make the payment large enough to cover the interest for the current year. That this was the voluntary act of Moses McCue, not required or demanded by Harnsbarger; and that it was done without any stipulation or understanding that Harnsbarger should wait one moment if he chose to sue, or was required by the sureties therein to sue, on said bond.

Moses H. McCue was examined as a witness; and he sustained the statements of the answer. He stated that the endorsements on the bond were made by himself, and that the payments had been made by him as the agent of his father at the house of Harnsbarger: And he sustained the statements in the answer, expressly negativing any contract or agreement for delay; and stating that the payments were voluntary on the part of McCue, made because of his previous delays in the payment of interest, and to keep Harnsbarger in a good humor, in the hope that he would not press for the payment of the principal of the debt.

516 *The endorsements on the bond referred to in the bill and answer, were as follows:

April 1st, 1833.—Paid this day $180, being the amount of interest till 10th of April next. M. H. McC.

November 20th, 1834.—Paid this day $127, being the amount of interest on this note, down to the 10th of April next.

M. H. McCue.

The last payment made previous to these was April 16th, 1831, when the interest for three years was paid.

The cause came on to be finally heard in June 1854, when the court perpetuated the injunction. Whereupon Harnsbarger's administrator applied to this court for an appeal, which was allowed.

Stuart and H. W. Sheffey, for the appellant.

Michie and Baldwin, for the appellee.

SAMUELS, J. A plaintiff who comes into a court of equity asking the new trial of an issue at law, on the ground of having discovered evidence after the trial, must show that he has not been guilty of laches in making the discovery; that the evidence is material to the issue; that it is not merely cumulative, or in addition to other evidence of like import heard at the trial. In the view I take of this part of the case, it is not necessary to consider any question other than the one whether the newly discovered evidence is cumulative, or whether it be such that no evidence of like substance was heard by the jury which tried the case. It was incumbent on the plaintiff to make out his case in all its material parts; he should have shown what newly discovered evidence he proposed to offer on a new trial; also what evidence had

517 been offered *at the former trial, to the end that the court might see that the new evidence was not of the like substance and import with any portion of that already heard. The plaintiff in this case in his bill alleges that upon the former trial it was proved, "that the said bond of three thousand eight hundred and fifty dollars was an accommodation bond, and that said Harnsbarger knew it to be so, but there was a failure of proof satisfactory to the court or jury, as it would seem from the result, to show that he gave less for it than its par value, which, if proven, would have made the transaction clearly usurious and void." This is not an allegation that no proof as to the particular fact stated had been offered, but only that the proof was "not satisfactory to the court or jury."

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This is not enough to justify the interference of the court; for in every instance in which the jury finds against a party who has offered proof to establish a fact or a series of connected facts to sustain the issue on his part, it is because the evidence is not satisfactory to the jury. The plaintiff seems to have been wholly intent upon proving in this case the usury alleged in defense, and to have omitted the plain duty, required by his case, of showing either that there was no proof at all, or no proof on which a jury might have acted, in regard to the fact he now seeks to prove by the newly discovered evidence. He has utterly failed to meet the exigency of his case, by showing that the evidence is not merely cumulative.

In the argument here, the counsel on both sides relied upon the record in the suit at law, of which the evidence at the trial is made a part. I do not perceive that this record has been made part of the record in the chancery cause (now before us) whilst in the Circuit court; and it cannot therefore be properly looked into. If it were otherwise, I would say that proof of precisely the same import as that now proposed to be offered, was heard on the trial
518 at law; and that the *new evidence is merely cumulative. Thus I am of opinion no new trial of the issue on the plea of usury should be directed.

The appellee seeks relief upon the further ground that his principal McCue in his lifetime had sold to Harnsbarger, the appellant's intestate, a tract of land at the price of three thousand dollars, to be applied as a credit to the bond on which the judgment was obtained; and that credit was not given for this price, but only for two thousand five hundred and twenty dollars, part thereof. Without stopping to comment upon the defects of the appellee's proof of the fact alleged, or on the probable application of a portion of the price to another debt from McCue to Harnsbarger, it is enough to say that this is a defense which, if well founded, might have been made on the trial at law, and that no reason is shown for the failure to make it there.

The appellee seeks relief upon the further ground that the contract by which McCue sold to Harnsbarger the tract of land already mentioned, was extortionate and unconscionable, and wrung from the fear and distress of the debtor by his grasping creditor. If this were all true as alleged, it is impossible to perceive how the appellee can found thereon any claim to relief in this case. At a proper time and between proper parties it might have been a question fit to be investigated whether the contract of sale should be rescinded; yet this would afford no relief to the appellee whose obligation existed before the sale; he could not claim to have a new and different contract established, and credit for a larger amount placed on the bond.

The appellee seeks relief upon the further ground that by the contract for sale of land above mentioned, the sureties Kinney and Sowers were to be discharged from all liability; and further that Harnsbarger should indulge McCue for the balance of the debt as long as Harnsbarger should live.
519 These grounds for relief are *not, nor is either of them, established by proof. It is shown that pending the negotiation for the sale Harnsbarger did say that if McCue would sell the land on certain terms, McCue should never be troubled for the balance due on the bond whilst his (Harnsbarger's) head "was hot;" that Harnsbarger offered to take a new bond for the balance with McCue's sons as sureties, but that it was not given; that McCue was anxious to relieve his sureties; that the deed was executed, and two thousand five hundred and twenty dollars credited on the bond. There is no proof whatever as to any thing said or agreed upon when the contract was finally consummated, and in the final execution of the contract the parties were aided by others who were fully competent to put their agreement into an authentic form. In the absence of proof to the contrary, we must hold that the bond still retained by Harnsbarger, with the credit endorsed but in nowise changed beyond placing the credit on it, showed all that was agreed to be done in regard to the bond or the parties to it; that the written evidence of what was done contains every thing upon which the parties had agreed.

The several grounds of relief above mentioned were not passed upon by the Circuit court. The decree of that court, it would seem, is founded upon the allegation in the amended bill, that Harnsbarger, on two occasions, without the consent of the surety, did agree to receive from McCue the principal a sum of money as interest on the bond in advance of the time at which the interest was payable; and that the interest on these several occasions was so prepaid and endorsed on the bond. The endorsements are found upon the bond giving credit for money paid for interest which was thereafter to accrue. The evidence of a witness proves that the money above mentioned was paid by him as the agent of McCue; that Harnsbarger did not require such prepayment, and that there was
520 no express *contract for indulgence in consideration thereof; that McCue was in pecuniary embarrassment, and that forbearance on the part of Harnsbarger was very desirable; that he had at times suffered the interest to fall in arrear, at which Harnsbarger was dissatisfied; that the prepayments were voluntary on the part of McCue, as well for the purpose of quieting Harnsbarger as of making amends for defaults in payment of interest at other times; that these were the motives which prompted McCue to make the payments in advance, but Harnsbarger was not informed of those motives.

Although it is not expressly stated in the decree of the Circuit court upon what ground the relief was granted, yet there is

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enough to show that it was upon the ground last stated.

It must be conceded that the doctrine of equitable releases to sureties is too firmly settled in Virginia by the decisions of this court to be again drawn in question; that an agreement for valuable consideration between a creditor and a principal debtor, whereby the creditor, without the consent of the surety, contracts to forbear for a definite time the collection of his debt, is, in equity, a release of the surety, cannot now be doubted. Yet when the attempt is made to bring a case of different facts within the principle of those decisions, we may well look into the principle itself to see whether its intrinsic justice and conformity with the general principles of equity require that it should be extended to a new class of cases. The decisions heretofore made have all proceeded upon the theory that by the contract for forbearance the surety would be subjected to liability for a longer time than that prescribed in his original obligation; that his right of substitution to the rights and remedies of the creditor would be impaired in case he paid the debt; and especially because the surety is thereby prevented from resorting to a bill quia timet, or a notice to the
521 *creditor to collect the debt. An agreement between creditor and debtor for forbearance is no bar to an action at law, unless it be a covenant never to sue, which is equivalent to a release to the party with whom the covenant is made. Regarding the subject as the courts of law regard it, a contract for indulgence would not delay a suit for the debt, and the surety might avail himself of his remedies to enforce the collection thereof, and thus obtain exoneration from liability. Ward v. Johnson, 6 Munf. 6; Steptoe's adm'rs v. Harvey's ex'ors, 7 Leigh 501; Devers v. Ross, 10 Gratt. 252.

Courts of equity, however, do interfere in any case in which the creditor and principal debtor, without the assent of the surety, make a contract for a consideration, however small, to delay the collection of the debt for a time, however short,' and as it seems, relieve the surety; and this without enquiring whether the obligation of the surety has been varied in any appreciable degree, or whether his remedies, for all practical purposes, have remained unimpaired. This doctrine is founded upon the hypothesis that the principal debtor might enjoin a suit brought in violation of the contract for indulgence, and thus specifically enforce that contract. If there be no surety, a contract for indulgence would be enforced in equity only in a case in which the general principles of the court require that such relief should be given; that is, in case adequate relief may not be had at law: yet, if a surety be bound, then the debtor is held to have the right, in all cases, to enjoin until the delay contracted for has been enjoyed; and the surety is thereby held to be discharged because of the change in his obligation, and the suspension of remedies whereby he might have sought exoneration. See 2 Rob. Prac. (old ed.) 134, and the cases there cited.

The case before us differs from all
522 others decided in *this court, in this, that no promise for indulgence was expressly given or contracted for; that the debtor having been in default in paying the interest theretofore due, made these prepayments as in some sort a compensation for his former remissness; and further in the hope of propitiating the creditor to give future indulgence. From these facts the attempt is made to imply a contract that Harnsbarger should postpone the collection of the debt to the time when the principal of his debt should have earned the interest so paid in advance. I am of opinion that such implication is strained and unjust, and at variance with the facts as shown in evidence.

In the argument here the counsel cited many cases decided in different courts on the question whether the isolated fact of prepayment of interest on a debt already due would of itself justify the implication of a contract for indulgence, whereby sureties would be entitled to a release in equity. Some of these cases are in conflict; others of them were decided upon the peculiar laws of the states in which they were made, and could afford no aid in the decision of a case in this state. Not regarding this as a case of that kind, I deem it unnecessary to consider the question. It is the duty of the court to declare the law upon the case as it stands, and not as it would be if some of the facts did not appear therein. It will be the time to decide this much controverted question when it shall arise in some case depending for its decision upon the solution thereof.

I am of opinion to reverse the decree, to dissolve the injunction, and dismiss the bill.

The other judges concurred in the result.

Decree reversed.

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523 *Randolph Justices v. Stalnaker.

July Term, 1856, Lewisburg.

1. **Tax Sales—Report of Surveyor—Duty of Court to Admit to Record.***—It is the duty of a County court,

*Tax Sales—Report of Surveyor—Duty of Court to Admit to Record—Mandamus.—For the proposition that the admission of the surveyor's report to record is purely ministerial and the county court may be made to admit it by mandamus proceedings, the principal case is cited and approved in the following cases: Doolittle v. County Court, 28 W. Va. 174; Paul v. Baugh, 85 Va. 961, 9 S. E. Rep. 329; Forqueran v. Donnally, 7 W. Va. 138, 145; Hays v. Heatherly, 36 W. Va. 631, 15 S. E. Rep. 229; Page v. Clopton, 30 Gratt. 419, and *note* and cases cited.

See, in accord, Dawson v. Thruston, 2 H. & M. 132; Manns v. Givens, 7 Leigh 689; Carter v. Robinett, 33 Gratt. 429; 2 Min. Inst. (4th Ed.) 867; Delaney v. Goddin, 12 Gratt. 266.

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acting under the Code, ch. 37, § 15, p. 203, in relation to land sold for taxes, to admit the report of the surveyor to record, if it conforms to the act. And the court has no authority to enquire into the regularity or validity of the sale made by the sheriff.*

2. **Same — Same — Same — Mandamus.** — The Circuit court may proceed by *mandamus* to compel the County court to admit the report of the surveyor to record.

This was a mandamus issued by the Circuit court of Randolph county, on the motion of Hamilton Stalnaker, to the justices of the County court of Randolph, requiring them to admit to record the report of the surveyor of the county in relation to a tract of land sold by the sheriff for the taxes due upon it. The facts are stated by Judge Allen in his opinion. The Circuit court awarded a peremptory mandamus; and the justices thereupon applied to one of the judges of this court for a supersedeas, which was allowed.

Hoffman, for the appellants.
Price, for the appellee.

ALLEN, P. The sheriff of Randolph county having sold a tract of land in said county on the 24th of September 1850 for the nonpayment of taxes due
524 *thereon, the appellee became the purchaser, as appears by the list of sales returned by the sheriff, and received from the sheriff his receipt for the price. The sale was of the entire tract; and on the 29th of June 1853 the surveyor of the county made a report in pursuance of the act found in the Code, ch. 37, § 15, p. 203; and the appellee moved the court to have it recorded. The motion was continued; and at the July term the appellee renewed his motion to have the report admitted to record. Certain persons appeared and resisted the motion; and the court being of opinion there was objection to the recording of the report, entered an order that the same be not recorded. The appellee excepted to the opinion and decision of the court, spreading the facts proved on the record; and afterwards presented his petition to the Circuit court of said county referring to and making the record and proceedings of the County court on the motion to record the surveyor's report, part of his petition, and asking for a mandamus to compel the County court to record the report.

A rule in the nature of a mandamus nisi was awarded; to which the County court made return, declining to order the surveyor's report to be recorded, for causes assigned.

The first, that the deputy sheriff who sold the land was at the time of the sale interested in the purchase; there being an agreement between him and the purchaser that he should have half of the land purchased, and that the purchase was made in pursuance of such agreement. Second, that the report was made by the surveyor on information derived from said purchasers, and does not set out the owners of adjoining lands. And in the third place, that the land had been redeemed by a payment to the clerk of the county, by whom the return does not show, on the 19th of August 1852; and also by a tender to the appellee on
525 the 31st *of October 1853, by the agent of parties claiming to be the equitable owners of the land, of the amount paid by the appellee, with interest at the rate of 10 per centum per annum, up to the time of the tender.

The Circuit court deeming the return insufficient, awarded a peremptory mandamus; from which decision the justices have appealed to this court.

The principal questions presented by the record have been settled by the decision of this court in the case of Delaney v. Goddin, 12 Gratt. 266. That case was elaborately argued and maturely considered; and all the judges were of opinion that the authority of the County court was limited to the enquiry whether the report of the surveyor is in conformity with the provisions of the section under which it is made; and if free from objection in this respect, it becomes the imperative duty of the court to order the report to be recorded. And a majority of the court held, that in passing on such question the County court is vested with no judicial power, but acts in a capacity purely ministerial; and that an error in refusing to order the report of the surveyor to be recorded, can only be corrected by mandamus.

The objections growing out of the alleged complicity of the sheriff with the purchaser, or whether the taxes and damages and cost of survey, where a survey was made, were paid by a party authorized by law to redeem, to the proper party and within the proper time, are matters not appearing on the report or the list of sales, or any thing connected therewith. The proper determination of them would involve enquiries into matters of law and fact, which the County court, acting ministerially and in this ex parte proceeding, cannot, in conformity with the decision in the case referred to, enter into. The survey and report returned by the surveyor describes the land with great particularity, referring to nu-
526 merous natural objects, *and naming many individuals through whose lands or near to whose lands or houses the lines of the tract in question passed. But he further certifies there are no lands owned known to adjoin the above named tract. The object of the report and survey is to give such description of the lands sold as

*Code, ch. 37, § 15, p. 203. "When also an entire tract of land is sold, and not redeemed within the said two years, the purchaser, his heirs or assigns, at his or their expense, shall have a report made by the surveyor of the county to the court thereof, specifying the metes and bounds of the land sold, and the names of the owners of the adjoining tracts; and giving any such further description of the land sold as will identify the same; and the County court, unless it see some objection to such report, shall order the same to be recorded."

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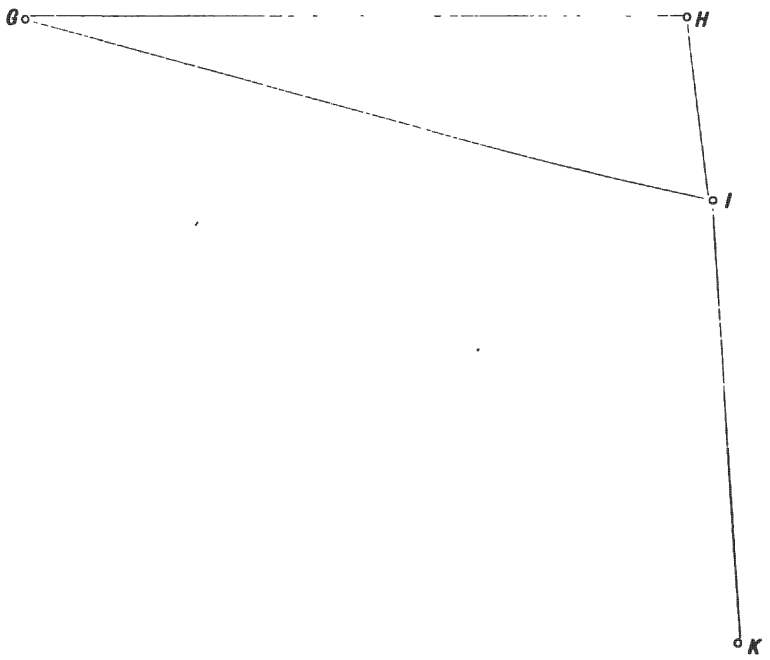

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will identify them. Specifying the metes and bounds and the names of the owners of adjoining tracts is the mode pointed out to identify them. The description given does identify the land by the lines as surveyed and the calls for all the other objects set out in the report. The survey is for the benefit of the purchaser, and can affect the rights of no other person. The materiality of a survey is apparent when made under the 14th section of the act, which provides for a survey where but part of a tract is sold, and directs how it shall be made; but where the whole tract is sold, the only effect of the survey is to furnish the purchaser with such a description as may identify the land. The surveyor must report such facts as may serve to describe and identify it. He acts officially, and cannot report the names of the owners of adjoining tracts, if they are not known to him. Whether other tracts do adjoin or not, might involve enquiries as to the boundaries of those tracts and an attempt to try questions without having the parties before the court, and without the means of arriving at a correct conclusion. I think the report comes up to the requisitions of the statute, and gives such a description of the land sold as will identify the same, and it was the duty of the court to order it to be recorded.

I think the judgment should be affirmed with thirty dollars damages and costs.

The other judges concurred in the opinion of Allen, P.

Judgment affirmed.

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527 ***Marlow v. Bell's Lessee.**

July Term, 1856, Lewisburg.

Land Patents—Calls for Natural Objects—Courses and Distances—Repugnancy.*—A patent of S calls to commence at a certain point admitted to be a corner of M's survey, and to run with his line a certain course and distance to a white oak corner of C; and thence with C's line a certain course and distance to another corner of C. Following the first call, it comes to a white oak corner of M, but not the corner of C; but to get to C's corner, the line must leave the second corner of M at nearly right angles and run seventy-nine poles, not running on the line of either M or C for this distance. The call for the line of M will, under the circumstances, be considered the correct call; and S's patent will be held to include all the land up to the line of M.

*Land Patents—Calls for Natural Objects—Courses and Distances.—Repugnancy.—In Clarkston v. Va. Coal, etc., Co., 93 Va. 260, 24 S. E. Rep. 987, it is said: "Where such repugnancy exists, the general rule is that both course and distance must give away to natural or permanent objects or monuments, and courses must be varied and distances lengthened or shortened so as to conform to the natural or permanent objects or monuments called for by the grant or survey. Dogan v. Seekright, 4 H. & M. 125; Baker v. Seekright, 1 H. & M. 177; Coles v. Wooding, 2 Pat. & H. 189; Smith v. Davis, 4 Gratt. 50; and Marlow v. Bell's Lessee, 13 Gratt. 527."

This was an action of ejectment in the Circuit court of Ohio county by Bell's lessee v. Marlow. The plaintiff claimed under a patent to Moses Shepherd, dated the 24th of August 1803, for fourteen hundred and forty-one acres of land lying on the waters of Little Wheeling creek in the county of Ohio. The defendant claimed under a patent bearing date the 1st day of March 1831, for sixty acres. The only question in the cause was whether the patent under which the plaintiff claimed included the land claimed by the defendant under his patent.

It appears that prior to the patent to Shepherd, Robert McCoy owned a tract of land of four hundred acres, which lies north of the land patented to Shepherd; and Samuel McConnell owned a tract of four hundred acres, which lies east of Shepherd's tract. Shepherd in his survey and patent calls for two lines of McCoy's patent. The first of these calls is for a line running S. 24 E. 170 poles, to a chestnut oak corner to Robert McCoy. This, it was agreed, was at the point G, in the accompanying
528 diagram. The second was, *"Thence with his line, N. 75 E. 265 poles to a white oak corner to Samuel McConnell. The next call was," thence with his lines S. 16 E. 180 poles to a white oak.

The beginning corner of McCoy's survey was at a white oak at H; and the call in his survey for the line from G to H is N. 75 E. 265 poles. The survey made in the cause makes the call N. 77 E. 280 poles. It was agreed that I and K were true corners of McConnell's survey; and that the line I K was a true line of that survey. The call in the survey for that line was, Thence S. 16 E. 180 poles to a large white oak. The survey made in the cause makes the distance 183 poles. It was agreed that K was a corner of Shepherd's survey: And it was agreed that the lines and corners G H I represent the true lines and corners of the survey made for the defendant. The line H I was the line, and they were the corners of a survey made in 1818 for Hugh McCutcheon, lying on the east of that line.

For the lines G, H, I and K, see diagram.

Upon the trial the parties dispensed with a jury, and submitted the cause to the court; and there was a judgment for the plaintiff. Whereupon the defendant Marlow applied to this court for a supersedeas, which was allowed.

Russell, for the appellant, insisted that in running the line of Shepherd's patent from the point G, one part of the descriptive call must necessarily be abandoned; as it was impossible to go by one line from the corner at G to McConnell's corner at I and follow McCoy's line, which ran to H and there stopped. And therefore as McConnell's corner at I was well known, and was called for, it was more reasonable to
529 suppose *that there was a mistake in

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calling for McCoy's line, than in calling for McConnell's corner. He referred to Hiscocks v. Hiscocks, 5 Mees. & Welsb. 363; Taylor's devisees v. Burnsides, 1 Gratt. 165, 201; Greenl. Evi. § 301, 302; Dogan v. Seekright, 4 Hen. & Munf. 125, 130; 4 Bibb's R. 497; McIver v. Walker, 9 Cranch's R. 173; Newsom v. Pryor, 7 Wheat. R. 7; Mercer v. Bate, 4 J. J. Marsh. R. 334, 361; Wychoff's lessee v. Stephenson, 14 Ohio R. 13; Frost v. Spaulding, 19 Pick. R. 445; Magoun v. Lapham, 21 Id. 135; Slater v. Rawson, 1 Metc. R. 450.

Jacob, for the appellee, insisted on the converse of the proposition. He referred to Johnson v. McMillan, 1 Strobh. Law R. 143; White v. Gay, 9 N. Hamp. R. 126; Hall v. Gittings, 2 Har. & John. 112; Jackson v. Hudson, 3 John. R. 375; Shultz v. Young, 3 Ired. Law R. 385; Carroll v. Norwood, 5 Har. & John. 155; Pennington v. Bordley, 4 Id. 457; Cox v. Couch, 8 Barr. R. 147; Jarrot v. McIlvaine, 1 Rich. R. 14; Hull v. Fuller, 7 Verm. R. 100; Law v. Hempstead, 10 Conn. R. 23.

ALLEN, P. Upon the trial of this ejectment, the controversy turned upon the construction of the description of the land contained in the grant under which the lessor of the defendant in error claimed. That grant is dated in 1803; the grant under which the plaintiff in error claimed, bears date on the 1st of March 1831. This action was commenced in 1839. If, therefore, the descriptive calls of the grant to the person under whom the defendant in error claims, embrace the land in controversy, judgment was properly rendered in his favor.

The grant to Moses Shepherd for one thousand four hundred and forty-one acres, under which the defendant in error claims, after setting out several lines and corners about which there was no dispute, and
530 all of *which it was agreed by the parties in the agreement of facts filed, are correctly laid down and designated in the plat and report made out and returned in the cause by A. P. Woods, surveyor; called at the point G on said plat for a chestnut oak corner to Robert McCoy, about which or the fact of its being McCoy's corner there is no controversy; both parties claiming and calling for it as McCoy's corner in their respective grants. From this admitted corner of McCoy, Shepherd's patent proceeds as follows: "Thence with his line N. 75 E. 265 poles to a white oak corner to Samuel McConnell. Thence with his lines S. 16 E. 180 poles to a white oak, conceded to be at K on the diagram. This last line terminating at K is a line in the patent to McConnell called for in his grant as beginning at McConnell's white oak corner admitted to be at letter I on the diagram, and running from the white oak at I, S. 16 E. 180 poles to the white oak at K. McConnell's corner at I is distant 79 poles from the termination of McCoy's line with which Shepherd calls to run, and at the end of which he calls for the white oak as a corner to Samuel McConnell: The corner of McConnell at I is nearly at right angles with the end of McCoy's line. To reach the corner of McConnell at K, the next call of Shepherd's grant, the line must be extended 79 poles; and instead of running with McConnell's lines throughout the whole extent, it would run for 79 poles through land vacant at the time until it reached McConnell's corner at I; and from I it would run with his line to K.

The defendant in error contends, that the true boundary of Shepherd's grant was the line of McCoy's grant, for the whole of which he called, and from the termination of the line, the correct boundary is to be ascertained by running nearly at right angles with McCoy's line to the first corner of McConnell at I, and continuing on the course called for with McConnell's line from I to K.

531 *The plaintiff in error insists, that the true boundary of Shepherd's grant is a straight line from the point G, called for as McCoy's corner, the agreed point of departure, to McConnell's white oak corner at I; and thence with McConnell's line as called for, S. 16 E. 180 poles, to the corner at K; thus departing entirely from McCoy's line as called for by Shepherd, and materially changing the course and distance. The line in question, as called for both by McCoy and Shepherd, being N. 75 E. 265 poles, found on actual survey to be N. 77 E. 280 poles, a difference of two degrees in course and fifteen poles in distance. Whereas the straight line is found on actual survey to be N. 88 E. 305 poles; a variation of thirteen degrees in course and an increase of forty poles in distance.

It is not controverted in argument, that where notorious land marks, as corner trees or natural objects, are called for, they are to be regarded as termini, and a straight line is to be run from one terminus to the other, without respect to course or distance. The case of Smith v. Davis, 4 Gratt. 50, recognizes this as a general rule. But though this be the true rule where no other call is found in the grant but the call to run from one terminus to another, there certainly may be other calls which show the line was not intended to be a straight line; as where a call is to run with a river or a public road from one terminus to another, the stream or road, if it leads to the other terminus, must be followed, though it may diverge from a direct line between the two points. The same rule would apply to a marked line, if there was enough to show that such line, though not a direct line, was intended as the boundary; provided by following the marked line the other terminus can be reached. The difficulty in this case grows out of the fact that by following the line of McCoy's grant from the corner at G to the end thereof, as called for in Shepherd's grant, though a
532 *white oak corner is found at the termination of the line of McCoy, it is not the white oak corner of S. McConnell, as called for. That corner is not found at

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the end of the McCoy line, or in the direction of it, but nearly at right angles with the end of said line and seventy-nine poles distant from it. If a direct line in legal construction, in the absence of proof of an actual survey on the ground, between the two termini is to be adopted, then the call to run with McCoy's line throughout its whole extent must be rejected. But by following the line as called for to its termination, and then running the next line by McConnell's corner at I to the corner at K, the call for McConnell's corner is reached, though not in the direct line as called for. It may be remarked, that there is no direct evidence in the record of any actual surveying on the ground when the original survey of Shepherd was made. And it is just as fair to presume he knew where McCoy's line was as that he knew the position of McConnell's corner. I think, indeed, it is the fair inference, deduced from the calls in the different surveys and the facts agreed, that he was much more likely to have known the position of the line than the corner. He was causing a survey to be made of waste and unappropriated land. He saw a large body of such land bounded in several places by the lines of previous grants. His survey calls to begin on a corner of Samuel Buchanan, and to run thence with his lines. It calls elsewhere for a corner of William Shepherd, and to run with a line of his survey. It afterwards runs with two lines of McCoy, and with two lines of the McConnell grant. Seeing the body of land he was about locating and surveying was bounded to a considerable extent on the western, northern and eastern sides by older grants or surveys, it was natural he should call for them. The land was vacant along the lines called for; and as he adopts the lines of McCoy

533 *where he runs with them throughout the whole distance, and precisely as they are found in McCoy's grant, it is manifest he intended to appropriate the vacant land up to McCoy's line, and to make his line the boundary of his tract on that side as far as it extended.

The land law, 1 Rev. Code 1819, p. 328, § 30, provides that the surveyor, at the time of making a survey, shall leave no open lines, but shall see the same plainly bounded by marked trees, except where a water course or ancient marked line shall be the boundary. It thus appears that the law regards an ancient marked line as sufficiently notorious to dispense with any further survey. It does not appear that the line of McCoy was marked. The corners, however, are found at each end, proving that it was actually run and probably marked; and it is admitted to be McCoy's line, and both parties call for it at the place designated in the plat. It is clear that McCoy's survey was before Shepherd when his survey was made; and from calling for the corners at each end of the line, the reasonable presumption is that he knew where the line was, and intended to call for it as his northern boundary in this portion of the survey. McCoy's line terminated at a white oak corner; and he called for a white oak, but by mistake supposing McConnell to corner on the same tree, and intending to run with two of his lines, he called for it as McConnell's corner. There is no mistake as to the object called for, a white oak, or as to the position of the white oak at the termination of McCoy's line. I think the object so called for must, in legal construction, be regarded as one of the land marks to which the party has a right to go, although he was mistaken in supposing it to be the corner of McConnell's survey. The line called for was called for as the boundary, and the object at which it terminates limits its extent in that direction. It shows the distance to

534 which the boundary *extends in the direction of the line called for; and if McConnell's corner be not found at the termination of the distance, yet by stopping at the distance called for and then running to the object and so by it to the next corner, effect is given in a measure to every call of the grant, and certainly much less violence is done to the calls than if that which is most material should be entirely disregarded. The case of Shultz v. Young, 3 Ired. R. 385, was similar in all its circumstances to the present. There the deed called to run south with A B's line 310 poles to C D's old corner. A B's line did not reach the corner, but at the end of A B's line it was necessary to run at right angles to reach C D's corner. It was held that the line should be run 310 poles on A B's line and then a straight line to C D's old corner, as that best conformed to the description of the deed, though it was necessary to run two lines instead of the one called for.

The court was of opinion that there were manifest and strong reasons for believing that the line called for was well known to the parties: And so believing, determined that the call for the terminus should not overrule the rest of the description. It is equally manifest from the calls of this grant, that the locator here knew that the waste land he was appropriating was bounded in part by older surveys; that he knew the general position of these surveys and where the lines run; that the surveys were before him, and that he intended to adopt and did adopt the lines of such surveys where called for, precisely as they had been run originally, and to make them the boundaries of his survey. And these things being so, it seems to me the call for McCoy's line cannot be rejected. I think therefore that the judgment of the Circuit court should be affirmed.

The other judges concurred.

Judgment affirmed.

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535 *Jenkins v. Liston & als.

July Term, 1856, Lewisburg.

Arbitrators—Admission of Evidence in Absence of One Party—Effect upon Award.*—Arbitrators having

*Arbitrators—Admission of Evidence in Absence of One Party—Effect upon Award.—For the proposition

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received a paper as evidence without the knowledge or consent of one of the parties to the arbitration, though they say that their opinions were formed before it was received, their award is void.

John Jenkins died prior to June 1835, after having made his will, which was duly admitted to probat in the County court of Preston county. By his will, after giving to his wife for her life a part of the tract of land on which he lived, and to his son Jonathan Jenkins, the land on which he lived, which was a part of the first tract, he says: "Thirdly. The lands I now live on, exclusive of that which I have bequeathed to my son Jonathan Jenkins, I give and bequeath to John Smith my son in law and Rebecca Smith, my daughter, after my wife's decease, fully to be possessed and enjoyed by them during their natural lives; and after their decease to fall to their son, John Jenkins Smith. And in case of his death, the land is to fall to the rest of John Smith and Rebecca Smith's children." The land devised in this third clause of the will is stated in the bill to be between one hundred and fifty and one hundred and sixty acres.

In March 1836 John Smith and wife and John Jenkins Smith and wife united in a deed, by which they conveyed to Jonathan and Graham Jenkins all their interest in the land devised to them by John Jenkins, and covenanted to warrant the land against their respective heirs.

John Jenkins Smith died in 1841,
536 in the lifetime of *John Smith and his wife, leaving a widow and two children. John Smith survived his wife and died in 1853, leaving several children, and real estate which, exclusive of his widow's dower, was valued at his death at nine hundred dollars; and which pending this suit was valued at one thousand four hundred dollars.

In February 1854 Abraham Liston, who had married a daughter of John Smith, and Jonathan and Graham Jenkins, entered into a mutual bond, in which, reciting that there was a controversy between them concerning the will of John Jenkins and the purchase of real estate, they submitted the said controversy to the arbitrament of three persons named, or any two of them; and convenanted to abide by their award, in the penalty of two thousand dollars.

Two of the arbitrators on the 22d of February 1854 made an award in the case, by which they awarded that Jonathan and Graham Jenkins were to keep the farm, by paying to Abraham Liston seven hundred dollars, in specified payments: Or if they should be unwilling to keep it upon these terms, and should express said unwillingness by 6 A. M. on the next Friday, then they awarded the farm to Liston, upon condition of his paying the above sum of seven hundred dollars in the manner specified.

Within the time specified, Jonathan and Graham Jenkins gave notice to Liston, that they had agreed to abide the decision of the arbitrators and pay him seven hundred dollars. And on the 27th of February 1854 Liston wrote at the foot of the award that he bound himself to make a good and warrantee deed against the children of John and Rebecca Smith and none others, within twelve months from that time.

It appears that whilst the arbitrators were engaged in considering the case, a
537 paper written by a person *in Pennsylvania, was put into their hands as evidence in the absence of the Jenkinses. One of the arbitrators who made the award says he had made up his opinion before he saw this paper, and that he did not use the paper as evidence at all. The other says he had made up his opinion before the paper was shown to him, and that he did not consider it as evidence; but it strengthened him in the opinion that no fraud had been committed. The contents of the paper do not appear.

The Jenkinses having refused to execute the award, Liston and wife and the other children of John and Rebecca Smith filed their bill in the Circuit court of Preston county against them to enforce it; alleging that Liston was authorized by most of the other heirs to prosecute their claim for the land; and that he submitted the whole matter in controversy to arbitration.

The defendants insisted that under the will of John Jenkins, John Jenkins Smith had the remainder in fee in the land. That if the arbitration only extended to Liston's interest, the award was unconscionable; and that if it was an award for all the complainants, they were not bound by it; and therefore the defendants were not bound. That in fact the arbitrators were only authorized to decide upon Liston's interest, and had exceeded their powers. That improper testimony had been submitted to the arbitrators without the knowledge of the defendants. And that the plaintiffs had inherited real estate from their father John Smith, and were therefore bound by his warranty of the land to the defendants.

The cause came on to be heard in August 1855, when the court below held that the award should be specifically executed; and made a decree accordingly. Whereupon the defendants applied to this court for an appeal, which was allowed.

538 *Price and Brown, for the appellants.

Fry, for the appellees.

SAMUELS, J. It is unnecessary to the proper decision of this case to determine whether Abraham Liston could make a submission to arbitration valid in law to bind his own wife and other femes covert in their rights to real property; or whether the submission before us can be held to

that, where arbitrators admit evidence without the knowledge or consent of one of the parties their award is void, the principal case is cited and approved in the following cases: Dickinson v. Railroad Co., 7 W. Va. 430; Fluharty v. Beatty, 22 W. Va. 707. See generally, monographic *note* on "Arbitration and Award."

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embrace those rights; or whether an intelligible construction can be placed upon the submission; or whether the award made is within its terms. If all these questions should be decided in favor of the appellees, still the decree directing the specific performance of the award must be reversed because of misbehavior in the arbitrators. The record shows that in the absence of the appellants, and without their knowledge, the arbitrators received from the appellees, or some of them, or from some one on their behalf, a written paper to be used as evidence upon the questions involved in the submission. What the paper contained, or whether its contents were sworn to, the record does not show. One of the arbitrators proves that, having previously made up his opinion as to what the award should be, the contents of the paper had the effect of confirming him in that opinion.

It has always been an object of great concern with the courts to keep the administration of justice free not only from partiality, but also from any suspicion thereof. It is due to all parties, whether asserting or defending their rights in courts of record, or before domestic tribunals of their own choice, that they should hear and know everything alleged or proved in opposition to the rights claimed. If, however, evidence on behalf of one party may be secretly heard, his adversary is deprived of the right to explain or disprove what is alleged to his prejudice.

539 *Many cases may be found affirming the position laid down: there is no conflict of opinion in regard to the general principle itself, although there may have been some in applying it to the facts of particular cases.

The case of Graham's adm'r v. Pence, 6 Rand. 529, is sustained as well by the cases cited by Judge Carr, who delivered the opinion, as by many others. It may therefore be safely declared that an award cannot be sustained if made in favor of a party who has secretly offered evidence which has been received by the arbitrators whilst acting in their capacity as such. Nor will the case be withdrawn from the operation of the general rule by proof that the award would have been the same without such proof. The law in its jealousy will not permit an enquiry into the effect of the evidence so received; it tends to partiality and corruption, and nothing less than the complete vacation of the award will satisfy the law.

There is no particular reason to impute improper motives to the arbitrators who made the award in question; they probably received the evidence in ignorance of the proprieties of their position.

It is said in behalf of the appellees, that the paper alleged to have been executed by the appellants after the award was made, agreeing to keep the land and pay the sum of seven hundred dollars, is in itself such a contract as the court should cause to be enforced. I am of a different opinion, however. The arbitrators had decided that the appellants should either give up the land and receive seven hundred dollars from the appellees, or retain the land and pay seven hundred dollars to the appellees, and that the appellants should make their election in a limited time. The paper referred to was merely to show that, of the two alternatives offered by the award, the appellant selected to keep the land and pay

540 the money; but it was in *nowise intended as a new and original contract of sale.

I am of opinion the decree should be reversed and the bill dismissed.

The other judges concurred in the opinion of Samuels, J.

Decree reversed and bill dismissed.

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541 *James River and Kanawha Co. v. Early.

July Term, 1856, Lewisburg.

(Absent, DANIEL, J.*)

1. **Navigation Companies—Failure to Complete Improvements of River—Liability—Case at Bar.**—The James river and Kanawha company not having completed the improvement of the Kanawha river as prescribed in their charter, and not having charged tolls as authorized by said charter, are not liable for damages occurring in the navigation of the river, for not having such an improvement as the charter prescribes.
2. **Same—Failure to Keep Channel Open—Liability.†**—The said company being authorized by law to charge tolls on the Kanawha river not exceeding those allowed to be charged by their predecessors the James river company, are bound to keep the navigation of the river in the condition in which the James river company was required to keep it, and are liable for any damages sustained by their failure so to keep it.
3. **Same—Same—Successors—Liability.**—The James river company was only required to improve the Kanawha river in the mode suggested in the report of the principal engineer of the state made in January 1820, and referred to in the act of the 17th of February 1820. This did not contemplate a continued line of improvement, but that specified works should be done at specified places. And for damages occurring in consequence of obstruc-

*Judge DANIEL is a stockholder in the James river and Kanawha company.

†**Navigation Companies—Failure to Keep Channel Open—Liability.**—For the proposition that when a navigation company, chartered to keep open a river channel, fails to perform its duty and damage results therefrom, such company is liable, the principal case is cited and approved in the following cases: Tompkins v. Kanawha Board, 19 W. Va. 260, 262; Tompkins v. Kanawha Board, 21 W. Va. 229.

The principal case is distinguished in Mendel v. City of Wheeling, 28 W. Va. 248, 250, 251, where it is held that a municipal corporation will not be held liable in damages for failure to supply water to extinguish fire, even though the city owns the waterworks and charges rent for supplying such water, on the ground that it was a governmental function.

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tions at other places the present company, the successors of the James river company, are not responsible.

4. **Same—Buoy—Statute—Case at Bar.**—The ninth section of the act of February 27th, 1829, Sup. R. C. p. 469, does not require the company to place buoys or beacons on a snag lodged temporarily in the river at a place at which, by the plan of improvement suggested by the principal engineer and adopted by the act of February 17th, 1820, no work was required to be done.*

5. **Same—Land Deposits—Statute—Case at Bar.**—The tenth section of said act of February 27th, 1829, only refers to depositions of sand, &c. in the artificial channels and sluices made in the improvement of the navigation of the river, and not to such depositions in the natural channels of the river.*

542 *In January 1820 the principal engineer of the Board of public works of Virginia made a report to the board upon a mode of improving the navigation of the James and Kanawha rivers. As to the Kanawha river commencing at the Great falls, which is ninety-four miles from its mouth, the engineer reports upon each mile separately, stating the then condition of the river, and the mode and estimated cost of improving the navigation. From this report it appears that in parts of the river the navigation was good, and nothing was necessary to be done. Thus the third mile is stated to be excellent navigation; so of the sixth, seventh and eighth miles; so of the fourteenth and fifteenth; of the seventeenth and eighteenth; and so from the twenty-eighth to the thirty-sixth, both inclusive; and this became more and more the condition of the river as it was descended; and from the eightieth to the ninety-fourth mile, both inclusive, the navigation was reported to be good, with scarce any fall in any part of this distance; and nothing was proposed to be done below the seventy-ninth mile. The fall in the river, including the Great falls, was one hundred and twenty-six feet: and the whole cost of the improvement of the river upon the plan of the report, was estimated at twenty-nine thousand six hundred and fifty dollars. The general mode of improving the river was by digging channels through the shoals, removing rocks at particular places, and making wing dams to collect the water.

By an act passed on the 17th of February 1820, the general assembly of Virginia, reciting that it would be greatly beneficial to the good people of the commonwealth to improve the navigation of the James and Jackson's rivers, to the mouth of Dunlap's creek, to make a road from thence to the Great falls of the Kanawha river; and to make the last mentioned river conveniently navigable from the Great falls thereof
543 to *the Ohio river, provided by the first section of the act for a modification of the charter of the Old James river company, so that it should be merely the agent of the state in the execution of the proposed improvement of the rivers. The second section of the act directed that the company should proceed: "First, to render the Great Kanawha from the Great falls thereof to the Ohio river navigable at all seasons of the year, for boats drawing three feet water, according to the plan of the principal engineer, in his report to the Board of public works made in January 1820." And when the work was done to a specified point on the river, the company was authorized to charge certain tolls; they being the same, whatever distance the freight was carried on the river.

By an act passed the 24th of February 1823, the old organization of the James river company was abolished, and the governor, lieutenant governor, treasurer and first and second auditors, and their successors in office, were declared to be the president and directors of the James river company, with the powers and duties of the former officers of the company.

From 1823 to 1829 the James river company proceeded to improve the navigation upon the plan pointed out in the engineer's report; and by a subsequent act a collector's district for the collection of tolls on the river was established at Charleston. There was great dissatisfaction, however, with the navigation upon the part of the persons navigating the river, and difficulty in collecting the tolls, as the boats frequently passed below the collection district without paying the tolls; and were thus beyond the reach of the collector. To provide for these difficulties and complaints, the act of February 27th, 1829, was passed. By this act the tolls were reduced; that on salt, which was the principal article carried on the river, was reduced to one-half cent a bushel: And the collection district
544 was *extended to the mouth of the Kanawha river, including all the shores, bays and inlets of said river within that distance; and various provisions were made, to enable the collector to collect the tolls. By the ninth section of the act, the James river company was required to cause buoys to be placed in the Kanawha river, so as readily and clearly to point out to navigators all the entrances and lines of sluices, the wing dams and jetties, and generally the course of the channels. And also to cause beacons to be placed on the bars, rocks and other obstructions to the navigation, not within the sluices and channels, but which from their position, or from other causes, were likely to endanger the safety of vessels or boats navigating said river; which buoys and beacons were to be so constructed as to be visible until the water of the river should rise five feet above its ordinary lowest level. By the tenth section the company was required to cause all depositions of sand, gravel, timber or other obstructions in the channels, sluices or passages of the said river, to be removed therefrom, so as to restore to the said channels, sluices and passages the width and depth of water produced therein by the works recently constructed

*See the report of the case for the statute.

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on said river; and at all times to keep the said channels, sluices and passages free from depositions or other obstructions which might impair or impede the navigation. Provided that nothing contained in that act should authorize the expenditure of more than one thousand dollars.

By an act passed the 16th of March 1832, the present James river and Kanawha company was incorporated. The provisions of this act bearing on the case are given by Judge Lee in his opinion.

In January 1850 Samuel H. Early instituted an action on the case in the Circuit court of Mason county against the James river and Kanawha company, to re-
545 cover *the value of a boat and its cargo of salt, which had been lost by striking on a snag in the Kanawha river. The amended declaration contained three counts, the substance of which is stated in the opinion of Judge Lee, so far as is necessary to show the question decided by this court. That question is, Whether the company is liable for a loss occasioned by a tree which had lodged in the river some miles below the works erected by the James river company, and where the engineer's report stated the navigation to be good, and nothing was required to be done? The defendant demurred to the declaration, and each count thereof; but the court overruled the demurrer. Upon the trial a number of exceptions were taken to rulings of the court; but they were not passed upon by this court, and therefore need not be further noticed. There was a verdict and judgment in favor of the plaintiff for five thousand four hundred and ninety-one dollars and seventy-one cents, with interest from the date of the judgment. Whereupon the James river and Kanawha company applied to this court for a supersedeas, which was awarded.

B. H. Smith and Grattan, for the appellants, and Patton and McComas, for the appellee, argued the cause on all the questions involved in it; but the opinion of the court is confined to a single question, and that is very fully considered by the judge.

LEE, J. I concur with the counsel in thinking that the most important and material question in this cause arises upon the demurrer to the declaration: and that is whether taking the declaration in its broadest sense and strongest import, and disregarding all matters of form and all technical defects and omissions which might be remedied or supplied, such a case is alleged as entitles the plaintiff in
546 the action to *recover against the defendant for the injury alleged to have been sustained.

The declaration (as amended) consists of three counts. The first alleges that the defendant being a body corporate created by act of assembly, was clothed with certain rights and privileges and charged with certain duties pertaining to the navigation of the Kanawha river among which was the duty of keeping the river within the line of their improvements free from all obstructions to the navigation; that this duty it had failed to perform; that it had suffered a large snag to be and remain in the river at a certain point specified as "in the neighborhood of Seven mile rock about seven miles above the mouth of the river in Mason county and within the line of their improvement," whereby the navigation of the river was obstructed; and that by reason thereof the plaintiff in navigating the river with a boat loaded with salt struck and stove his boat upon the snag whereby both boat and cargo were wholly lost.

The second count alleges that one of the duties of the company was to place buoys in the Kanawha river to indicate the entrance of the sluices, wing dams and jetties, and generally the courses of the channels, and also to cause beacons to be placed on the bars, rocks and other obstructions to the navigation which though not within the channels or sluices yet from their positions or other causes were likely to endanger the safety of boats and vessels navigating the river but that the company in disregard of this duty had failed to place a beacon at or upon a large snag in the river about seven miles from the mouth at or near the Seven mile rock, which snag from its position in the river did endanger the safety of vessels and boats navigating the same and that by reason of such neglect, the plaintiff had stove a boat with which he was navigating the river upon the snag and both
547 it *and a large cargo of salt with which it was freighted were wholly lost.

The third count alleges that it was the duty of the company to remove all depositions and obstructions in the channels and passages of the river which might impede the navigation, but that in disregard of this duty it had unlawfully permitted a large snag to be and remain in the river at the same point designated in the two previous counts being a portion of the line of the company's improvement; by reason of which the navigation was greatly obstructed, so that a boat with which the plaintiff was navigating the river ran against and was stove upon the snag, and both it and its cargo were wholly lost.

The act of assembly referred to in each of the counts of the declaration is the act entitled "an act incorporating the stockholders of the James river and Kanawha company," passed March 16, 1832. After a preamble reciting that the measures theretofore adopted by the general assembly for the purpose of connecting the tide water of James river with the navigable waters of the Ohio had been found inadequate to effect that object by such a line of transportation as the public interest required, the act provided for the opening of books for subscriptions to the capital stock of a new company in which the state was to take ten thousand shares; and when three-fifths of the stock should have been subscribed by persons other than the commonwealth and

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the required sum paid on each share, the company was to be incorporated by the name of "The James River and Kanawha Company," with the usual rights and incidents, and declared to be to every intent and purpose in law the successors of the then James river company. By the twentieth section, the whole interest of the commonwealth in the works and property of the James river company was transferred
548 to the *new company to be held for the use of the stockholders; and the new company was declared to be thenceforward (after the period at which the transfer was to take effect) entitled to all the tolls, rents and other emoluments, rights, privileges and immunities enjoyed by the James river company subject however to the incumbrances, limitations and restrictions in the act declared. By the twenty-second section the new company was charged with the duty of connecting the tide water of James river with the navigable water of the Ohio by one of three plans of improvement at their election, that is to say, either by a continuation of the lower James river canal to some point not lower than Lynchburg, a rail road from its western terminus to some convenient point on the Kanawha below the falls and an improvement of that river thence to the Ohio so as to make it suitable for steamboat navigation; or secondly by such a combination of the canal and a rail road from its western terminus to the Ohio; or thirdly by a continued rail road from Richmond to the Ohio.

By the twenty-sixth section it was provided that if the western termination of the rail road should be at any point on the Kanawha above its mouth, then the navigation of that river thence to the Ohio should be improved by locks and dams or otherwise so as at all seasons of the year to afford a safe and convenient navigation for steamboats of not less than one hundred tons burden.

By the twenty-seventh section the company was required to commence its works within two years after the passing of the act and to finish them within twelve years after the first general meeting of the stockholders, on pain of forfeiting their charter and property which in that event were declared to be vested in the then existing James river company for the benefit of the commonwealth. By the act of the
549 *6th March 1833, the time within which the works were to be commenced was extended to the end of two years after the passage of that act and twelve years allowed for the completion of the works after the first general meeting of the stockholders. By the act of March 1, 1847, this time was extended to the 25th of May 1859, and is therefore not yet expired.

By the forty-sixth section of the act of 1832, the company was authorized upon the completion of the improvements upon the Kanawha river as therein directed, to demand and receive on articles transported by water on their line of improvement, in lieu of the tolls then authorized by law, such as the company might assess not exceeding certain rates per ton per mile specified in the act; and until the river should be rendered navigable in the manner prescribed from the terminus of the rail road to the mouth of the river, it was authorized to demand and receive such tolls as it might assess not exceeding those then allowed by law.

Turning now to the provisions of the several acts concerning the James river company, it will be seen at once that a new and very different improvement of the Kanawha river was contemplated by the act of 1832 from that projected by the former. By the second section of the act entitled "an act to amend the act entitled 'an act for clearing and improving the navigation of James river,' and for uniting the eastern and western waters by the James and Kanawha rivers," passed February 17, 1820, the company was required to proceed to render the Kanawha from the falls to the Ohio navigable at all seasons for boats of three feet draught, according to the plan of the principal engineer in his report to the Board of public works made in January 1820. This improvement was plainly not intended by the legislature to be a complete and perfect improvement of the river, but to
550 be in its character *partial limited and sporadic. The plan of the engineer referred to proposed only to improve the navigation at different points specified along the river by opening sluices through certain shoals, deepening the channel in particular places, removing rocks at certain points and the like; and the particular places at which work is to be done are all plainly set down and an estimate made of the probable cost of the work necessary to be done at each. At all other places the natural state of the river is assumed to be sufficient to afford an ordinary navigation of three feet in depth. Under the provisions of that act, a continuous and connected improvement was not contemplated. The intended improvement was to consist of a succession of works at the different points named, the river elsewhere and between the different works of the company, being assumed to be an open navigable highway in regard to which no duty is imposed by the act upon that company. The act of February 24, 1823, to make more effectual provision for carrying the former into effect, refers to the mode of improvement as contemplated by that act, and the plan of the engineer is thus made as much a part of both acts as if embodied in them at length, nor until the act of 1832 creating the James river and Kanawha company, was any change made or any different plan adopted for the improvement of the Kanawha.

If this view of the nature of the improvement designed by the acts concerning the James river company needs any confirmation, it will be found in the amounts authorized to be borrowed for the purpose of completing the works with which it was charged, which would seem to be compara-

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tively inconsiderable and such as would only suffice for works of a partial and limited character; and especially the very moderate sum which the improvements on the Kanawha were to cost according to
551 the engineer's estimates and *which must have been in the contemplation of the legislature at the time; and in the character of the several tariffs prescribed for the tolls which were at different times authorized to be collected by the former company. All of these as well that of the act of 1820, that in favor of the salt interest of the act of February 28, 1821, that of the act of March 1, 1828, and that of the act of February 27, 1829, unlike that prescribed by the act of 1832, were specific tolls fixed at an arbitrary rate having no reference to the distance navigated; whilst the tolls authorized by the act of 1832 for the new improvement which was to afford a constant navigation for steam boats of an hundred tons burden, are all graduated by a scale of exact distance navigated, and not to exceed a given rate per ton per mile.

By the terms of the act of 1832, the tolls authorized to be taken for the new improvement of the Kanawha river, were only to be collected when the improvements on the same should have been fully completed as by that act authorized and directed; and in the absence of any express provision in the act upon the subject, it would seem clear that the company could not be held liable for an injury to an individual occasioned by any neglect or breach of duty on its part in respect to the new and more perfect improvement of the river projected by the act until it had entitled itself to demand the tolls thereby provided upon the completion of its works, or had exercised the right to demand such tolls upon the assumption that the works had been completed. The right to demand the tolls and the liability for neglect of the duty upon the performance of which the tolls were authorized, are reciprocal and correlative: the tolls are the remuneration to the company for its expenditures on its works and the consideration and basis for any legal liability that
552 may be cast upon it for any *omission or neglect of duty in respect of the new works with which it was charged.

Now there is no express provision in the act in regard to liability for neglect of duty in reference to the improved navigation of the Kanawha river. The subject of such liability is left by the act to the general principles applicable to the case and to the relations in which the company stands to the public and individuals. That the company may upon proper allegations be held liable for an injury to an individual navigating the Kanawha occasioned by neglect of its duty in reference to the new improvement with which it was charged after it shall have exercised the right to demand the tolls provided by the act (which is in effect an affirmation upon its part that it has completed its works according to the requirements of the act) I entertain no doubt. It is not a public corporation representing the public and administering public funds for the benefit of the public, but it is a joint stock company which has undertaken the construction of a work useful to the public certainly but intended for the private emolument of the stockholders in dividends of the profits. There can be no good reason why such a corporation should be exempt from liability for injuries occasioned by its neglect. It is a maxim of the common law that one specially injured by a breach of duty in another shall have his remedy by an action; and the case of a corporation should be no exception. It undertakes its corporate duties by its own consent and receives an equivalent for their performance. And it may be considered now well settled that such a corporation will be liable for damages specially occasioned to an individual by a breach or neglect of its corporate duties. Mayor of Lynn v. Turner, Cowp. R. 86; Yarborough v. Bank of England, 16 East's R. 6; Townsend v. Susquehanna Turnpike Co., 6 John. R. 90; Riddle v. Proprietors of Locks and Canals on Merrimack
553 River, *7 Mass. R. 169; Chesnut Hill T. Co. v. Rutter, 4 Serg. & Rawle 6. That the state owned a large interest in the stock of the company will not vary the case. The act of incorporation declares that it may sue and be sued, may plead and be impleaded; and a mere interest taken by the commonwealth in the stock would not be sufficient to bring an action against the company for neglect of its corporate duty within the influence of the decision in the case of Sayre v. The Northwestern Turnpike Road, 10 Leigh 454, and the class of cases upon the authority of which that case is supposed to have been decided and which are referred to by Judge Allen in delivering his opinion in the case of Dunnington v. The Northwestern Turnpike Road, 6 Gratt. 160, 171.

But in order to charge the company with the consequences of a neglect of duty in reference to the new and more perfect improvement projected by the act of 1832, a proper case showing that it was so responsible, and setting out the nature of the duty and the character of the supposed liability must be distinctly alleged. If it be not averred that the company had taken possession of the river under its charter and had completed its new works according to the requirements of the act, or had demanded and collected tolls according to the improved tariff authorized by its charter, enough at least should be averred to show that in point of time, place and circumstances the company was chargeable with the consequences of neglect of duty in reference to the new improvement. Now of the three counts in the declaration the first is the only one which can be supposed to have any reference to the new duties imposed upon the company for the purpose of affecting the more perfect improvement of the navigation of the Kanawha designed by the act of 1832. The second and third counts although they speak of duties
554 with which the company was *charged

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by the act of 1832 in reference to the navigation of the Kanawha, yet are plainly founded upon the ninth and tenth sections of the act of the 27th of February 1829 prescribing certain duties to be performed by the James river company in reference to the navigation of the Kanawha contemplated by that and previous acts concerning that company, and which duties it is assumed devolved upon the James river and Kanawha company by the provisions of the act of 1832 in anticipation of the more perfect improvement required by that act. But this first count only alleges in general terms the duty to remove obstructions within the line of its improvement and the failure to perform that duty, specifying the obstruction complained of. It does not specify whether the supposed duty related to the new improvement or to the previous navigation of the river confided to its charge. It does not aver that the company had elected the plan which makes the Kanawha river a part of its line of improvement nor that it had completed its works and taken possession of the entire water line by exercising or claiming to exercise the right to demand the improved tolls according to the act of 1832; it does not charge a failure to render the river navigable for steam boats of the specified tonnage, nor does it contain any other sufficient averments to charge the company as for a breach of corporate duty in its failure to provide the new and improved navigation required by the provisions of that act.

I think it clear that the liability sought to be asserted in this case cannot be maintained upon the ground of any neglect or breach of duty on the part of the company in failing to provide the more perfect navigation required by the twenty-second and twenty-sixth sections of the act of 1832; and if it can be successfully asserted, it must be on the basis of its succession to the rights of property, privileges and
555 *franchises of the James river company and by consequence to the burdens and duties devolved upon that company by the laws then in force.

Counsel have argued it is true that no liability to an action at the suit of a party injured even by its neglect of duty devolved upon this company in virtue of its succession to the former company's rights and duties, because it succeeded as well to the privileges and immunities enjoyed by that company as to its rights and duties, and that one of those immunities was exemption from liability to be sued by an individual for neglect of duty, because as it is said, the James river company was but the agent of the commonwealth, administering public funds and holding only in trust for the commonwealth, and thus as being in effect the commonwealth itself for the purposes of the acts, was not liable to any such action. But I cannot assent to this reasoning. Even if it be conceded that the James river company was not liable to an action upon the principle of the decision in Sayre v. The Northwestern Turnpike, it by no means follows that the present company would be entitled to the same exemption. The reason of that case cannot apply to this. The exemption from liability to be sued is a privilege peculiar and personal (so to speak) to the commonwealth and does not extend to her assignee any more than would her privilege not to be sued for land claimed by her extend to her grantee of the land. The transfer of the "privileges and immunities" of the James river company was not intended to place the James river and Kanawha company above the law and to leave individuals who might be specially injured by the neglect of its corporate duties without remedy or redress. It would be grievously unjust that such a corporation should be clothed with a privilege of this character only properly pertaining to the sovereign authority of the state, and there is no sufficient reason for sup-
556 posing *that the legislature ever intended to confer it upon this company.

I think therefore whether the James river company would have been liable or not for neglect of its duties in reference to the "convenient navigation" of the Kanawha river contemplated by the act of 1820 and the subsequent acts concerning that company (a question upon which it is unnecessary to express any opinion) that the present company having taken upon itself the performance of those duties in consideration of the privileges conferred upon it and among the rest of the right to demand the tolls allowed to the James river company until the new improvement should be completed, will be liable for any breach or neglect of duty in reference to the navigation of the Kanawha which it was bound to keep up until the new works should be completed, to any one sustaining special damage thereby in the same manner as it will be liable for nelgect of its corporate duty in reference to the more perfect improvement contemplated by the act of 1832 after it shall have placed itself in a condition to be subject to such responsibility.

But to subject it to such liability the neglect of duty must be plainly and sufficiently alleged. It must be charged that the injury complained of was occasioned by some act or omission of the company for the consequences of which it was legally responsible. The enquiry then occurs what were the duties of the James river company required to be performed with a view to render the Kanawha river "conveniently navigable" as contemplated in the preamble to the act of 1820.

Now, as has been already stated, it is clear it was not made the duty of that company to provide a perfect and complete navigation of the Kanawha throughout its entire length from the falls to the Ohio.

Before the act of 1820 was passed it
557 appears that the *Board of public works had caused a survey to be made by the principal engineer of the James and Kanawha rivers and of the intermediate country with a view to the commercial communication which it was desired to

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establish between the eastern and western waters of the state. In January 1820 a detailed report was made by the engineer of the results of his exploration and examination, accompanied by his recommendation as to the plan and mode of improvement by which the desired communication might be effected, and his estimates as to the cost of the works and the amount of expenditure necessarily involved. Amongst the rest is the plan proposed by him for the improvement of the Kanawha river. Every mile from the falls to the mouth is examined, the state of the navigation, as found, reported and the mode and method of improving it specified particularly. The different points at which work is required and the kind of work at each point, are stated with great precision and particularity. Upon the intermediate portions of the river where no work is required to be done it assumed that in its natural state the river afforded a sufficient navigation for ordinary purposes, and estimates are furnished of the cost of the works that would in the opinion of the engineer suffice to secure a navigation of three feet at all times. The total amount of these estimates is twenty-nine thousand six hundred and fifty dollars. This report was adopted by the legislature as the basis of its legislation on the subject; and by the act of 1820, the James river company was directed to make its improvement of the Kanawha upon the plan thereby proposed. It is clear therefore that a limited and partial improvement only was contemplated by the legislature and not an entire connected improvement throughout the whole course of the river below the falls. Unlike the act of 1832 which required a navigation for steam boats of a
558 *certain tonnage to be provided by locks and dams or whatever other means might be found necessary, throughout the entire length of the river below the western terminus of the rail road (if the combined method of a rail road and a river navigation should be adopted) the act of 1820 only required the improvement of particular places in the river upon a prescribed plan. Thus it only contemplated such an improvement of the navigation as the execution of the detached works prescribed by the engineer's report would afford. It was assumed that this mode of improvement would insure an ordinary navigation of three feet. But if this expectation should not be realized the company could not be held responsible. It was responsible that the required works should be constructed in conformity to the plan of the engineer, and that they should be kept in proper repair. For although there is no express provision in the act of 1832 requiring the James river and Kanawha company to keep the works in repair, I think it is their duty so to do. They are entitled to collect tolls according to the rates of former laws until the improvement required by the act of 1832 shall be completed; and it is impossible to suppose that the legislature intended they might abandon all the old works, suffer them to become entirely useless for want of repairs, and yet permit them to demand the tolls allowed for the improvement which in a proper state of repair they afforded to the navigation. I consider that to keep the works in a sufficient state of repair so as to afford such aid to the navigation as was intended by the act of 1820, is the condition of the right to demand the tolls, and that such demand amounts to an affirmation on the part of the company that they were in such a state of repair. I do not mean by this that a party could successfully resist the payment of tolls by alleging that the works were not kept in proper
559 *repair. What I mean is that the company would be liable for special injury occasioned to an individual by reason of its works not being kept in the condition required by law. Beyond this however, its liabilities cannot be carried. If the works were executed upon the prescribed plan, and kept in due repair, the company cannot be held liable for losses not attributable to any default or neglect on its part, but occasioned by defects or insufficiencies in the plan of improvement or which occurred outside of its works upon those portions of the river which were reported by the engineer as not requiring any improvement and which were therefore not placed by the act in charge of the company.

To charge the company then with the consequences of an injury sustained by a party in navigating the river it must be distinctly averred that it was occasioned by some unlawful act of the company or its omission or neglect to do or provide something which the report of the engineer or the law required. It should at least be averred that the place at which the alleged injury occurred was one of those at which the company was required to do the necessary work for the improvement of the navigation and that the injury was occasioned by its default.

Now in this respect the first count is plainly defective. The allegation is that it was the duty of the company to keep the river free from obstructions within the line of its improvement which duty it failed to perform. This is not a sufficient allegation that the obstruction occurred in any part of the company's works or at any place which the company was bound to keep clear of obstructions. The James river company had no line of improvement in the sense intended in the declaration. The phrase appears to be borrowed from the act of 1832 which treats the entire river below the western terminus of the railroad as
560 *occupied by the line of the company's improvement, and graduates the tolls according to the distance navigated; but it can have no application to the particular improvement in detached parcels and in different places required by the acts concerning the James river company. It is too vague and indefinite at best to fix the place intended within the limits of the company's works or to designate it as one

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of those at which the company was charged with the duty of improving the natural navigation of the river. But this count not only fails to show that the place in question was one of those which the company was charged with the duty of improving, but in point of fact it shows very distinctly that it was not. The place of the injury is sufficiently identified as being "in the neighborhood of the Seven mile rock about seven miles above the mouth of the river." Now if we turn to the engineer's report we find that for fifteen miles above the mouth of the river he pronounces the navigation good in the natural state of the river and requiring no improvement of any kind whatever. His plan of improvement requires nothing whatever to be done below the seventy-ninth mile (computing from the Great falls) which terminates fifteen miles above the mouth of the river; and thus the place at which the injury is alleged to have been sustained was one at which no duty devolved upon the company in reference to the navigation of the river and for the sufficiency of which it was no more responsible than any other person whatever.

I think it clear therefore that the first count wholly fails to make out any case to charge the company with the consequences of the injury and loss alleged to have been sustained.

The third count is obnoxious to very much the same objection as the first. It does not sufficiently allege that the place at which the injury of which it
561 *complains occurred was one of those at which the company was required to make any improvement by the report of the engineer or the acts which adopted it. The breach of duty of which it complains was in the failure of the company to remove depositions and obstructions in the passages, sluices and channels of the river, which it is alleged it was its duty to remove in order that such passages, sluices and channels might afford a free and unimpeded navigation. The count is evidently framed under the tenth section of the act of February 27, 1829, upon an entire misconception as I think of the true intent and meaning of that section. It proceeds upon the assumption that that section makes it the duty of the company to remove depositions and other obstructions in all the passages, sluices and channels of the river, whether artificial or natural. Such is not the meaning of the section. It did not intend to require any new improvement or any work to be done at other places than those specified in the engineer's report. It was not the purpose of the act to extend the company's charge and responsibilities over those portions of the river which had been reported as affording a sufficiently good navigation in its then condition. The true object was to cause the works that had been constructed upon the engineer's plan, to be repaired and reinstated in the condition in which it was contemplated they should be kept by the engineer's report. The passages, sluices and channels spoken of were the artificial passages, sluices and channels produced by the works of the company constructed upon the engineer's plan and which it would seem had become obstructed by depositions of sand, gravel and timber impeding the navigation through them, and not the natural channels of the river at other places. This is apparent from the terms of the section which require the obstructions to be removed so as to restore to the channels, sluices and passages
562 *referred to, the width and depth of water produced in them by the works then recently constructed upon the river; and it is confirmed by the limited amount of the expenditure authorized for the purpose which was not to exceed one thousand dollars. I think therefore this third count equally fails to make a case of such neglect of duty on the part of the company as would charge it for the consequences of the injury complained of.

The remaining count is the second which alleges the neglect of duty on the part of the company to consist in the failure to place a beacon or beacons at or upon the snag in the river which occasioned the injury. This count is evidently framed upon the ninth section of the act of February 27, 1829, but as I think, under a misconception of the true meaning of that section. The bars, rocks and other obstructions upon which it was made the duty of the James river company to place beacons were such as were of a fixed and permanent character then in the river or at the banks or in such other positions that they might endanger the navigation. They were such as formed part of the natural features of the river. It was not designed to require beacons to be placed upon a casual, temporary, movable impediment such as that specified in the declaration. A tree which having been adrift, had accidentally become stationary in the river forming whilst it remained in that position "a snag" could not have been within the meaning of the legislature. It might be in a given place on one day and in a different on the next; and with the first rise of the water if not sooner, it would probably disappear entirely. Such an obstruction as this would not admit of the erection of a beacon upon it and is to be guarded against and avoided by the care and vigilance of those engaged in the navigation. This count therefore I think without any just foundation to sustain it.

563 *The views which I have thus expressed all go to the foundation of the action, and thus it becomes unnecessary to express an opinion upon any other of the questions raised and discussed by the counsel. The only remaining question is as to the disposition of the case if the demurrers to the declaration be sustained. If the defects were merely in the statement of the case and might be remedied by a proper amendment, then according to the settled practice of this court, the cause should be sent back to the Circuit court to give the

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party the opportunity to make such amendment. But such is not their character. They are defects in the very substance of the case itself, and such as cannot be helped by any amendment consistent with the allegations and proofs in the record before us. These all show that the party has and can have no cause of action against this company for the loss which he has sustained. I think therefore no useful purpose can be answered by sending the cause back and that it should be finally determined here.

I am of opinion to reverse the judgment and render final judgment for the plaintiff in error.

The other judges concurred in the opinion of Lee, J.

Judgment reversed, the demurrer sustained, and final judgment thereon for the defendants.

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564 *Amick v. Tharp.

July Term, 1866, Lewisburg.

Obstruction of Water Channel—Liability.*—City authorities change the channel of a drain so as to throw the water flowing along it upon the lot of T lying below. He cannot obstruct the channel so as to cause the water to flow back upon and injure the lot of A lying above his.

This was an action on the case in the Circuit court of Ohio county by Jacob Amick against Daniel V. Tharp, to recover damages for an injury done to the plaintiff's lot in the city of Wheeling, by the obstruction of a drain by which the water from a spring on the plaintiff's lot, and that which flowed from the surface of the ground after a rain, had been accustomed to run off. On the trial of the cause it appeared that there had been from time immemorial a ravine through which water could flow to Wheeling creek from a certain part of the city of Wheeling. The bottom of this ravine was from thirty to forty feet wide. This ravine seems to have run through the rear of lots laid off on each side of it; and the city authorities having determined to fill it up at least for a part of its distance, had a culvert built in the bottom of the ravine for the purpose of carrying off the water, and then filled up the ravine over the culvert with earth. This culvert the defendant insisted, and introduced evidence tending to prove, was not built over the ordinary channel along which the water ran at the bottom of the ravine, but that it was built from fifteen to thirty feet from said channel, and was thus put upon the lot of the defendant. This work was done under the superintendence of the plaintiff, who was a street commissioner of the city of Wheeling.

565 *At the time the culvert was built and the ravine was filled up, neither the plaintiff or defendant owned his lot. The plaintiff afterwards purchased the lot on the north side of the alley, on which the spring before mentioned was situated; and the defendant purchased his lot on the south side of said alley, lying further down said ravine, and extending below the point to which the culvert extended: And the mouth of the culvert being on his lot and throwing the water thereon, he filled up the ravine on his own lot so as to shut up the mouth of the culvert; and thus prevented the flow of the water through the culvert, and caused it to be thrown back on and over the lot of the plaintiff where it lay stagnant.

The evidence having been introduced, the court, on the motion of the defendant, instructed the jury, "That the defendant had a right to fill up his lot, as aforesaid, notwithstanding such filling up may have stopped the flow of water through said culvert, and caused the same to overflow the property of the plaintiff; provided the jury believe that the course of said drain was changed so as to cause the water to flow over a different part of his lot from the place where it had always been accustomed to flow: And that the city had no authority so to grade an alley as to throw the water of such drain on the property of a citizen without compensation, and thereby deprive him of the right to exercise any authority as owner which he previously had over his own property." To the giving of this instruction the plaintiff excepted: And there having been a verdict and judgment for the defendant, the plaintiff applied for a supersedeas, which was allowed.

Russell, for the appellant.
Fry, for the appellee.

566 *DANIEL, J. In the view which I take of this case, it does not seem to me necessary to enquire whether the city of Wheeling, in grading the street and constructing the culvert in the proceedings mentioned, did or did not act in pursuance of a lawful authority. There is nothing in the evidence, upon which the instructions of the Circuit court are founded, to show that these works had caused any obstruction to the course of the branch in its passage over the lot of the plaintiff, or had in any manner become, or were likely to become,

*Obstruction of Water Channel—Nuisance.—In Masonic Temple v. Banks, 94 Va. 697, 27 S. E. Rep. 490, the court said: "The right of the complainant and the erection of the dam by the defendant were not disputed: and it was clearly shown that the basement and cellars of the complainant's building were flooded with water as the result of the erection of the dam. The act of the defendant in obstructing the stream and causing the water to overflow the premises of the complainant was unlawful and constituted a nuisance. 1 Wood on Nuisances, secs. 1 and 117; Burwell v. Hobson, 12 Gratt. 322; *Amick v. Tharp, 13 Gratt. 564;* and N. & W. R. R. Co. v. Carter, 91 Va. 567, 22 S. E. Rep. 517."

The last named case contains a full discussion by JUDGE RIELY of the rights and duties of landowners relating to surface water.

The principal case is referred to in Powell v. Bentley, etc., Co., 34 W. Va. 808, 12 S. E. Rep. 1086.

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the cause of injury to his property, till the flow of the water through the culvert was stopped by the defendant. And indeed the instructions of the Circuit court proceed on the hypothesis that the works of the defendant on his own lot were the proximate cause of the overflow of the plaintiff's; and declare to the jury that the defendant had a right to fill up his lot, notwithstanding such filling may have stopped the flow of water through the culvert and caused the same to overflow the property of the plaintiff; provided the jury should believe that the course of the drain was changed by the works of the city above mentioned, so as to cause the water to flow over a different part of his lot from the place where it had always been accustomed to flow; and that the city had no authority so to grade an alley as to throw the water of such a drain on the property of a citizen without compensation and thereby to deprive him of the right to exercise any authority as owner which he previously had over his own property.

In Angell on Water Courses, § 389, it is said that a party aggrieved may remove a private nuisance if it can be peaceably done. Thus, if a ditch is dug, by means of which the water is diverted from the land of a riparian proprietor, through whose land it would otherwise flow in its
567 natural course, he may go upon *the land of the wrongdoer and fill it up. So the law affords the owner of land protection against the flow of back water on his land or upon his mill; and he may lawfully enter upon the land of the person causing the injury, and remove the obstruction by which it was occasioned. And in the same treatise, § 332, it is declared that a riparian proprietor, whose lands are directly inundated by the acts of his neighbor, can not only by the common law recover adequate damages, but he is allowed by the same authority to defend his land against encroachments; and if any consequences detrimental to the wrong doer result from this course, they afford no legal ground of complaint. The same doctrine is asserted in Hilliard on Real Property, vol. 2, p. 120, where it is said that if the land of one person is overflowed through the act of another, the former may erect any obstruction which may be necessary to keep off the water, and will not be answerable for damages thereby occasioned to the wrongdoer. But the important qualification is added, that "he cannot lawfully cause damage to third persons by such erection."

In looking to the cases cited in the foregoing passages in support of the proposition therein asserted, it will be seen, I think, that, whilst the right of a party aggrieved to protect his property from the injurious consequences of works unlawfully erected, by the abatement of such works, is well established, the circumstances which justify a resort to counter works which must result in damage to the property of the wrongdoer, are by no means very clearly defined. Be this, however, as it may, I have been unable to find any precedent which would justify a party, in a case like this, where the evidence affords the presumption that there was ample time to resort to other means of protection, in placing such obstructions to the flow of the water as would inevitably cause the overflow
568 of *the lands of a third person. And justice and fair dealing would seem to require of a person who, under such circumstances chooses, instead of resorting to the legal tribunal, to take his redress or protection into his own hands, the caution, that his proceedings do not involve the ruin or injury of third parties. It seems to me that the cases which deny to the original wrongdoer the right to recover for damages done to his property by countervailing works, have gone full far enough in vindicating the right of self-protection; as under their sanction slight wrongs may, in some cases, be redressed by very serious injuries. A just deference to the rights of unoffending third parties and a proper regard for the peace and order of society, forbid a further extension of the doctrine. Under the instructions of the Circuit court, a person whose property is injured in any degree, however slight, by the unauthorized diversion of a stream from its accustomed flow, may justify the erection of any work necessary to the complete protection and full enjoyment of his property, though the necessary consequence is not merely to endanger but to visit with certain destruction the property of a neighbor, however valuable; and he may thus, in order to prevent or repair a loss, or obviate even an inconvenience, however trifling, carry ruin to the fortunes of innocent parties, and then refer them for redress to the remote, and perhaps insolvent wrongdoer.

In the absence of authority plainly so declaring the law, I cannot give my assent to a doctrine which may work out such unjust results.

On the contrary, justice and convenience seem to me to require, in such cases, that an aggrieved party should not be compelled, in seeking redress, to look beyond the person whose acts are the proximate cause of the injury done to his property. When he shows that but for the act complained
569 of he would have *sustained no injury, he establishes a right to have redress at the hands of the person who did it. No sufficient answer to the complaint is made by the plea that such act was done by the defendant to repair an injury to his own property, proceeding from the illegal acts of a third person.

The cases in which parties have been held excused for acts done injurious to the property of others, under circumstances of imminent danger expected from fire or flood, furnish, I think, no rule or argument in support of the instructions of the Circuit court. In such cases of accidental and extraordinary casualty, where the law is powerless to afford either protection or redress, each person exposed to the danger is

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left to adopt the best means within his power to avert the threatened mischief; and if consequences prejudicial to the property of others ensue, the defense and excuse are found in the pressing emergency of the occasion. The difference between such cases and those where the parties have it in their power to appeal to the preventive and remedial justice of the court; and have also time and opportunity afforded to select the means of preventing or repairing the mischief without damage to others, is so obvious as to need no comment. And it is also to be observed, that even in cases of the threatened outburst of a flood or spread of a conflagration, the right of a person to protect his property cannot be exercised in total disregard of the rights of others. He must still, in the selection of the means of protection within his power, use care to prevent unnecessary injury to the property of others. Noyes v. Shepherd, 30 Maine R. 173, 179; Beach v. Trudgain, 2 Gratt. 219.

In the first mentioned case, where the defendant was sued for damages resulting from the use of means employed to prevent an expected inundation from the waters of a pond which threatened to do great
570 injury *to the property of the defendant and others, he was held to show that he had observed ordinary care in his proceedings: And in the case of Beach v. Trudgain, in which parties, pulling down a house in a town to arrest the spread of a fire, were sued by the owner, this court held that they were responsible for the damages thereby sustained by the owner, if the house might have been prevented taking fire by the use of the means within the power of the parties pulling it down.

If any analogy favorable to the defense could be drawn from the indulgence extended to parties acting under the pressure of imminent danger, (and I have already expressed the opinion that the analogy does not hold,) I should still be of the opinion that the rule declared by the Circuit court was too broad, inasmuch as it asserts the unqualified right of the defendant to use his property, under the state of things disclosed in the proofs, to the prejudice of his neighbor, without any reference to the consideration whether he might not have prevented damage as well to his own property as to that of the plaintiff, by the use of other means.

Before a party, in a case of the kind under consideration, should be allowed to repair an injury or indemnify himself against a loss by the employment of means, of which mischief to the property of third persons is the natural and inevitable result, he should be at least required to show that he could not have prevented the damage by the use of means involving no greater trouble or expense than that encountered in the use of those selected. And in this case, whilst the ordinary remedies recognized by the law were open to the defendant, (which differs his case from those just commented on,) there is an absence of any proof to show that he might not have restored the stream to its original channel, or, whilst filling
571 up his *lot, might not have provided a passage for the water, so as to prevent the overflow of the plaintiff's land, without any further outlay of money or use of labor than that employed, and without being curtailed in any manner of an equally full and convenient enjoyment of his own lot.

The evidence, that the plaintiff was the street commissioner of the city of Wheeling, superintending and directing the work at the time of the grading of the alley and the construction of the culvert, seems to me to make no difference in the case. At that time, (the bill of exceptions states,) neither the defendant nor the plaintiff had purchased their lots. No portion of the culvert was upon the plaintiff's lot; and his entire connection with it ceased before the defendant became the owner of his lot. The plaintiff, after the culvert was completed, had no control or power over it. Its continuance was not in virtue of any permission, license or grant from him. It was wholly the property of the city, by whose order it was built, before the defendant or the plaintiff had acquired any rights of property to be affected by it; and its continuance thereafter, by which alone the defendant could have been injured, was by the authority of the city alone. This evidence of the plaintiff's connection with the works of the city does not seem to have formed in any degree the basis of the instructions given to the jury; and I am of opinion that it does not relieve them of the objections which I have pointed out.

I am of opinion to reverse, and remand the cause for a new trial.

The other judges concurred.

The judgment was as follows:

It seems to the court, that whether
572 the city of *Wheeling had or had not lawful authority to grade the alley or construct the sewer in the bill of exceptions mentioned, so as to cause the water which had hitherto flowed over a part of the lot of the defendant to flow over another part of said lot, to the injury of the defendant, the defendant had no legal right to obstruct the flow of water through said sewer so as thereby to cause the water to be dammed and thrown back on the property of the plaintiff, to his injury: And consequently, that the Circuit court erred in giving the instructions in said bill of exceptions mentioned. It is therefore considered, &c., that the judgment be reversed, &c., with costs, verdict set aside, and cause remanded for new trial; on which the Circuit court will not repeat such instructions, if asked.

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573 ***White v. Campbell.**

July Term, 1856, Lewisburg.

Seduction—Action by Father—May Prove Promise of Marriage.*—In an action for the seduction of the

***Seduction—Action for by Father—Damages.**—The principal case lays down the rule that in an action

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plaintiff's daughter, to enhance the damages, he may prove that the defendant promised to marry her, and by means of said promise had succeeded in debauching her.

This was an action instituted by George W. Campbell against John White, for the seduction of the daughter of the plaintiff. On the trial, after the plaintiff had introduced evidence tending to prove that the defendant had debauched his daughter, to enhance the damages, he proposed to prove that defendant had promised said daughter to marry her, and by means of said promise had succeeded in debauching her. The defendant objected to the admission of this evidence; but the court overruled the objection; and he excepted. There was a verdict and judgment in favor of the plaintiff for eight hundred dollars. Whereupon the defendant applied to this court for a supersedeas, which was allowed.

Robert Johnston, for the appellant.
Fry, for the appellee.

MONCURE, J., delivered the opinion of the court:

The action brought by a father for the seduction of his daughter is founded on the supposed relation of master and servant; and at common law, it was necessary to aver and prove loss of service in order to maintain the action. It was long and well settled, however, that loss of actual service had little to do with the action; and that, in substance, it was an action for damages, not only for the loss of service,
574 *but also for all that the plaintiff could feel from the nature of the injury. The jury, in assessing the damages, might consider his loss of the comfort, as well as the service, of the daughter, in whose virtue he could feel no consolation, and his anxiety as the parent of other children whose morals might be corrupted by her example. Greenl. Ev. § 579. The Code, ch. 148, § 1, p. 589, has provided, that "an action for seduction may be maintained without any allegation or proof of the loss of the service of the female by reason of the defendant's wrongful act." The action is now, in form as well as substance, an action to recover damages for the wound inflicted by the seducer on the peace and happiness of the injured father. These damages are exemplary; and whatever evidence reasonably tends to aggravate the offender's wrong, and show the extent of the father's loss, is legal and proper. Evidence of the means by which the seduction was accomplished is of that character. And upon principle, therefore, it would seem to be very clear, that if the wicked act was accomplished by means of a prior promise of marriage, evidence of such promise would be admissible in aggravation of the damages. That such promise is an independent cause of action by the daughter, is no good reason why it should not be proved in aggravation of damages in the father's action for seduction. His action is ex delicto; her's ex contractu. The evidence is merely collateral to his action, while it is the very foundation of her's. Each has a perfect right to recover damages to the full extent of the wrong done to each; and in order to do so, may prove whatever may reasonably serve to show the measure of damages sustained by each.

Thus stands the case on principle. How does it stand on authority? We have no decision of our own on the subject, and are therefore let free to follow
575 *principle, aided by whatever light we may be able to derive from decisions elsewhere. In Dodd v. Norris, 3 Camp. R. 519, decided at nisi prius in 1814, Lord Ellenborough held that the daughter, examined as a witness in the action, might be asked whether the defendant had not paid his addresses to her in an honorable way, but not whether he had promised to marry her. To admit evidence of a direct promise of marriage would be, he said, to allow the parent to recover damages for a breach of that promise upon the testimony of the daughter. We cannot see the force of the distinction thus drawn between evidence of a direct promise of marriage, and evidence tending to prove such a promise. If one is admissible, the other should be. This case has never, so far as we have seen, been directly recognized as a binding authority in England. In Elliott v. Nicklin, 5 Price's R. 641, decided by the Court of exchequer in 1818, Dodd v. Norris was referred to and explained by Garrow, baron, who had been counsel in the case. There the evidence was not of a promise of marriage, but that the defendant was addressing the plaintiff's daughter; and the court unanimously admitted the evidence. They carefully avoided deciding the question whether evidence of a promise of marriage would have been admissible, as the case did not require it. There has been no other English case on the subject since Dodd v. Norris, that we have seen. There is a prior case, Tullidge v. Wade, 3 Wils. R. 18, decided in the Common pleas in 1769. But in that case the evidence was admitted, and with approbation, by Lord C. J. Wilmot; though Bathurst, one of the justices, said such evidence was improper. In New York, it seems, the doctrine of Dodd v. Norris has been followed. 1 John. R. 296; 2 Wend. R. 459; 7 Id. 193. Though it has been much modified in a more recent case. 5 Denio's R. 367.

Few other cases on the subject are to
576 be *found in the American books.

Some of the best elementary writers seem to disapprove the doctrine of Dodd v.

by the father for the seduction of his daughter he may *prove*, to enhance the damages, that the defendant promised to marry his daughter and by such means succeeded in debauching her. This is approved in Hudkins v. Haskins, 22 W. Va. 660, where it is said that if a promise of marriage, etc., is alleged in the declaration it will be treated as mere surplusage, since that fact can be proved at the trial as well without as with such allegation.

See also, on the subject of seduction, *foot-note* to Clem v. Holmes, 33 Gratt. 722.

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Norris, and think the evidence is or ought to be admissible. See 3 Stephens' N. P. 2356; 3 Starkie's Ev. 1310, title Seduction; Greenl. Ev. § 579, same title.

We think the evidence is admissible, for the purpose for which it was offered in this case, and that the judgment should be affirmed.

Judgment affirmed.

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577 *Gilkeson v. The Frederick Justices.

October Term 1856, Richmond.

1. **Taxation—Constitution—Construction.***—The constitution of Virginia, article 4, § 22, 23, 25, in relation to taxation and finance, relate to taxation by the general assembly for purposes of state revenue, and do not apply to taxes, levies, &c. by counties, corporations, &c. for the local purposes of such bodies.†

2. **Same—Same—Levy by Municipal Corporations.**‡—The general assembly has full power to authorize counties, municipal corporations and the like, to levy taxes within their bounds for their peculiar purposes. And the mode, subjects, and extent of such taxation is not limited or regulated by the provisions of the constitution in relation to taxation and finance.

3. **Statute—Assessment on Sheriff—Constitutional.**—The act of June 7, 1852, Sess. Acts of 1852, p. 12, authorizing assessments in certain cases on the office of sheriffs and sergeants, is not in violation of the constitution.§

4. **Same—Same—Case at Bar.**—An assessment of four hundred dollars upon the sheriff of Frederick county, laid on the 4th of October and to be paid on the 1st of February following, is not in violation of the act of 1852.§

5. **Same—Same—Time of Payment.**—If the time of payment fixed by the court was inconsistent with the act, that would not render the assessment void; but it would be corrected as to the time of payment.

At a court held for the county of Frederick, all the justices of the county having been summoned for the purpose, it was ordered that the sum of four hundred dollars be taxed on the sheriff of the county, to
578 be *paid on the first of the next February. At the April term of the court for 1853, Thomas A. Tidball was appointed a commissioner to settle the accounts of William D. Gilkeson, for all charges of the county against him as sheriff of the county. And Tidball having reported to the court that the sheriff refused to pay the tax assessed upon his office, the court at its May term directed the attorney for the commonwealth to take the necessary steps to enforce the payment thereof. In pursuance of this direction, the attorney gave to Gilkeson a written notice that at the June term of the court a motion would be made in the name of the commonwealth for the use of the county of Frederick, for a judgment against him for the said sum of four hundred dollars.

At the June term the motion came on to be heard, when the court awarded a judgment against Gilkeson, who was still the sheriff, for the sum of four hundred dollars, with interest from the date of the judgment. Gilkeson thereupon took the case to the Circuit court by supersedeas: But when the cause came on to be heard in that court, the judgment of the County court was affirmed. He then applied to this court for a supersedeas, which was allowed.

Philip Williams, for the appellant.
Byrd and Holliday, for the appellee.

SAMUELS, J. The plaintiff seeks to reverse the judgment in this case for two reasons:

1st. Because the statute of June 7, 1852, Sess. Acts, p. 12, § 1, is not such as the general assembly might enact under the constitution of Virginia.

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*Taxation—Constitution—Construction.—In Douglass v. The Town of Harrisville, 9 W. Va. 165, it is said: "The first section of article eight of the Constitution of 1868, and the first section of article ten of the Constitution of 1872, in so far as they provide that taxation shall be 'equal and uniform' throughout the state, and that all property, both real and personal, shall be taxed in proportion to its value, do not apply to counties, cities, towns, and villages. See *Gilkeson v. The Frederick Justices, 13 Gratt. 577.*"

The principal case is also cited in Powell v. Parkersburg, 28 W. Va. 706; Norfolk City v. Ellis, 26 Gratt. 226, and *note*; Eyre v. Jacob, 14 Gratt. 434. The principal case is referred to in Norfolk v. Chamberlain, 89 Va. 202, 15 S. E. Rep. 524. See, in accord, Slaughter v. Com., 13 Gratt. 767.

†For these provisions of the constitution, see the opinion of JUDGE SAMUELS.

‡Same—Same—Levy by Municipal Corporations and Counties.—For the proposition that municipal corporations and counties may levy taxes within their bounds for their peculiar purposes, the principal case is cited and followed in Ould v. City of Richmond, 23 Gratt. 473, and *note*; Norfolk City v. Ellis, 26 Gratt. 234, and *note*; Neale v. County Court, 43 W. Va. 95, 96, 27 S. E. Rep. 373; Powell v. Parkersburg, 28 W. Va. 706.

The principal case is cited in Virginia, etc., R. R. Co. v. Washington County, 30 Gratt. 484, and *note*, where it is said: "The constitution of the state does not authorize the county authorities to assess property for taxation and levy taxes upon it independent of the action of the legislature."

See, in accord, Bull v. Read, 13 Gratt. 78, and *note*; List v. Wheeling, 7 W. Va. 501; Probasco v. Town of Moundsville, 11 W. Va. 501; Langhorne v. Robinson, 20 Gratt. 661, and *note*. See generally, monographic *note* on "Municipal Corporations" appended to Danville v. Pace, 25 Gratt. 1.

§This act authorizes the county courts and the city authorities to assess a tax on the office of sheriff and sergeant, for the purposes of the county or city. And it provides that said levies shall be payable semiannually, if so required by the court or other body ordering the same. But they shall not for any one year, exceed eleven hundred dollars on the office of sheriff in certain specified counties, of which Frederick county is one: And other rates are fixed for other counties and cities.

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2d. Because, if the statute be constitutional, yet the action of the County court under it is not warranted by the law.

The power of the courts to decide
579 against the validity *of a statute which is in conflict with the constitution, is beyond question. The duty of the court so to decide, when a proper case is presented, is manifestly plain.

We are referred to the constitution, article 4, title "taxation and finance," § 22, 25, with which, it is alleged, the statute under consideration is in conflict. It is said to be in violation of these provisions of the constitution in this, that it allows a rate of taxation which is not "equal and uniform throughout the commonwealth;" nor equal and uniform within any one county: That a subject, the office of sheriff, is taxed, the incumbent of which, being assessed with a tax on the fees or income of his office, is exempt from any further tax, a license tax, on the office itself: That the general assembly itself has no power to impose a tax such as this, and of consequence, could not delegate to the county courts the power to impose it.

It is necessary, to avoid confusion and its consequent error, to keep separate things which are essentially different; to distinguish between the revenue of the commonwealth at large, its modes of assessment and collection, and the revenues of the counties, (levies, poor rates and other charges,) and their modes of assessment and collection. As to the commonwealth's revenue; the constitution, article 4, § 22, prescribes that "taxation shall be equal and uniform throughout the commonwealth, and all property other than slaves shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law." This section manifestly relates to the commonwealth's revenue, and to nothing else: Its place in the constitution and its language require that it should be so construed. That it does not apply to county charges is apparent from the fact that they are nowhere mentioned in the constitution. It is not proper to
seize upon general words used with
580 reference to *one subject, and apply them to a subject not in the mind of the law giver when the words were used. Pendleton, judge, Case of the County levy, 5 Call 141. We could not give the construction contended for by applying this section to county charges, without imputing to the framers of the constitution either gross ignorance of the condition of the several counties of the state, or a willful disregard of justice. The framers of the constitution did know that there was a great difference in the amount of county charges in the several counties; they did know that, at different times in the same county, there was great inequality in the amount of those charges; yet to have prescribed a rate "equal and uniform" for all counties, without regard to their wants, would have been highly unjust. Although the people of Virginia may be rightfully required to contribute to the expenses of their government in all its departments, yet if in some local departments their expenses be small, they cannot be required to pay large sums for the mere purpose of preserving an "equal and uniform" rate of taxation. Thus I am of opinion that the rate of taxation prescribed by the twenty-second section is not necessarily to govern in levying to defray county charges.

For the same and other reasons, not yet expressed, I am of opinion that county levies and other charges are not affected by so much of the twenty-second section as requires taxes to be laid on all property, other than slaves, in proportion to its value; nor by no much of the twenty-third section as prescribes a tax on each slave over twelve years of age, equal to the tax on land, of the value of three hundred dollars. As already said, this part of the constitution, from its face and context, is intended to apply to the commonwealth at large, and not to counties or subdivisions. The contemporary history of the adoption of the constitution leaves no doubt on the subject.
581 These sections were *inserted to reconcile an alleged antagonism of interests between the western and eastern portions of the state. The western portion of the state had a large relative portion of the white population, and but a small relative portion of the slaves, within the commonwealth; the people of the western portion desired to make internal improvements which would require the expenditure of large revenues; and the people of the eastern portion of the state, who held much the largest proportion of the slaves, were apprehensive that the large revenues required might be levied by making a discrimination against property in slaves; and to obviate this apprehension, the rule of equality and uniformity was adopted and made part of the construction. If we look to these sections standing alone, or in connection with the reasons for their adoption, it must be seen that they have no application whatever to county charges of any kind.

It is said, moreover, that the statute is in violation of the twenty-fifth section of the fourth article of the constitution, which provides that "the general assembly may levy a tax on incomes, salaries and licenses; but no tax shall be levied on property from which any income so taxed is derived, or on the capital invested in the trade or business in respect to which the license so taxed is issued." The same general answer may be given to this objection, that was given to that in regard to the rates and subjects of taxation; that is, that the section applies only to the commonwealth's revenue and not to county levies. If it were otherwise, however, the plaintiff would find great difficulty in bringing himself within the terms of this section. It was intended thereby to protect any party from double taxation—once on his income, and again on the property yielding the income. Property, and income from the same property, cannot both be

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taxed at the same time; but unless we
582 hold the office of *sheriff to be property, the case does not come within the twenty-fifth section. This office, or an office of any kind, is not embraced by any just definition of the word property.

It is alleged, moreover, that the general assembly itself has no power to impose a tax such as this, and that therefore it could not delegate it or confer it on the county courts.

In ascertaining the extent of the legislative authority vested in the general assembly, it must be borne in mind that the federal constitution, within its limited scope, the bill of rights and the constitution of Virginia, prescribe its only limits. No suggestion has been made that either the federal constitution or the bill of rights is invaded by the statute under consideration; they may therefore be dismissed from further investigation. The constitution of Virginia contains certain mandates and certain restrictions applicable to the departments of state government, legislative, executive and judiciary, respectively. It is a modification and arrangement of the sovereign power retained by the state, and a distribution thereof amongst the appropriate departments. The legislative department (now under consideration) is clothed with the power of making any law within the limits above stated. The constitution of Virginia requires certain laws to be enacted; it forbids the enactment of certain other laws. It is said that the statute before us is of the forbidden class; that levies or county charges come within the twenty-second and twenty-fifth sections of the fourth article of the constitution; that the rates and subjects by and from which state revenue is to be levied, are to be observed in county levies. The answer to this objection has been already given; it is that these sections were intended to apply only to the state revenue.

The constitution, article 6, § 28,
583 directs that "the *justices shall receive for their services in court a per diem compensation, to be ascertained by law, and paid out of the county treasury." This is the only section having the slightest reference to the expenses within the counties. The organization of the county treasury and its mode of supply are in nowise provided for by the constitution. They were left to pass (with innumerable other subjects) under the control of the legislature. There they had been from a time anterior to the adoption of the first constitution, during all the time of the first and second constitutions, and there the third and last constitution still leaves them.

The power of the general assembly to confer authority on county courts, city councils, coporations and other organized bodies to impose local taxes for local purposes, had been exercised from the adoption of the first constitution down to the formation of the last. The rates and subjects of taxation were different in many instances, if not in all; the powers conferred were not always the same, but were varied to meet the exigencies of particular circumstances, and frequently were left to the discretion of the body on which they were conferred. All this was known to the convention; yet no explicit provision was inserted in the constitution changing this power of the general assembly. Surely if a change in the whole scheme of local taxation was intended, the convention would have expressed the intention in plain terms, and not have left us to arrive at it by a forced construction.

The objection to this power of the general assembly has been passed on several times by this court; and the power under the first and second constitutions has been affirmed. In 5 Call 139, we find an opinion of Judge Pendleton in the Case of the County levy, said to have been pronounced in the Court of appeals. No statement of the case is given, but it may be gathered
from the opinion that the validity
584 of a county levy *assessed by the County court of Fairfax, was drawn in question, because the power of levying taxes could be exercised only by representatives chosen by the people, and could not be delegated to the County court; yet Judge Pendleton was of opinion the levy was well laid. From the fact that the county courts have continued from that time to this to exercise the power of laying levies, we may infer that the question was regarded as settled either by this case or otherwise.

In Goddin v. Crump, 8 Leigh 120, this court decided that the general assembly acted within its constitutional power, in conferring on the common council of the city of Richmond authority to levy taxes within the city to pay a subscription to the James river and Kanawha company.

In Harrison justices v. Holland, 3 Gratt. 247, it was decided that an act of assembly requiring a county court to lay a levy upon the tithables of the county, for the purpose of improving the navigation of a stream lying within it, though passed without the assent of the people, was constitutional.

In the case of Bull, &c., v. Accomack school commissioners, recently decided by this court, supra 78, it was held that a statute was constitutional, which conferred on certain commissioners for certain districts in Accomack the power of taxation for the purpose of establishing free schools.

I am of opinion that the power of local taxation for local purposes is in nowise varied or changed by the constitution of 1851; but that it remains the same as under the first and second constitutions: and that the objection on the first ground is not well taken.

It remains to consider the second error alleged as cause for reversing the judgment.

The plaintiff being the incumbent in office at the time the levy was assessed,
585 and continually thereafter *until the time when the levy become payable, and even up to the time the judgment was rendered, it could make no difference to him whether the assessment was on him as

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sheriff, or on the office of sheriff; the result would be the same.

In ascertaining the comparative weight of the burden imposed by the court with that which the law authorized, two elements must be taken into the estimate, to wit, the amount of money, and the time of payment. It is perfectly obvious that a smaller sum to be paid promptly may be a more onerous charge, than a larger sum the payment of which is postponed to a remote time. If we may adopt this mode of making the estimate, it will be found that four hundred dollars assessed at October court, payable the first of February then next, is far less burdensome than eleven hundred dollars, payable at the end of the six months prescribed by the general law of county levies, Code of Virginia, ch. 54, § 15, 16, or payable semiannually, as might have been directed under the statute of June 7, 1852.

If, however, it be conceded that the time fixed by the court for payment was less than that allowed by law, still the levy would not be thereby vitiated; but so much of it as was rightly done would be sustained, and so much of it as was wrongly done would be corrected, and made to conform to the general law contained in § 15, 16, above cited. In this view of the case the levy assessed at the October term 1852, on the fourth day of the month, was payable the 4th of April 1853. Nothing whatever was done to enforce payment until the 4th of April 1853, when an order was made requiring the sheriff to settle his account of the levies. At the May term it was ascertained that the sheriff refused to account for the levy assessed at the October term; and thereupon the court ordered that the commonwealth's attorney should take
586 such *steps as might be necessary to enforce payment thereof. At the June term the judgment now before us was rendered on motion made after due notice under § 16, chap. 54, of the Code. Thus it appears that if the court erred in fixing the time of payment at the first of February 1853, yet it was corrected by the law and proceedings had under it, and that no injury has been done to the plaintiff.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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587 *Carrington v. Goddin.

January Term, 1857, Richmond.

1. **Ejectment—What Interest Will Support.***—A party having an interest in or claim to land held adversely by another, may under the Code, ch. 116, § 5, p. 500, sell and convey the same; and his grantee may maintain ejectment for it.†

2. **Wills—Construction of—Case at Bar.**—Testator empowers his executors to set apart so much of his estate, not specifically bequeathed, as they may think sufficient to produce a clear annual income, by rent or interest, of two thousand dollars; which is directed to be distributed among certain legatees for life. And after some other unimportant provisions, he gives the balance of his estate among his nephews and nieces. And then he says, "And for the purpose of making such division with greater facility, I hereby give to my executors, or such of them as may choose to act, full power to sell or otherwise dispose of the whole or any part of said property, in such time and manner and on such credit as to them may seem most beneficial for the whole."

1. QUÆRE: If the legal title to the real estate vested in the executor.

2. **Same—Executors Given Power to Sell Real Estate—Purchaser Need Not Show Necessity for Sale.**—The executors had full power and authority to sell all or any part of the real estate; and a *bona fide* purchaser from them is not bound to show that such sale was necessary for the purpose of making division among the devisees.

3. **Same—Same—Liability of Purchaser—Case at Bar.**—A *bona fide* purchaser will not be affected by the failure of the executors to account for the purchase money; and therefore evidence to prove such failure is properly excluded in an action at law between a claimant under such purchaser and the devisees.

4. **Same—Same—Deed.**—The executors by a deed reciting that it is made in execution of the powers vested in them, in consideration of an exchange of land made with A (one of the executors) and for the further consideration of one dollar paid by the purchaser, convey a lot belonging to
588 their testator's estate. *Such a deed on its face is not invalid; but passes the title to the purchaser.

5. **Ejectment—Evidence to Vary Deed—Inadmissible.**—In an action of ejectment by a party claiming under the purchaser against the devisees evidence to prove that the consideration of the deed was different from that expressed in it, is inadmissible.

3. **Deeds of Trust—Case at Bar.**—A deed of trust conveys two small lots in Adams' Valley, with other property; and upon its face shows that it was intended to convey all the property of the grantor. In fact three lots had been conveyed to the grantor, though two of them fronted on the same street and adjoined each other, and both together fronted but sixty-two feet on the street, and they were uninclosed.

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*Ejectment—Action of—What Title Will Support.—In the principal case it is held that, a party having an interest in or claim to land held adversely by another, may, under the Code of 1849, ch. 116, sec. 5, sell and convey the same, and his grantee may maintain ejectment (or unlawful detainer) for it.

For the above, the principal case is cited and followed in Dobson v. Culpepper, 23 Gratt. 363.

In Mustard v. Wohlford, 15 Gratt. 339, the principal case is quoted from, but the case at bar is distinguished.

See monographic *note* on "Ejectment"; also, monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

†Code, ch. 116, § 5, p. 500. "Any interest in or claim to real estate may be disposed of by deed or will. Any estate may be made to commence *in futuro* by deed, in like manner as by will. And any estate which would be good as an executory devise or bequest, shall be good if created by deed."

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1. **Same—Proof of Intention of Grantor by His Own Testimony.**—It is not competent to prove by the grantor that he intended to include both parcels of the lots in his deed, though there is no objection to his competency as a witness.
2. **Same—Construction of.***—If it is doubtful on the face of the deed whether one or both of the parcels were intended to be conveyed, the deed will be construed most strongly against the grantor, and so as to give it effect, rather than that it should be void for uncertainty.
3. **Same—Proof of Intention by Grantor as Witness—Identity of Lots.**—Though it is not competent to prove by the grantor his intention to convey by his deed the land in controversy, yet he may identify the lot, and may show that it answers to the description embraced in the deed.
4. **Ejectment—Possession of Part—Verdict for All.**†—In an action of ejectment, the tenant, without disclaiming title to any part of the land in the declaration mentioned, proves upon the trial that he is only in possession and claiming title to a part of it. A verdict and judgment in favor of the plaintiff for all claimed in the declaration, is not erroneous; or if it is, it is not an error by which the tenant is injured, or of which he can complain in an appellate court.
5. **Appellate Practice—New Trial—Verdict Contrary to Evidence.**‡—On a bill of exceptions to the refusal of the court to grant a new trial on the ground that the verdict is contrary to the evidence, the evidence, and not the facts proved, is stated. The court will reject all the parol evidence of the exceptor, and give full force and credit to all the evidence of his adversary; and will not reverse the judgment unless it then appears to be wrong.

This was an action of ejectment in the Circuit court of the city of Richmond, brought by Isaac A. Goddin against George M. Carrington, to recover possession of a lot in Adams' Valley, fronting on Fifteenth street. The lot belonged to Richard
589 Adams *in his lifetime. He died in 1816, possessed of a very large real estate in the city of Richmond, having first made his will, which was duly admitted to record in the Hustings court of the city. By the first clause of his will he says, "It is my will and desire that my executors hereinafter to be appointed, will set apart so much of my property, not herein specifically bequeathed, as they may think sufficient to produce a clear annual income, by rent of interest, of two thousand dollars. Which amount I wish them to pay, and I hereby give in manner following, viz: The sum of five hundred dollars annually to my sisters Tabitha, Elizabeth Griffin and Anna Carrington, and to my niece Sally Bland Adams, to be paid to each of them for and during her life."

The testator then gives the burying ground including an acre, to his family, and one thousand dollars to his nephew Richard Lee Smith, which he says is all that this nephew is to receive from his estate; and then comes the residuary clause, as follows: "The balance of my property of every sort, kind or denomination, whether real or personal, in possession, expectancy or reversion, I give and bequeath to all my nieces and nephews, (except the two already herein provided for,) to them and their heirs forever. And for the purpose of making such division with greater facility, I hereby give to my executors, or such of them as may choose to act, full power to sell or otherwise dispose of the whole or any part of said property, in such time and manner and on such credit as to them may seem most beneficial for the whole; provided that the old mansion-house, the two lots immediately attached thereto, and the four lots now used and enclosed as my garden, be assigned, at a valuation of twenty thousand dollars, to Richard Adams, the son of my brother Samuel G. Adams; and in case of his death under the age of twenty-one years,
590 then *the property last mentioned shall be signed as aforesaid to Richard Henry Adams, the son of my brother John Adams, as so much of the legacy of the whole estate.

The testator appointed his brothers John and Samuel G. Adams and his brother in law William Marshall, his executors, and directed that they should not be required to give security, except that so many of them as qualified should become jointly bound. Marshall died in the lifetime of the testator; the other two qualified and executed bonds in the penalty of one million of dollars.

By deed bearing date the 20th day of January 1819, John and Samuel G. Adams, as executors of Richard Adams, by virtue of the power vested in them, "and for and in consideration of an exchange of land made with John Adams, and for the further consideration of one dollar paid by Thomas H. Drew," conveyed to said Drew a lot in the city of Richmond, fronting on Fifteenth street, about thirty-three feet six inches, and running back of irregular width one hundred feet. This was the lot in controversy. And on the same day John Adams

*Deeds of Trust—Construction of.—That a deed will be construed most strongly against the grantor, and so as to give it effect, rather that it should be void for uncertainty, see the principal case cited and followed in Bank, etc., v. Green, 45 W. Va. 174, 31 S. E. Rep. 263.

†Ejectment—Possession of Part—Verdict for All.—The 7th headnote of Beckwith v. Thompson, 18 W. Va. 104, reads as follows: "In an action of ejectment against a single defendant, who pleads not guilty without disclaiming title to any part of the land named in the declaration, the defendant proves at the trial that he is in possession of and claims title to only a definite part of the land, a verdict and judgment for the plaintiff for all the land claimed in the declaration is not erroneous; or if erroneous, it is not an error, by which the defendant is injured, or of which he can complain in the appellate court. See *Carrington v. Goddin, 13 Gratt. 587.*" The principal case is also cited and followed in Messick v. Thomas, 84 Va. 894, 6 S. E. Rep. 482.

See monographic *note* on "Ejectment."

‡Appellate Practice—Verdict Contrary to Weight of Evidence.—See *foot-note* to Dean v. Com., 32 Gratt. 912; also, monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

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and wife conveyed to Drew another lot adjoining the first, and fronting about twenty-nine feet on the same street. It appears also that about the same time John Adams and wife conveyed to Drew another lot fronting forty-four feet on Fifteenth street, but not adjoining the other lots.

By deed bearing date the 6th day of August 1819, the firm of Drew, Blair & Carroll, of which Thomas H. Drew was a member, conveyed to Andrew Stevenson and two others, all their property, social and individual, including their household furniture, in trust to secure certain debts due to the Farmers Bank and the Bank of the United States. In this deed is conveyed two small lots in Adams' Valley, the property of Thomas H. Drew. In 1853 Stevenson
591 the surviving *trustee sold, and by deed bearing date the 14th day of April of that year, conveyed to Isaac A. Goddin a lot fronting sixty-two feet on Fifteenth street, embracing both the lots conveyed to Drew by the two deeds of the 20th of January 1819, hereinbefore mentioned. And on the same day he conveyed to George W. Ruffin the other lot conveyed to Drew by John Adams and wife.

On the trial of the cause the plaintiff introduced in evidence the will of Richard Adams, the deeds of the 20th January 1819, the deed from Drew, &c., to Stevenson, &c., and the deed from Stevenson to him. The defendant then introduced in evidence the deed from Stevenson to Ruffin and the deed from John Adams and wife to Drew for the same lot. He also introduced evidence to prove that he only claimed the lot conveyed by the executors to Drew, and that at the time of the conveyance by Stevenson to the plaintiff, he was in possession of that lot, claiming it as the property of Richard Adams' estate, of which he was the administrator de bonis non with the will annexed, and was beside interested by devise, by purchase and as guardian of his infant children to the extent of one-third thereof. He proved that he entered it upon the assessor's books in 1842 as the property of Richard Adams' estate, and had paid the taxes on it ever since; and that in 1849 he had filled up the lot. And to show that the executors of Richard Adams had not duly executed the powers vested in them by his will, in executing the deed to Drew, but that said deed was a breach of their trust, offered to produce in evidence the settlements of the accounts of the executors, to show that they had never credited Richard Adams' estate with anything as the consideration of said deed for said lot, and that moreover the executors, both of whom died insolvent, were largely in arrear to the parties interested in said estate.
592 But the plaintiff *objected to the introduction of the accounts, and the court sustained the objection: Whereupon the defendant excepted.

The plaintiff introduced a witness to prove that the lot in controversy had not been enclosed by the defendant until a few days before the sale by Stevenson; and that it had previously been vacant for upwards of twenty-seven years. The plaintiff also introduced Thomas H. Drew as a witness. He said that when he made the deed to Stevenson he meant to include in it all the property he had in Adams' Valley. That he considered there were but two lots. That he never saw the deeds by which they were conveyed to him until long after the deed to Stevenson was executed, and did not know that there were three deeds, or that either of them was by the executors. That John Adams being indebted to him, and greatly embarrassed, proposed to let him have the lots for the debt, and promised to have them conveyed, and afterwards told him it was done. He had no treaty about them with the executors, but the consideration for them was the debt of John Adams: There was no exchange of land between him and John Adams. He said further that he never took actual possession of the lot in controversy: It remained vacant. That he had never paid taxes for it; though he supposed he had until within the previous eighteen months, when upon examination he found he had paid taxes on the other two lots, but not on that conveyed by the executors.

The evidence having been introduced, the defendant moved the court to give the following instructions:

1. If from the evidence the jury believe, that at the time of the purchase by the plaintiff of the property in dispute from Stevenson as trustee, the defendant held adverse possession, claiming to be entitled thereto, and had previously openly
593 exercised acts of *ownership over it, and for not less than ten years had paid the taxes upon the property, then the plaintiff is not entitled to recover in this action.

2. That the aforesaid deed from John and Samuel G. Adams to said Drew was on its face not a due execution of the power and authority conferred by the will of Richard Adams, but a violation thereof and a breach of trust, which did not give the said Drew a legal title to the premises conveyed in the said deed; and that the said conveyance of Drew to Stevenson did not give him a legal title to the lot in dispute.

3. That if from the evidence the jury believe, that the lot in possession of the defendant and claimed by him is entirely a distinct lot from the two lots in the aforesaid two deeds from John Adams and wife to Drew; and that Stevenson under the trust deed from Drew and others, has sold those other two lots, and his right to do so as to them has not been disputed or questioned, then the jury are not authorized to consider the lot in the possession of the defendant as conveyed in the said trust deed to Stevenson, or that he had as trustee a right to sell and convey the same.

4. That the parol testimony hereinbefore set forth as given in by the witness Drew, that in his trust deed to Stevenson he meant to include the lot in controversy, was legally inadmissible, and they ought

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to disregard it in making up their verdict.

But the court refused to give the said instructions; being of opinion, that a bargainee under a deed from a bargainor who was out of possession, and against whom adverse possession was held, may, under the Code of Virginia maintain ejectment in his own name; and also being of opinion that the deed from John and Samuel G. Adams as executors of Richard Adams, was at law on its face a sufficient execution of the power of sale and conveyance con-
594 ferred upon them *by the will of Richard Adams: And likewise being of opinion that the matter embraced in the third instruction asked for was a matter entirely for the jury; and as to which no instruction should be given by the court.

The court also refused to give the fourth instruction; and in lieu thereof, the competency of Drew not being objected to, instructed the jury to disregard so much of his testimony as relates to what lots he meant to embrace in his deed of trust to Stevenson and others; and that they were to consider only that portion of his testimony which tends to identify the lot in controversy, and to show that it answers to the description embraced in said deed. Whereupon the defendant excepted to the opinion and decision of the court.

The plaintiff also asked the court to instruct the jury, that the evidence of Thomas H. Drew, in so far as it affects or discloses the consideration upon which the deed from the executors of Richard Adams to him was founded, was not to be regarded by the jury. This instruction the court gave; and the defendant again excepted.

There was a verdict and judgment for the plaintiff for all the land claimed in the declaration. And thereupon the defendant moved the court to set aside the verdict and grant him a new trial, on the ground that the verdict was contrary to the evidence: But the court overruled the motion; and the defendant again excepted, referring in the exception to the evidence stated in the previous exceptions; which it was admitted was all the evidence in the cause. From the judgment of the court below the defendant applied to this court for a supersedeas, which was awarded.

Morson, for the appellant, insisted:

1st. That the court erred in instruct-
595 ing the jury *that the bargainee in a deed from a bargainor out of possession, and against whom adverse possession is held, may, under the Code of 1849, maintain ejectment in his own name. He referred to Tabb v. Baird, 3 Call 475, Hopkins v. Ward, 6 Munf. 38, See v. Greenlee, Id. 303, to show that previous to the Code of 1849, such a party could not maintain ejectment; and he insisted that the purpose and effect of the act, Code, ch. 116, § 5, p. 500, was to do away with the illegality of making such deeds; but not to enable the bargainee to sue in his own name. And he further said that although in Taylor's devisees v. Rightmire, 8 Leigh 468, it was held that devisees who had not had possession might maintain the action, yet that the language of the statute of wills of 1819, 1 Rev. Code, p. 375, upon which that case was decided, was very different from the act relied on to sustain this action; and that there was wanting in the latter act the words upon which the judges rested their opinion in that case.

2d. That the court erred in instructing the jury that the deed from John and Samuel G. Adams as executors of Richard Adams, was at law on its face a sufficient execution of the powers of sale and conveyance vested in them. That the will of Richard Adams gave to his devisees the legal title to his residuary real estate, of which this lot was a part; and the executors had but a naked power, which must be strictly pursued to enable them to pass the title to a purchaser. 3 Lom. Dig. p. 272, 273; Sugd. on Powers 132, 133, 264; Banister & wife v. McKenzie, 6 Munf. 447; Nalle v. Fenwick, 4 Rand. 585; Allen v. Smith, 1 Leigh 231; Chapman v. Bennett, 2 Leigh 329; Stainback v. Read & Co., 11 Gratt. 281; Stainback v. Bank of Virginia, Id. 269; Bank of U. S. v. Beirne, 1 Gratt. 234; Jesse v. Preston, 5 Gratt. 120; Gibson v. Jones, 5 Leigh 370.

That the deed showed on its face that
596 the power was *not properly exercised, as the consideration is stated to be an exchange of land, which the power does not authorize them to make, and which could not have been necessary for the purposes of the power. He referred to Spence v. Bagwell, 6 Gratt. 444; Mundy v. Vawter, 3 Gratt. 518, 550. He distinguished this case from Mosby v. Mosby, 9 Gratt. 584; and insisted that even if these executors had a trust coupled with their power, they did not therefore have the legal estate. Hill on Trustees, p. 238, marg. 334 top.

3d. That the court erred in refusing to give the third instruction asked for by the defendant, and in referring the question to the jury. The question was upon the construction of the deed from Drew to Stevenson; and whether it passed the lot in controversy. To pass property the deed must describe it so as to identify it, otherwise it is void. 2 Lom. Dig. 191, § 5, 210, § 9.

4th. That the court should have given the fourth instruction as asked: the rule that parol evidence is inadmissible in such a question being well settled; 2 Lom. Dig. 192, § 8; and should not have given that asked by the plaintiff; as evidence of Drew thereby excluded went not to add to or alter the deed; but to fortify it as it appeared on its face; and proved that the deed from the executors was a fraud upon the power, and therefore utterly null and void.

5th. That there should have been a new trial. If any of the rulings of the court upon the trial were erroneous, it was good cause for a new trial. 2 Tuck. Com. 305; Guerrant v. Tinder, Gilm. 36. But in fact the plaintiff made out no case which entitled him to recover.

6th. That there was error in the verdict

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in finding that the defendant withheld the whole premises claimed in the declaration, when the evidence showed that he was only in possession of a part, and set
597 up *no claim to the rest. He referred to 2 Starkie's Evi. 432, marg. pl. 5; Code of 1849, p. 560, § 16.

Sands and Crump, for the appellee, insisted:

1st. That though it is true that the old rule as to the right of a bargainee taking a deed for land in the adverse possession of another, was as stated by the counsel for the appellant, yet that the rule had been changed by the Code of 1849, ch. 116, § 5, p. 500. This statute was intended to put grantees in deeds in the same condition as devisees in the wills; and although the verbiage of the statute of wills of 1819 is pruned down, yet the word "interest" is retained, which is certainly of as extensive meaning as any of the words that are omitted. Under that statute it was held that devisees never in possession might maintain the action. Taylor's devisees v. Rightmire, 8 Leigh 468. They referred to the Code, ch. 135, § 4, p. 558, which provides that no person shall bring the action unless he has at the time of commencing it a subsisting interest in the premises and a right to recover it; and by § 6, the name of the real claimant must be inserted as plaintiff: And thus if the action may not be brought in the name of the bargainee the remedy is lost, as the bargainor has no subsisting interest in the premises.

2d. That the deed from the executors to Drew was a valid deed, and within the scope of their powers. That from the terms of the will, and especially from the provision as to the annuity of two thousand dollars, the legal title vested in the executors; and that their deed passed it to Drew. 2 Lom. Dig. 382, top; 1 Id. 427; Taylor v. King, 6 Munf. 358; Mosby v. Mosby, 9 Gratt. 584. And they referred to the opinion of Judge Moncure in this latter case, as equally applicable to the present, and as showing that the executors were clothed with the title and a trust. That there was no fraud upon the face of the deed.
598 *The exchange spoken of was not an exchange between the executors and Drew, but between John Adams in his own right and the executors; and even if it was with Drew it cannot be said that it is impossible an exchange could have been expedient for the purpose of a division of the estate. They also referred to 1 Sugd. on Powers 265, 331; Steele v. Levisay, 11 Gratt. 454.

3d. That the deed from Drew to Stevenson passed the lots in controversy. Although the two lots adjoining were conveyed to him by two deeds, yet they adjoined, and in fact constituted one lot; and by howsoever many deeds Drew received them, there was no necessity on him to describe them as other than they were. But if there was any ambiguity in the deed produced by extraneous proof, then it may be explained. 3 Lom. Dig. 139, marg.: Morrell v. Cook, 35 Maine R. 207.

4th. That as to the third and fourth points made by the counsel on the other side, the court excluded the evidence of Drew except as to the identity of the lot, and referred that to the jury. That there was no ambiguity in the deed without his evidence, and it was therefore of no importance; but if it was, he might remove an ambiguity which he produced, by his evidence. As to the consideration of the deed, that was expressed on its face; and though you may prove other considerations of the same nature as those expressed, it is not competent to prove that the consideration expressed was not a consideration of the deed. As to fraud upon the face of the deed, that of course must be found in the deed itself; and as to the mode of proving fraud in a deed, that is stated in 2 Lom. Dig. 294, marg.; and in the Code, ch. 172, § 5, p. 654.

5th. That the bill of exceptions to the refusal of the court to grant a new trial on the ground that the verdict was contrary to the evidence, is improperly taken,
599 *the evidence being given and not the facts. Vaiden's Case, 12 Gratt. 717, is the last case on the subject. As to erroneous rulings of the court, they have already been considered.

6th. That the verdict for the whole land claimed is correct. Code, ch. 135, § 25, 27. The defendant did not disclaim title to any part on the record. But if it was error, it is one which cannot injure the appellant; and from which therefore he had no right to appeal.

MONCURE, J. The first question arising in this case is, Did the Circuit court err in instructing the jury that a bargainee, under a deed from a bargainor who was out of possession, and against whom adverse possession was held, may, under the new Code, maintain ejectment in his own name?

It is very clear that before the Code took effect, a bargainee of a party not in possession, actual or constructive, at the time of the execution of the deed, could not maintain ejectment in his own name, at least against the party at that time in the adverse possession of the land. His disability to maintain the action proceeded, not from the act against conveying or taking pretensed titles, 1 Rev. Code 375, but from the common law, whose maxim it was that nothing in action or entry could be granted over. A feoffment was void without livery of seisin; and without possession there could be no livery of seisin. 4 Kent Com. 448; 2 Lom. Dig. 8, 9. The statute of uses, 1 Rev. Code 370, § 29, did not remove the disability, because it only operated on a possession existing in the bargainor at the time of the execution of the deed, and transferred that possession to the use created or declared in favor of the bargainee. If no possession existed in the bargainor, of course none could be transferred to the bargainee. But the Code has changed the common law rule by

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600 *declaring that "any interest in or claim to real estate may be disposed of by deed or will." Ch. 116, § 5, p. 500. That such a change was contemplated by the revisors, is manifest from their report, p. 602, § 5, and note‡. They recommended the adoption of a section similar to 8 and 9 Vict. ch. 106, § 6; in which "a right of entry" is expressly named. Instead of adopting that section, which is complicated in its details, the legislature enacted the provision before quoted. Their object was to use brief and plain terms, which would be at least as extensive in their meaning as the terms used in the statute of Victoria. They could not have used more comprehensive terms than they did. A right of entry is certainly "an interest in or claim to real estate," and may therefore "be disposed of by deed or will." If it may be so disposed of, the grantee or devisee may bring the action in his own name. The right of action is incident to the right of entry, and comes along with it to the grantee or devisee: otherwise it would exist nowhere; for it cannot remain in the grantor or devisor, who has disposed of the right of entry, and has no longer any interest in or claim to the land which can give him any right of action. There can be no right without a remedy, nor a remedy without a right. These views are strongly sustained by the case of Taylor's devisees v. Rightmire, 8 Leigh 468, and the opinion of Carr, J., and Tucker, P., therein. It was held in that case that a writ of right may be maintained by devisee upon the seisin of his testator, under the statute of wills, 1 Rev. Code, ch. 104, § 1, p. 375. The terms of that statute are certainly not stronger in favor of the right of action in the devisee, than the terms of the provision of the new Code, before referred to. I am therefore of opinion that the court did not err in giving the instruction in question. The second question is, Did the court err in in-

601 structing *the jury that the deed from John and S. G. Adams, as executors of Richard Adams, was at law, on its face, a sufficient execution of the powers of sale and conveyance conferred upon them by the will of their testators?

The question was much discussed in the argument of this case, Whether the power conferred on the executors by the will was a naked power, or a power coupled with an interest? In other words, Whether or not the executors were invested with a legal title to the estate? But in my view of the case, it is unnecessary to decide that question. It is true, that if trustees invested with the legal title to an estate conveyed it to another in plain violation of the trust, and even by a deed which on its face shows such violation, the title of the grantee is good at law, and resort must be had to a court of equity to set aside the deed. But it is also, I apprehend, equally true, that if the donee of a power make a sale and conveyance in pursuance of the power, the title of his grantee will be as good at law as if he had been invested with the legal title. The donor of the power being clothed with the legal title, and having empowered another to pass it from him in a certain way, the execution of the power in that way, as effectually invest the appointee with the title, as if it had been directly conveyed to him by the donor. The appointee takes the estate under the donor, and not under the appointor, who is a mere ministerial agent in passing the title. Thus we see the difference, and so far as concerns the present question the only difference, between the two cases of conveyance by a trustee invested with a legal title, and a conveyance by a donee of a power conferred on him by the owner of the estate conveyed. In the former case, the trustee may pass the legal title as any other owner may. In the latter, the donee of the power can pass it only

602 in the prescribed *mode. But having passed it in that mode, he places the grantee on the same impregnable ground at law, which is occupied by a grantee in the former case. In either case, the title, though impregnable at law, is assailable in equity; and on the same or similar grounds: As where the trustee or appointor has committed a breach of trust or fraud in the execution of the trust or power, in which the grantee participated; or of which he had notice; or for which he may be otherwise responsible. An illusory appointment, if made in pursuance of the power, is good at law, and is assailable alone in equity on the ground of fraud. The obligation of a purchaser in certain cases to see to the application of the purchase money, is an obligation which does not affect his legal title, and can be enforced only in equity; whether the purchase be made from a trustee invested with the legal title or in pursuance of a mere power of sale. A bona fide purchaser without notice from one clothed with a mere power of sale, but who, in making the sale and conveyance, has pursued the terms of the power, is entitled to the same advantage and protection with such a purchaser from a trustee invested with the legal title.

Having stated the principles of law which bear upon the question under consideration, in my view of it, let us now see how they apply to this case. The will certainly confers very extensive power and discretion upon the executors in regard to the whole estate, real and personal. By its first clause it empowers them to set apart so much of the testator's property, not specifically bequeathed, as they may think sufficient to produce a clear annual income, by rent or interest, of two thousand dollars; which is directed to be distributed among certain legatees for life. And after giving the family burying ground to certain of his relations, and one thousand dollars to

603 one of his *nephews, it gives the balance of his estate to his nephews and nieces, (except the two thereinbefore provided for). It then proceeds in these words: "And for the purpose of making such divisions with greater facility, I hereby give to my executors, or such of them as

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may choose to act, full power to sell or otherwise dispose of the whole or any part of said property, in such time and manner and on such credit as to them may seem most beneficial for the whole." And then follows a proviso in regard to the old mansion-house lots and thereto appurtenant.

The executors are required to set apart a very large amount of property or money, sufficient to produce a clear annual income, by rent or interest, of two thousand dollars. To do this, it might have been, and probably was, necessary to sell a portion of the estate, real or personal; and whether necessary to do so or not, a purchaser from them would not be presumed to know, and if he acted bona fide, would be protected in his purchase. In the residuary clause full power is given to the executors to sell or otherwise dispose of the whole or any part of the residuum, in such time and manner, and on such credit as to them may seem most beneficial for the whole. It is scarcely possible to conceive broader terms in which a power of sale or disposition could be given. It is true this broad power is given "for the purpose of making such divisions with greater facility." But surely this sentence was not inserted in the will to make the necessity of a sale for the purpose of a division, a condition precedent to the exercise of the power. If it had been, then, undoubtedly, no title could have been acquired under the power unless the condition precedent existed; and the burden of proving its existence would devolve on the purchaser in order to maintain his title. This might be very inconvenient, if not impossible. But he who owns an estate may prescribe the
604 terms *on which alone it shall cease to be his; and they who deal for its acquisition must take care that all the prescribed terms and conditions are strictly complied with. Upon this principle it has been held, that if a mere power be given to sell real estate for the payment of debts in case the personal estate should be deficient, the power does not arise unless the personal estate be actually deficient; and that a purchaser must, at his peril, ascertain the fact, notwithstanding that the purpose provided for be the payment of debts generally. Whereas a mere power to sell for payment of debts generally, without such a condition precedent, would not impose upon the purchaser the obligation of seeing to the application of the purchase money, much less invalidate his title at law in case the purchase money should be misapplied. 1 Lom. Dig. 246, Marg.; Sug. Law Ven. 847. But a reasonable construction must be put upon the will to ascertain whether the testator intended to make the necessity of a sale for the purpose of division, a condition precedent to the exercise of the power. We must not construe the will in reference to what has since transpired, but must go back to its date, put ourselves in the place of the testator, in the midst of all the circumstances which then surrounded him, and thus ascertain the meaning of his language. He must have intended to have his estate disposed of to the best advantage for the benefit of his residuary devisees. To have imposed upon every purchaser the burden of ascertaining the actual necessity for a sale, would have defeated the purpose of the power, or greatly impaired the capacity of his executors for its beneficial execution. An intention to create such a clog, ought to be shown by plain words, and not left to be inferred from doubtful ones. As to the nature of these conditional powers, and their impolicy and inconvenience, see Hill on Trustees 478; 2 Sug. Pow. 503.

605 The preliminary *words in the clause conferring the power in this case were used merely to show the purpose for which it was conferred, and not to create a condition precedent to its exercise. A power of sale coupled with a trust is always conferred for some purpose; which is generally expressed on the face of the power: but such expression of purpose rarely creates a condition precedent to the exercise of the power. The power does not depend in this case on the necessity of a sale for the purpose of division—such a necessity is not mentioned in the will, and was not contemplated by the testator. The power was conferred "for the purpose of making such division with greater facility." But whether, and to what extent, and in what manner, it would be proper to exercise it, was left to the sound discretion of the executors, subject alone to the control of the courts. The testator selected for the execution of the power and trust, his brothers and brother in law, in whom he reposed great confidence, and of whom he required no security as executors, except each for the other. They were the fathers of some, if not most, of the residuary devisees, and were doubtless men of high character and great responsibility. The estate entrusted to their care by the testator was of immense value; the penalty of each of the two executorial bonds which were given, being a million of dollars. He gave them full power to sell or otherwise dispose of the whole or any part of the property in such time and manner and on such credit as to them might seem most beneficial for the whole. Whether most beneficial for the whole or not, was referred alone to their discretion. The necessity, or even expediency, for a sale of the whole for the purpose of making a division with greater facility, was hardly possible. And yet, full power is given to sell the whole or any part: as if to remove all restraint, and give assurance to purchasers that they might deal
606 *with the executors without doubt as to their capacity to confer a good title. The trust was to be one of long duration, and to be executed at different times. The beneficiaries were numerous, and many if not most of them were probably infants. The large subject directed to be set apart to produce the annual rent or interest of two thousand dollars, could only be divided among the residuary devisees, as or after those to whom that income was

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given, died. The old mansion-house, with certain lots thereto appurtenant, was directed to be assigned, at a valuation of twenty thousand dollars, to one nephew, and in case of his death under the age of twenty-one years, to another nephew, as so much of his share of the whole estate. The testator seems not to have contemplated that a final division would be made among his residuary divisees until after they all arrived at the age of twenty-one years: though he no doubt intended that in the meantime partial divisions might be made among them and advancements made to them, in property or money, as occasion might require; to be accounted for in the final division.

In view of all these circumstances I am of opinion that the power of sale, though conferred on the executors for a special purpose, was yet to be exercised at their discretion; that for the proper exercise of that discretion a bona fide purchaser from them for .valuable consideration was not responsible; and that a deed purporting to be a conveyance by them to such a purchaser in pursuance of the power, would at law, on its face, be a sufficient execution of the power. But the question is, Whether the deed under which the defendant in error claims in this case, has that effect? There can be nothing on the face of that deed which can affect its validity, unless it be the words "and for and in consideration of an exchange of land made with John Adams, "inserted therein.

607 *It was argued by the counsel for the plaintiff in error, that the deed shows on its face that it was executed in consideration of an exchange of land made with John Adams, one of the executors, individually, by the grantee Drew, and not for the purpose of making a division among the residuary legatees. It was argued on the other hand by the counsel for the defendant in error, that these words, taken in connection with the context, show that the exchange of land referred to was made with John Adams by the executors of Richard Adams, and not by Drew. I think the latter is the true construction. The deed refers to the will of Richard Adams, recites the power of sale therein contained, purports to be executed by the executors by virtue of the power vested in them, and contains covenants exclusively relating to the said testator's estate; thus indicating that the exchange which was the consideration of the deed had been made by the executors in the execution, or supposed execution of their trust. The words before quoted consist with this view; and rather with it than the opposite. The executors, "by virtue of the power vested in them, and for and in consideration of an exchange of land made with John Adams, and for the further consideration of one dollar by the said Drew to them in hand paid," have granted, &c. That is, "the executors, in consideration of an exchange of land made by them with John Adams," &c. The substantial consideration, to wit, the exchange, passed between John Adams and the executors. The nominal consideration, to wit, one dollar, was paid by Drew to the executors. Regarding this as the true construction of the words in question, Do they invalidate the deed at law? I think not. The only ground on which it can be contended that they do, is that the executors had no power to make an exchange of land, especially with one of themselves.

608 They had "full *power to sell or otherwise dispose of the whole or any part, &c. as to them might seem most beneficial for the whole," &c. It might have seemed to them most beneficial for the whole to make an exchange of land with John Adams, "for the purpose of making the division with greater facility." We may well suppose that the estate consisting perhaps of many parcels of land in different parts of the city, it might have been highly beneficial to the parties concerned, and much facilitated a division among them, to have made an exchange of some of the land for other land which was more salable, or which, by being attached to some other land belonging to the estate, rendered it more desirable, and more susceptible of easy division. In such a case, did not the testator intend to empower his executors to make the exchange? If not, what did he mean by giving them power, not only to sell, but otherwise to dispose of the whole or any part? Might not an exchange be a convenient and beneficial mode of executing even the power of sale? An owner of a large estate in detached parcels, in selling at different times to different persons, often finds it convenient and prudent to sell portions of it for other property more easily or advantageously convertible into money. An exchange, it is true, is not a usual mode of making partition or making a sale; but it might be proper; and it would be too much to say that the executors, in this case, had no power under any circumstances or to any extent, however small, to make one. It does not appear to what extent the exchange was made. The record only shows that John Adams thereby acquired a small lot of little value in Adams' Valley; for which he may have given in exchange another lot of much greater value to the testator's estate. Then, does the circumstance of its being made with one of themselves ipso facto render it void? I think not. A trustee cannot be a purchaser

609 *at his own sale. But then the purchase is only voidable, not void. It may be for the interest of the beneficiaries; who may therefore choose to let it stand. They have an easy mode of avoiding it, if they elect to do so. But that is by a suit in equity, brought in proper time; and not by an objection to the title of the purchaser in a suit at law, especially after a great lapse of time, and after the title has passed to bona fide purchasers without notice of any such objection. 1 Sugd. Law Vend. ed. of 1851, p. 62, marg.; 2 Id. 887, and notes. An exchange stands on the same footing with a sale in this respect. I am

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therefore of opinion that the court did not err in refusing to give the second instruction asked for by the plaintiff in error, nor in giving the instruction which it did in lieu thereof.

Thirdly. Did the court err in refusing to give the third instruction asked for by the plaintiff in error, and saying that it was a matter entirely for the jury?

The deed from Drew to Stevenson conveys "two small lots in Adams' valley." There is no patent ambiguity. A deed conveying all the land of the grantor in a certain county, is not void for uncertainty. Vanmeters' ex'ors v. Vanmeters, 3 Gratt. 148. Nor is a deed conveying all the estate both real and personal, to which the grantor is entitled. Mundy v. Vawter, Id. 518. Though notice of such a deed as the latter would not affect a subsequent purchaser from the grantor unless he had notice that the land purchased by him was embraced by the deed. Id. If Drew had only two small lots in Adams' Valley, then there was no latent ambiguity, and these two lots passed by the deed. But it is contended that if he owned the lot in controversy, he had three small lots in Adams' Valley, and that the deed is therefore void for uncertainty; or, at least, did not pass the lot in controversy. It is true that one of the lots owned by
610 Drew in *Adams' Valley was composed of two small lots, one of which had belonged to Richard Adams, and the other to John Adams. But John Adams had acquired the former from the executors of Richard Adams, no doubt with the view of adding it to the latter, which was too small to be of much value; and afterwards sold the lot, composed of the two small parcels, to Drew. The two parcels were conveyed to Drew by different deeds, because Richard Adams' executors had made no deed to John Adams, (who was one of them;) and therefore Richard Adams' executors made a deed directly to Drew for one parcel, while John Adams made a deed to him for the other. But the two deeds bear date on the same day, and are parts of the same transaction. The two parcels, when they became the property of one owner, became but one lot; which well answers the description of a small lot, fronting but sixty-two feet on Fifteenth street, and running back about one hundred feet in the form of a wedge. Drew owning this lot and another in Adams' Valley, (which other had also at the same time been derived from John Adams,) shortly thereafter executed the deed to Stevenson, conveying "two small lots in Adams' Valley." That that deed embraced the parcel of land which had belonged to Richard Adams as aforesaid (and which is the land in controversy) is evident, not only from what has been already said, but from the intention plainly apparent on the face of the deed to convey all the property of the grantors. But even if it were doubtful whether one or both of the parcels aforesaid were intended to be conveyed, I would construe the deed most strongly against the grantor, and so as to give it effect, rather than that it should be void for uncertainty.

Fourthly. I think the Circuit court did not err in refusing to give the fourth instruction asked for by the plaintiff in error, and giving the instruction which it did in lieu thereof.

611 *Fifthly. I think the court did not err in sustaining the objection of the defendant in error to the admissibility of the recorded settlements of the accounts of Richard Adams' executors, which the plaintiff in error offered to produce in evidence. The deed being made by the executors to Drew in consideration of an exchange of land between the executors and John Adams, and not of money paid to them by Drew; of course the executorial accounts would show no credit to the estate for the price of the land conveyed. But the deed being at law upon its face, as I have already endeavored to show, a sufficient execution of the power of sale and conveyance conferred by the will of Richard Adams upon his executors; it follows, as I have also endeavored to show, that the title of Drew under that deed was good at law, and cannot there be impeached by any evidence of a breach of trust by the executors in not accounting for the price of the land conveyed. Therefore the settlements which were offered for that purpose were irrelevant and inadmissible evidence.

Sixthly. For the same reason, I think the court did not err in giving the instruction asked for by the defendant in error, that the evidence of Drew, in so far as it affected or disclosed the consideration upon which the deed to him from Adams' executors was founded, was not to be regarded by the jury. That evidence was introduced to show a breach of trust by the executors; for which purpose, according to what has been said, it was inadmissible. But it tends to confirm the construction I have put upon the deed and to repel that construction, which would make the deed a breach of trust on its face. In any view of the evidence, it was properly excluded.

Seventhly and lastly. Did the court err in overruling the motion of the plaintiff in error for a new trial on the ground that the verdict was against law and evidence?

612 *The objections taken to the rulings and opinions of the court during the trial, which are also relied on as grounds for a new trial, having already been considered and disposed of, it is unnecessary to notice them any further. The remaining ground relied on is that the verdict was contrary to the evidence. The bill of exceptions states the evidence of the witnesses examined on the trial, instead of the facts appearing to the court to have been proved by such evidence. This court cannot therefore, according to our well settled practice, take cognizance of the case and reverse the judgment, unless by rejecting all the parol evidence for the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below still appears to be wrong. The application of

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that test puts an end to the case. But looking at the whole evidence, I do not think that the judgment ought to be reversed on the ground that the verdict was against the evidence. The only objection taken to the verdict under this head is, that it is for the whole lot claimed in the declaration, while the evidence shows that the plaintiff in error was in possession of, and claimed title to, only a part of the lot, viz: the part conveyed to Drew by the executors of Richard Adams. The plea of not guilty put in issue the title to the whole lot, and gave no notice of an intention to claim only a part. The evidence showed that the defendant in error was entitled to the whole, and that the plaintiff in error was in possession of, and claimed title to a part. On this evidence the jury properly rendered a verdict for the premises in the declaration mentioned. Code, ch. 135, § 25, p. 561. At all events, if there be any error in this respect, it is not an error to the prejudice of the plaintiff in error, and therefore the judgment should not be reversed on that ground.

I am of opinon that there is no error in the judgment, and that it ought to be affirmed.

613 *SAMUELS, J. In my opinion the will of Richard Adams conferred on his executors a mere power over his real estate; that it gave them (amongst other things) power to set apart so much of the real estate as they might think sufficient to produce a clear annual rent of two thousand dollars, for payment of annuities for the lives of the annuitants; that if the executors thought proper to exercise this power, by setting apart real estate for this purpose, then the direction to the executors to pay the rent for the lives of the annuitants, must be held, by implication of law, to confer an estate of equal duration upon the executors; that as the interest of the annuitants respectively expired, the residuary devisees would succeed to their portions. That in this mode, to this extent and for this purpose only would the executors acquire any interest in the testator's real estate; not by devise directly from him, but by virtue of the power conferred on them.

I am further of opinion that the consideration mentioned in the deed of bargain and sale from Adams' executors to Drew, must be held to move from the bargainee. This consideration is of two parts, to wit: "an exchange of land with John Adams," "and for the further consideration of one dollar by the said Drew to them in hand paid," &c. The parts of this consideration seem to have taken different directions; one having gone to John Adams alone in his own right; the other to the executors as such. If the executors, as such, had made an exchange with John Adams acting in his own right, it is difficult to perceive why the fact should be mentioned in their deed to Drew, or how it could be regarded as a consideration paid by him; yet without doubt the substantial consideration was the exchange, and not the nominal sum of one dollar.

Holding then that the deed was 614 intended to perfect *an exchange between John Adams and Drew, I cannot find any authority to make it in the power conferred by the will, large as it is. I am of opinion, therefore, that the judgment should be reversed, for the reason that the Circuit court erred in refusing to instruct the jury that the deed was invalid.

I concur in the opinion of Judge Moncure on the other questions presented by the record.

ALLEN, P., and LEE, J., concurred in the opinion of Moncure, J.

DANIEL, J., concurred generally in the opinion of Moncure, J.; but was inclined to think that the power to provide for the annuities vested the executors with the legal title; and therefore if the ground taken by him was not sound, still their conveyance would be valid.

Judgment affirmed.

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615 *McCandlish v. Keen & als.

Same v. Coke's Ex'or & als.

January Term, 1857, Richmond.

1. **Conveyance of Property in Consideration of Covenant to Pay Annuity—Case at Bar.**—A conveys real and personal property on a consideration of a sum of money and of an annuity for the life of the grantor, if she survives the grantee, from the death of the grantee; and in the deed the grantee covenants that his estate shall pay to the grantor if she survives him, the annuity. HELD:

1. **Same—Does Not Create Charge upon Property in Preference to Creditors.**—This does not create a charge upon the property conveyed, so as to entitle the grantor to subject the same to the payment of the annuity after the death of the grantee, in preference to other creditors of the grantee.

2. **Same—Vendor's Lien.***—The conveyance is in consideration of the covenant of the grantee that his estate shall pay the annuity, and the vendor's lien does not attach upon the property.

*Conveyance of Property in Consideration of Covenant to Pay Annuity—Vendor's Lien.—In Whiteley v. Central Trust Co., 76 Fed. Rep. 79-80, it is said: "What the circumstances are which will determine the existence or nonexistence of the lien is often a question of difficult determination, and has given rise to certain nice distinctions which have crystallized into rules of decision, somewhat arbitrary in their consequence. Thus it seems to be settled that, if the consideration be that the vendee will enter into certain covenants, as for the payment of an annuity to A. and a certain sum to another in the event of the death of the vendor, the consideration on the one side is the conveyance of the estate, and upon the other side the entering into the covenants; in which case, if no lien be reserved, none will be implied for the performance of the covenants. Clarke v. Royle, 3 Sim. 499; Parrot v. Sweetland, 3 Mylne & K. 656; Buckland v. Pocknell,

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2. **Same—Same—Case at Bar.**—Deed conveys grantor's life estate in land, all live stock upon the place, farming implements, carriage and horses, household and kitchen furniture as it stands, and in a number of slaves, also the grantor's interest in the reversion in the property derived from three of her children who had died since the death of their father, and a number of slaves absolutely, in consideration of a sum of money, and that grantee shall support the grantor for life; and in the event of grantee's death in lifetime of grantor, his estate shall pay her three hundred dollars a year during her life, for her board, &c. and let her have a maid servant, if she lived out of his family: but if she lived in his family, then she should have her choice of maid servants of his estate to wait on her, one room in the house and its furniture for life, and should receive one hundred and fifty dollars a year during her life to purchase clothing, &c. The grantor has no lien upon the property conveyed, for the annuity.

3. **Deeds of Trust—Unrecorded—Case at Bar.**—C in 1849 gives a deed of trust upon land to secure a *bona fide* debt, which is duly acknowledged and certified for record, but it is not recorded until after his death. He makes his will in December 1849, by which he charges his whole estate with the payment of his debts; and he dies in 1851, indebted more than his whole estate will pay; but there were no judgment creditors at his death.

HELD:

616 *1. **Same—Same—Valid against Creditors.**—The deed of trust though not recorded, is valid against the creditors of C.

2. **Same—Sufficiency of Recordation—Case at Bar.**†—Though the recording the deed after the death of C was not necessary to give it validity, yet it seems that if that were necessary to render the deed valid against creditors, such recordation was sufficient.

3. **Statutes—Payment of Decedent's Debts—To What Applicable.**‡—The act, Code, ch. 131, § 8, p. 545, which declares that all the real estate of a party dying, which he has not subjected by his will to the payment of his debts, shall be assets for the payment of debts in the order in which personal estate is to be applied, does not apply, except subject to the charge, to the real estate on which the debtor has created a *bona fide* lien, which is good against himself.

4. **Wills—Whole Estate Subjected to Payment of Debts—Effect on General Creditors.**§—C having subjected his whole estate to the payment of his

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13 Sim. 406; Sugd. Vend. 65, 66; *McCandlish v. Keen, 13 Gratt. 615-626 et seq.* The principle upon which Clarke v. Royle, and the other case cited above may be said to rest is that, where the consideration for the conveyance is the entering into an agreement to do or not to do certain things, and the remedy for a breach of such agreement consists in an action for unliquidated damages, the parties will be presumed not to have intended that the land should remain charged with a vendor's lien to secure such unliquidated damages,—damages which may never accrue, and are unascertainable by third persons dealing with the land. The consideration for the deed is deemed to be the entering into the covenants. When this is done, the covenants are deemed a substitute for the price. Indeed, the rule has been very broadly stated by most American courts to be that a vendor's lien will not arise where the consideration is unliquidated, and ascertainable only by an action sounding in damages. The existence of such a lien for the security of a covenant, accepted as the consideration for a conveyance of land, has most often arisen where the deed was in consideration that the vendee would maintain or support the vendor. Where there has been a breach of such a covenant, the great weight of opinion is that no lien exists to secure the performance thereof, unless expressly contracted for. The subject received elaborate consideration from the supreme court of Virginia in the cases of Brawley v. Catron, 8 Leigh 522, and *McCandlish v. Keen, 13 Gratt. 615*, and the doctrine of those cases has been generally accepted as a sound statement of the equitable doctrine touching the nonexistence of a lien where the consideration consists in the entering into covenants to do or perform acts for the breach of which the remedy at law was an action sounding in damages. Hiscock v. Norton, 42 Mich. 320-325, 3 N. W. 868; Campbell v. Campbell, 21 Mich. 438; Payne v. Avery, *Id.* 524-551; Arlin v. Brown, 44 N. H. 102; Harris v. Hanie, 37 Ark. 348; Bell v. Pelt, 51 Ark. 433, 11 S. W. 684; McDonald v. Land Co., 78 Ala. 382-384; Walker v. Struve, 70 Ala. 167; Patterson v. Edwards, 29 Miss. 71; Barlow v. Delany, 36 Fed. 577; Peters v. Tunell, 43 Minn. 473, 45 N. W. 867; Chase v. Peck, 21 N. Y. 581; Chapman v. Beardsley, 31 Conn. 115; Meigs v. Dimrock, 6 Conn., 458; Jones, Liens, § 1071."

In Crim v. Holsberry, 42 W. Va. 667, 26 S. E. Rep. 314, it is said: "The law is well settled that an implied equitable lien does not exist in favor of a vendor of real estate to secure the consideration therefor when such consideration is the maintenance and support of the grantors during life. *McCandlish v. Keen, 13 Gratt. 615;* Brawley v. Catron, 8 Leigh 522; Arlin v. Brown, 44 N. H. 102; Hiscock v. Norton, 42 Mich. 320, 3 N. W. 868; McKillup v. McKillup, 8 Bard. 552; Chase v. Peck, 21 N. Y. 581; Meigs v. Dimock, 6 Conn. 458; Hobson v. Edwards, 57 Miss. 128; 1 Perry, Trusts, § 235; 28 Am. & Eng. Enc. Law 165."

As authority for the proposition that there is no implied equitable liens in favor of the vendor of *personal* property for the purchase money, the principal case is cited in the following: Cole v. Smith, 24 W. Va. 290; Williams v. Gillespie, 30 W. Va. 590, 5 S. E. Rep. 212; Hobbs v. Interchange, 1 W. Va. 67.

The principal case is cited in Renick v. Ludddington, 16 W. Va. 894, that case holding that an attorney has a lien on the judgment or decree obtained by him for his client, for services and disbursements in the case.

†**Deeds—Recordation.**—In Guggenheimer v. Lockridge, 39 W. Va. 457, 19 S. E. Rep. 876, it was said: "The recordation of a deed does not impart any force or validity to it. On the contrary, it presupposes an already perfect deed. Its only effect is, not to operate as between the parties (as a deed not recorded is just as binding on them as if recorded), but it is to give notice to those who may afterwards, for value, and without notice of the deed, purchase the land of the grantor, and to creditors. 2 Minor Inst. 871; McCandlish v. Keen, 13 Gratt. 632." The principal case is distinguished in Rorer v. Roanoke Bk., 83 Va. 610, 4 S. E. Rep. 820.

‡**Statutes—Payment of Decedent's Debts—To What Applicable.**—The principal case is cited in Peirce v. Graham, 85 Va. 235, 7 S. E. Rep. 189.

§**Wills—Whole Estate Subjected to Payment of Debts—Effect on General Creditors.**—In Dulaney v. Willis, 95

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debts, his general creditors must take the real estate under the charge in the will; and must take it in the plight and condition in which he held it; and it is equitable assets, though the statute would have subjected it to the payment of his debts if there had been no such charge in the will.

5. **Statute—Protection of Creditors against Unrecorded Deeds—To What Creditors Applicable.**—The act, Code, ch. 118, § 11, p. 509, in relation to the creditors and purchasers who shall be protected against unrecorded deeds, does not include creditors claiming under a devise for the payment of debts, or under the statute subjecting real estate to their payment. But the creditor who may avoid such a deed must have some lien by judgment or otherwise, which entitles him to charge the subject conveyed specifically.

By deed bearing date the 29th of June 1828, Mrs. Susan Byrd, in consideration of five thousand three hundred and sixty-five dollars, conveyed to Richard Coke, jr., all her right to a tract of land in the county of Gloucester called Abingdon, supposed to contain about seven hundred acres, together with the stocks of horses, mules, sheep, hogs and cattle, and the farming implements; one four wheel carriage and harness; the household and kitchen furniture at Abingdon as it then stood; the crops growing thereon, and those then on hand; also her interest as widow and distributee of William P. Byrd in thirty-seven slaves; and also her interest as heir and distributee of three of her children who had died
617 since their father, in the *real and personal estate of the said William P. Byrd; and also fourteen slaves, which were hers in her own right; subject to a lien upon the land for five hundred pounds in favor of Rebecca Innis, the interest upon which the said Susan was entitled to for her life, and was by the deed released to the said Coke. The deed then proceeded to state that in addition to the consideration before mentioned, of five thousand three hundred and sixty-five dollars, the said Richard Coke, jr., bound himself and his heirs to maintain the said Susan Byrd during her life, in a comfortable and respectable manner, suited in all respects to a well bred lady. And in the event of Coke's death in the lifetime of Mrs. Byrd, it was covenanted and agreed that Coke's estate should pay to her three hundred dollars a year during her life, for her board, clothing and support, and let her have a maid servant; that is if she should for any cause choose to board out of the family of the said Coke. And if she should live in his family after his death, then it was covenanted that she should have her choice of the maid servants of his estate to wait on her, one room in the house at Abingdon and its furniture, to be enjoyed by her during her life, and then to be returned to his estate; and that she should receive from said Coke's estate one hundred and fifty dollars a year during her life, to purchase clothing, &c.

This deed was executed by Mrs. Byrd alone; but on it was endorsed the following memorandum, which was to be taken as a part of the deed: "I agree that in the event of my death, living Mrs. Byrd, she shall have a maid servant and the furniture for a room, to carry with her where she pleases, to be enjoyed by her during her life, and at her death to return to my estate. This my signature is to relate as well to the foregoing deed as to this memorandum. Witness my hand and seal." And it was signed and sealed by both Coke and Mrs. Byrd. The deed was admitted to
618 *record on the certificate of Mrs. Byrd's acknowledgment before two justices; and the memorandum was recorded on the acknowledgment by Coke in court.

At the time this deed was executed Coke was married to the daughter of Mrs. Byrd; and the reversion in the land and slaves mentioned therein as held by Mrs. Byrd as widow and distributee of her husband, seems to have been vested in his wife, and her two brothers and sister; and Coke purchased the interest of the brothers and sister in the property within two or three years after Mrs. Byrd's deed was executed.

On the 21st of June 1848 Coke borrowed from the Exchange Bank of Virginia at Norfolk ten thousand dollars, upon his note made to Robert McCandlish and George W. Southall, and endorsed by them; and by deed bearing date the same day, he conveyed to two trustees the tract of land called Abingdon and an adjoining tract called Woodville, in trust to secure the bank and his endorsers; and this deed provided for the renewal of the note. The deed was acknowledged by him on the same day before two justices, and certified by them for record; but it was not recorded until the 3d day of May 1851, after the death of Coke.

The note was renewed from time to time, the last having been made on the 9th of November 1850, for eight thousand eight hundred and sixty dollars, payable at four months; and Coke having died before it fell due, it was protested for nonpayment. And George W. Southall having died in November 1851, McCandlish on the 11th of February 1852 paid one-half the note, principal, interest and charges of protest, amounting at that time to four thousand six hundred and seventy-nine dollars and twenty-five cents.

It appears that Richard Coke died in possession of a large estate, but indebted to a large amount, probably more than enough

Va. 608, 29 S. E. Rep. 324, it is said: "It is the established doctrine in this state that the rights of the general creditors of a decedent's estate are subject to all the equities attaching thereto at the time of his death; that they take the estate in the same plight and condition in which the debtor left it, and their rights cannot be enlarged and improved beyond those of the debtor, to the prejudice of a creditor who has taken a lien, though he may have failed to record it. The creditor who seeks to assail it must come with a lien by judgment or otherwise giving him a right to charge the property specifically. McCandlish v. Keen, 13 Gratt. 615."

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to absorb the whole. By his will, which was dated on the 30th of December
619 1849, *and admitted to probat on the 16th of April 1851, he subjected his whole estate, real and personal, to the payment of his debts, with power to his executors to sell the whole or any portion of it, to make speedy payment thereof.

McCandlish having paid one-half of the note on which he was endorser, as before stated, filed his bill in the Circuit court of Gloucester county, against Coke's executor, Southall's administrator, Mrs. Byrd and others, setting out the foregoing facts, and claiming a lien under the deed of trust executed by Coke to secure the debt to the bank; stating that he understood Mrs. Byrd claimed to have a lien upon the tract of land called Abingdon, and asking that if necessary for the payment of the debt to the bank the land conveyed by the deed might be sold; and for general relief.

About the same time Keen & Co. filed their bill in behalf of themselves and the other creditors of Richard Coke, against his executors and others, in which they sought to subject his property to the payment of his creditors. These plaintiffs were creditors at large; and it does not appear that there were any creditors who had recovered judgments against Coke in his lifetime.

The two cases were heard together, and the two questions of controversy were, 1st. Whether Mrs. Byrd, either by virtue of the provisions of her deed to Coke, or as vendor, had a lien for her annuity upon the land called Abingdon? 2d. Whether the deed of trust, not having been recorded until after the death of Coke, was a valid lien to secure the debt due to the bank, or whether all the creditors were to share ratably in all the property? The court below held on the first question, that Mrs. Byrd had a lien on the land she had conveyed to Coke for her annuity; and on the second, that the deed of trust was not valid as
620 *against the other creditors of Coke. And from this decree McCandlish applied to this court for an appeal, which was allowed.

The case was elaborately argued by Wellford and Morson, orally, and by Scarburgh and Peachy, in a printed note, for the appellant, and by J. Alfred Jones and Robinson for Mrs. Byrd and the general creditors.

LEE, J. Two questions occur in this case first, whether Mrs. Byrd under the deed and contract of the 29th of June 1828 has any lien express or implied, upon the estate of Coke, or any portion of it, for the amount of the annuity secured to her by that contract; second, as to the effect of the failure to record the deed of trust of the 21st of June 1848 until after the death of Coke, the grantor, upon the lien thereby created as against the general creditors of Coke. Of these in the order stated.

There is no just foundation for any claim to an express charge. There is a reservation of what is termed "a mortgage or lien" upon the land conveyed in favor of Rebecca Innis for five hundred pounds, but nothing said of a lien for the annuity. The only terms in the deed which can furnish any semblance of a charge are those in which it is covenanted that in the event of Coke's death, his estate should pay Mrs. Byrd three hundred dollars during her life for her board, &c. Such terms or terms of similar import, mutatis mutandis, might in a will in favor of securing payment of just debts, perhaps, be held to constitute a charge, but in a contract of this character they cannot have this effect. They are but the words of a party intending to create a debt to be paid after his death in the form of annuity for life to the other in the event she survived him. It was of course to be paid out of his estate as any other mere personal liability;
621 but it will *not constitute nor was it intended to constitute any charge in the nature of a specific lien. Considering that if a lien upon any thing it would be a lien upon the whole estate of the grantor real and personal, involving embarrassment and inconvenience in disposing of even the most inconsiderable article amounting to almost a disability to enjoy his property, an intention so to bind it should not be imputed unless plainly expressed. The terms used should be construed as a covenant for his representatives,—one on his own behalf being inappropriate,—and as binding his estate only in the sense in which any personal covenant binds that of the covenantor. If there is any lien under this contract, it can only be that implied charge, the creature of the court of equity, familiarly known as "the vendor's lien."

The doctrine in regard to this lien although of comparatively modern origin, may now be regarded as well established in the English chancery; and although it has been adopted in several of the states in this country, as also in the circuit courts and Supreme court of the United States, yet in others of the states it has been questioned and unsettled or wholly repudiated. In Pennsylvania it has no existence; Kauffelt v. Bower, 7 Serg. & Rawle 64, 74: So in North Carolina; Womble v. Battle, 3 Ired. Eq. R. 182: So in South Carolina; Wragg's representatives v. The Comptroller General and others, 2 Dessaus. R. 509: so in Maine; Philbrook v. Delano, 29 Maine R. 410; and in Massachusetts, per Story, J., in Gilman v. Brown, 1 Mason's R. 191. In Delaware and Connecticut, the doctrine is questioned and unsettled. Budd v. Busti, &c., 1 Harring. R. 69; Atwood v. Vincent, 17 Conn. R. 575. In Virginia the doctrine has been admitted and such a lien asserted against the vendee or purchaser with notice from him. Cole v. Scot, 2 Wash. 141; Graves v. McCall, 1 Call 414; Duval v. Bibb,
622 4 Hen. & Munf. *113; Hatcher's adm'rs v. Hatcher's ex'ors, 1 Rand. 53; Tompkins v. Mitchell, 2 Rand. 428.

But although thus recognized in Virginia the doctrine has not been favored. On the contrary it has been denounced as violative

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of the policy of our law which seeks as far as possible to discourage secret liens and require all to be made matters of record; and a settled disposition has been manifested to extend the doctrine no farther than it has already been carried. See the remarks of Judge Carr in Moore v. Holcombe, 3 Leigh 597, 600, 601; quoting with approbation those of Chief Justice Marshall in Bayley v. Greenleaf, 7 Wheat. R. 46, 51; and those of Judge Tucker in Brawley v. Catron, 8 Leigh 522, 527. That such a doctrine is inappropriate in a state in which every debt may be at once made a lien by a judgment and in which the real estate of a decedent is made assets for the payment of his debts cannot well be denied; and the legislature of this state very clearly evinced the opinion which is entertained upon this point when at the recent revisal it adopted the policy of those states in which this lien had been repudiated by abolishing it formally by statutory enactment. Code of Virginia, ch. 119, § 1, p. 510.

From the English cases it would seem to be deduced that in general this lien is presumed to exist and that it will follow the subject into the hands of a purchaser with notice from the vendee. Hughes v. Kearney, 1 Sch. & Lef. 132; Mackreth v. Symmons, 15 Ves. R. 329, and the cases cited and reviewed by Lord Eldon; Saunders v. Leslie, 2 Ball & Beat. 509; Winter v. Anson, 3 Russ. 488, (3 Cond. Eng. Ch. R. 495); Grant v. Mills, 2 Ves. & Beame 306. Nor will the mere taking of a note or covenant for the payment of the purchase money suffice to extinguish the lien. Gibbons v. Baddall, 2 Equ. Cas. Abr. 682, n. (b.); ex parte Peake, 1 Madd. R. 344;
623 Cary's Ch. R. 25, cited *3 Sug. Vend. [192], [193]; Winter v. Anson, ubi sup.; Hughes v. Kearney, ubi sup.; Teed v. Carruthers, 2 Younge & Coll. 31, 21 Eng. Ch. R. 31. Nor will it make any difference that the purchase money claimed is in the form of an annuity and not a gross sum. Blackburn v. Gregson, 1 Bro. C. C. 420; Tardiffe v. Scrugan, cited 1 Bro. C. C. 423. So in case of a covenant for payment of purchase money in weekly sums, the vendor was held entitled to the lien, by Wigram, V. C., in Matthew v. Bowler, 6 Hare's R. 110, (31 Eng. Ch. R. 110). It is true that Lord Camden's decision in Tardiffe v. Scrugan would appear to have been criticised and questioned by Lord Eldon in Mackreth v. Symmons; and in Clarke v. Royle, 3 Simons' R. 499, 502, the vice chancellor (Sir Lancelot Shadwell) is reported to have said that it appeared to him that Lord Eldon had in Mackreth v. Symmons expressly overruled Lord Camden's decision in Tardiffe v. Scrugan; and Tucker, P., in Brawley v. Catron, 8 Leigh 522, 530, speaks of the latter case as overruled. He says "it certainly was." However in Buckland v. Pocknell, 13 Simons' R. 406, 412, (36 Eng. Ch. R. 406,) Sir L. Shadwell alluding to what he had been reported as having said in Clarke v. Royle, observed that if that had been said in those very terms, it was said too strongly; because although Lord Eldon was not satisfied with the decision in Tardiffe v. Scrugan in all its parts, yet it could not be said that he had overruled it. The decision too is supported by that of Matthew v. Bowler above cited and the case of Winter v. Lord Anson; and is fully sustained by the opinion of Sir Edward Sugden who thinks that it is still an authority and that in such a case the lien will be raised. 3 Sug. Vend. ch. 18, § 32, 38, p. 127, 131, (ed. of 1843).

But in every case whether of an entire gross sum or a sum payable in in-
624 stallments or in the form of an *annuity for lives, the question of lien depends on the particular circumstances; and although generally speaking the lien exists, yet it may be waived or repelled by the character of the case. "The rule" says Judge Story "is manifestly founded on a supposed conformity with the intention of the parties upon which the law raises an implied contract; and therefore it is not inflexible but ceases to act where the circumstances of the case do not justify such a conclusion." Gilman v. Brown, 1 Mason's R. 191. What are the circumstances which shall decide whether lien or no lien is a matter of some difficulty and obscurity, and many doubts and nice distinctions will be found in the authorities. As the lien is generally presumed, it would seem that the burden is upon the purchaser to show that it was waived. Hughes v. Kearney, above cited; Mackreth v. Symmons, 15 Ves. R. 329; Garson v. Green, 1 John. Ch. R. 308. But this the purchaser may do not only by showing an express agreement to that effect, but also by the reasonable inference and implication from the circumstances. Now it would seem settled that the mere taking a bond, promissory note, bill of exchange or a simple covenant of the vendee himself will not repel the lien because as said by Lord Eldon it may have been given not to supersede the lien but for the purpose of ascertaining the debt and countervailing the receipt endorsed upon the conveyance. But it is equally clear that where a distinct and independent security is taken either of other property or the responsibility of a third person the party having carved out his own security the law will not come to his aid by creating another and the equitable lien will be gone. Bond v. Kent, 2 Verm. R. 281; Fawell v. Heelis, Amb. R. 724; Nairn v. Prowse, 6 Ves. R. 752; Cole v. Scot, 2 Wash. 141; Fish v. Howland, 1 Paige's R. 20; Wilson v. Graham's ex'or, 5
Munf. 297; Gilman v. Brown, 1 Ma-
625 son's R. 191; *S. C. 4 Wheat. R. 255.

In such cases the waiver of the lien is placed upon the ground of intention deduced from the party's taking a special security. See 3 Sugd. Vend. 191; 4 Kent's Comm. 153. So where although the responsibility of a third person be not taken, if it appear that the note bond or covenant was substituted for the consideration money

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and was in fact the thing bargained for, the lien will not exist. There it may be inferred that credit was given exclusively to the person on whom the security was taken. Thus in Clarke v. Royle, 3 Sim. R. 499, (5 Cond. Eng. Ch. R. 218,) the conveyance was in consideration of the vendee entering into covenants therein contained for an annuity to the vendor and three thousand pounds to certain persons in the event of the vendee's marrying. The vice chancellor distinguished the case from Tardiffe v. Scrugan. He considered that the deed plainly marked out that the consideration on the one side was the conveyance of the estate and on the other the entering into the covenants. He said that to declare a lien in such a case would be to go further than any of the cases that had been previously decided upon the subject of lien on purchased estates and to do that which appeared to be contrary to the intention of the parties. He accordingly pronounced against the lien.

This case is cited as authority and with apparent approbation by Tucker, P., in Brawley v. Catron, 8 Leigh 522, 530; and although the vice chancellor said that he considered it decided by the case of Winter v. Lord Anson, 1 Sim. & Stu. 434, (1 Cond. Eng. Ch. R. 221,) in apparent ignorance of the fact that the opinion of Sir J. Leach in that case had been overruled by Lord Chancellor Lyndhurst (3 Russ. R. 488, 3 Cond. Eng. Ch. R. 495), yet its weight as authority is not on that account lessened: because the difference between Sir J. Leach and Lord Lyndhurst was not in
626 the principle *applicable to the case but as to the exact state of the case. The former when he decided against the lien (for he had at first decided in favor of it) thought that the case was in principle the same as if the conveyance had stated the real contract of the parties; and that by the effect of that contract, the vendor agreed to part with his estate on consideration of the bond for the future payment of the price and that upon the execution of such bond the estate passed to the vendee in equity as well as at law. Lord Lyndhurst however held that the lien was not affected by the circumstance that the period of payment was dependent on the life of the vendor. He did not think it afforded such evidence of intention to rely on the personal credit of the vendee as would waive the lien. The fault in the reasoning of Sir John Leach, as stated by Sugden (3 Sug. Vend. 187, § 6) was that he placed the case on grounds that did not exist. He assumed that it was a case in which in effect the conveyance was in consideration of a covenant in a deed to pay the price at the future period. But though the conveyance was in pursuance of the agreement (which however was to take a bond and not a covenant) it did not otherwise refer to it and was expressed to be made not in consideration of the agreement but in consideration of the purchase money. In Clarke v. Royle however the very case was presented which was erroneously assumed to exist in Winter v. Lord Anson. The conveyance was in fact in consideration of covenants entered into by the same deed for payment of the price. "There is a marked difference," says Sir Edward Sugden, "between a conveyance as for money paid with a separate security for the price whether by covenant bond or note, and a conveyance expressed to be in consideration of covenants which the purchaser enters into by the deed itself." "It may be considered against the bearing of such a secu-
627 rity for the purchase *money to raise another upon the estate itself by implication from the very transaction." He concludes therefore that Clarke v. Royle is not shaken by Lord Lyndhurst's decision in Winter v. Lord Anson.

The principle of the case of Clarke v. Royle was applied in the case of Parrot v. Sweetland, 3 Mylne & Keene 655, (10 Cond. Eng. Ch. R. 348). There a receipt was endorsed on the conveyance for the bond of the vendee conditioned for the payment of three thousand pounds to one Orlebar with whom the vendor was about to be united in marriage, and expressed to be the full consideration to be given by the vendee. Sir John Leach, master of the rolls, held that it was a case of substitution for the price and not security, and pronounced against the heir. The cause was reheard before the V. C., Sir L. Shadwell and Mr. Justice Bosanquet, sitting as lords commissioners, and the decree of the master of the rolls was affirmed. So in Buckland v. Pocknell, 13 Sim. R. 406, (36 Eng. Ch. R. 406,) which was the case of a conveyance in consideration of certain annuities granted by the vendee and which he covenanted to pay, the vendee also being bound to pay off a mortgage debt to which the estate was subject: held by Sir L. Shadwell, V. C., referring to Parrott v. Sweetland, that there was no lien for the annuity. And the same principle may be traced in other cases.

Now the case before us seems plainly to fall within the class of which Clarke v. Royle is the leading case. It differs from that case in no material particular. Here the consideration of the conveyance is the sum of five thousand three hundred and sixty-five dollars, and the covenants of Coke to maintain Mrs. Byrd during her life, for the payment of the annuity, in case she should survive him, of three hundred dollars if she chose to board out of his family, or if she should continue in his family after his death, of one hundred
628 and *fifty dollars; and in the latter case, that she was to have a room and furniture, &c., and in either case a maid servant to wait upon her. These covenants of the vendee, and the conveyance to him were by the same deed, and upon the principle of the above cases, the covenants were the thing contracted for, and no lien can be held to exist.

If we look still further and more closely into the instruments executed by these parties to deduce from them what their

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meaning must have been, according to the principle laid down by Lord Lyndhurst in Winter v. Lord Anson and to the view of Judge Story in Gilman v. Brown, we must be brought to the same conclusion. Here is a conveyance by the grantor of her whole interest in a large plantation with all the live stock of every kind upon it, and all the farming implements used in its cultivation, the crops on hand and those then growing, the household and kitchen furniture at the mansion-house, just as it stood and a carriage and harness: also all the grantor's interest in the slaves of her husband, and her interest in the estate real and personal, as heir and distributee of three of her daughters who had died after their father: also fourteen slaves which were the separate property of the grantor. All this property is conveyed to the grantee forever free and quit of any claim of the grantor and with covenants to assure full and perfect title, unencumbered, against the grantor and her heirs forever subject only to a mortgage on the land in favor of one Rebecca Innis for the sum of five hundred pounds, to the interest upon which during her lifetime the grantor was entitled under the will of R. Innis, but her claim to which she renounced in favor of the grantee, by a covenant in the deed. The considerations of this conveyance have been already stated.

Such a contract would seem to repel
629 the idea of *lien. If one were intended, why not alluded to when the lien in favor of R. Innis is specially reserved? The consideration is in gross for both real and personal property and no discrimination is made between the proportions due for each severally. Now there is no implied equitable lien for the purchase money of personal property sold in favor of the vendor. James v. Bird's adm'r, 8 Leigh 510; McNeil v. Bird's adm'r, not reported but cited in the foregoing case: and I am aware of no case in which such a lien has been declared on a sale of both real and personal property for a gross sum. That the court of chancery will enforce specific performance of such a contract or that rent may be reserved issuing out of both on a demise of real and personal property will not help the argument. The question is what may reasonably be supposed to have been the intention of the parties, and those principles do not serve to illustrate it. The great inconvenience and embarrassments that would follow if a lien should exist in this case tend strongly to show it could not have been intended. If a lien upon any thing, it would be a lien upon all the property sold, thus disabling the vendee from disposing of a slave or any other article except subject to this doubtful uncertain contingent lien in favor of Mrs. Byrd. For there is a contingency as to the amount depending on her continuing to reside in the family or choosing to reside elsewhere. And as to part, the use of a room and furniture and the services of a maid servant, if the covenant be broken as to these, the compensation is not in a specific sum due but in damages to be assessed by a jury. To maintain the lien here would be to encounter all the objections stated by Tucker, P., in Brawley v. Catron, 8 Leigh 522, if indeed they be not stronger in this case than in that. It is no answer to say that the lien declared is for the arrears of the annuity. It cannot thus be separated
630 *from the rest of the subject but must share the fate of the whole; and if no lien for the whole consideration there is none for the annuity.

Upon the whole, I feel no doubt that Mrs. Byrd was content with the personal security of Coke and that at the time of executing the instrument, neither party contemplated or thought of a lien. And to set it up here would be to carry the doctrine further than it has ever yet gone, which in view of the expressions of eminent judges against the policy of such a lien and the marked sense of the legislature in its total abolition by statutory enactment, I certainly am not prepared to do.

We come next to the effect of the failure to record the deed of trust until after the death of Coke.

That such a deed though unrecorded is yet good and valid as between the parties is clear from the terms of the law which have no application to such a case and was decided at an early day under a former registry law. Turner v. Stip, 1 Wash. 319; Currie v. Donald, 2 Wash. 58. A general creditor therefore coming in the lifetime of the mortgagor can assert no claim to satisfaction of his debt out of the mortgaged subject to the prejudice of the mortgagee. But it is argued that upon the death of the mortgagor in this case, the general creditors acquired such rights under the provisions of the statute making the real estate of a decedent liable to his debts or under the charge in the will of Coke for payment of his debts, as entitles them to displace the mortgagee and deprive him of the benefit of the lien for which he had contracted.

The first enquiry then is what is the interest which is thus made liable by the statute to the debts of a decedent?

The act provides that all real estate of any person who might thereafter die as to which he might die intestate or which though he die testate shall not
631 *have been by his will charged with or devised subject to the payment of debts or which might remain after satisfying the debts so charged or subject to which it was so devised, shall be assets for the payment of the decedent's debts in the order in which the personal estate is to be applied. Code Va. ch. 131, § 3, p. 545. The estate then thus made subject is the estate of the debtor not that which he may have previously conveyed to another, nor (except subject to the charge) that on which he has created a lien for the payment of a particular debt. In the latter case creditors coming in under the statute must take the subject in the same plight and condition in which the debtor left it. Their rights in

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the subject cannot be enlarged and improved beyond those of the debtor to the prejudice of the creditor who has taken the lien though he may have failed to record it. The creditor who seeks to assail it must come with some lien by judgment or otherwise giving him a right to charge the property specifically. That the right given by the statute constitutes no such lien, I think, is clear. The law makes real estate assets, merely, to be disposed of as personal assets; and a creditor has no lien upon the assets. He has a right to have the whole applied in a due course of administration, but nothing in the nature of a specific lien. Nugent v. Gifford, 1 Atk. R. 462; Mead v. Lord Orrery, 3 Atk. R. 235; per Lord Eldon, McLeod v. Drummond, 17 Ves. R. 153. See remarks of Sir Wm. Grant in Mitford v. Mitford, 9 Ves. R. 87, 100; Clason v. Morris, 10 John. R. 525, 540. See also Black v. Scott, 2 Brock. R. 325.

That the general creditors take only the estate of the debtor and in the plight and condition in which he left it, is deducible from the general tenor of the act and also from the terms of the seventh section which expressly declares that the provisions of that chapter should not affect any
632 lien by judgment or *otherwise acquired in the lifetime of the decedent. And there is no sufficient reason for excluding an unrecorded mortgage from the protection afforded by this section. It is still a lien on the mortgaged subject which a court of equity will respect and enforce, assuming the debt to be fair and honest, and there can be no reason why the general creditors having no claim to charge the subject specifically, but only the estate left by the debtor, generally, should be entitled to claim any thing more than the debtor himself had, to wit, the equity of redemption after satisfying the mortgage debt. To permit them to deprive a creditor having an equity at least equal to theirs and certainly prior in point of time of the benefit of the lien for which he had contracted would be required neither by any principle of justice nor by the policy on which the law is founded.

If therefore Coke had died intestate, it is difficult to perceive on what grounds the general creditors coming in after his death under the statute could be entitled to displace the creditors claiming under the deed of trust of the 21st of June 1848 or to subject to their debts anything beyond the equity of redemption. The mortgage being good against the grantor and his heirs, nothing could descend to the heir but the equity of redemption; and if he and the mortgagee were to unite in a sale of the mortgaged premises, the creditors could not make him liable at law beyond the value of such equitable interest. The act makes him answerable for the value of the assets descended, but no more, and all that descended was the mere equity of redemption. And equity certainly would not carry the liability further. The case of a fraudulent conveyance will not illustrate the question here. It may be true that in that case, the descent would not be broken and the whole property would be liable. For when the deed is adjudged void for
633 *fraud the party has nothing to fall back upon. Very different is the case of a deed defective merely for want of having been duly recorded. Though the transfer of the legal title be arrested, the creditor has the equity of a just debt and of the stipulation with the debtor for the security of the trust deed to rely upon; and this a court of equity administering equities according to its own principles will duly respect and enforce against general creditors having no specific lien by judgment or otherwise. The parties come into the court of equity asking its aid to subject the property and they must abide by the rules and principles of that court. And although a fraudulent alienee would be treated as a mere trustee for the benefit of the creditors entitled, a creditor holding under an unrecorded mortgage to secure a bona fide debt would stand on a different footing. His equity would be at least equal to that of the creditors competing with him and he moreover stipulated for a security which they did not.

But the claim of the creditors in this case does not rest upon the right given by statute to subject the real estate of a decedent to the payment of his debts. Coke by his will which was made on the 30th of December 1849 charged his whole estate with the payment of all his debts; and it was not therefore within the terms of the third section of chapter 131, subjecting real estate to the payment of the decedent's debts. For that section is expressly confined to the real estate as to which the party died intestate or which though he may have left a will, shall not have been charged by the will or devised subject to the payment of debts, or if so charged or devised, to what might remain after satisfaction of the debts so provided for. The devise then being for payment of debts was clearly good under the act in force
634 at the date of the will; *and although generally wherever real estate is by statute made liable for payment of debts it would appear to constitute legal assets as held in Goodchild v. Ferrett, 5 Beavan's R. 398; 2 Spence Equ. Jur. 319; yet where a testator by his will charges his real estate with his debts, the real estate so charged will be equitable assets notwithstanding the statute would have rendered it liable if there had been no such charge. Charlton v. Wright, 12 Simon's R. 274; 2 Spence Equ. Jur. 312. But in the administration of assets of a decedent whether legal or equitable, the courts of equity recognize and enforce all antecedent liens, claims and charges, in rem, resting upon the property according to their priorities whether they are legal or equitable. 2 Lom. Dig. 119; Fremoult v. Dedire, 1 P. Wms. 429; Finch v. Winchelsea, 1 P. Wms. 277; 1 Sto. Eq. Jur. § 553, and cases cited in the note. And as the mortgage though unrecorded is

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valid against the grantor and his heirs, it constitutes such a lien as will be respected by the court of equity in administering the assets of the decedent.

The statute of wills authorizes every person to dispose by will of any estate to which he shall be entitled at his death and which if not so disposed of would devolve upon his heir, &c. Code of Virginia, ch. 122, § 2, p. 516; and if there were no further provision on the subject, the effect of this would be to enable the devisee to take the land devised discharged from any liability to the general creditors of the testator. Hence the statute in England upon the subject of fraudulent devises and the similar provisions of our Code. But to what estate shall it be said a party was entitled at his death and what shall devolve upon his heir if not disposed of by will? Certainly not lands which the testator had conveyed to another by deed binding upon him and his heirs, in his lifetime;

635 *or if the conveyance were not absolute but in the nature of a mortgage to secure a debt, nothing more than the equity of redemption. In the former case, his title has passed from him absolutely; in the latter it is only to be reinstated by himself or those claiming under him by payment of the amount due. By the devise, the testator will only be understood to intend to charge what he lawfully might charge and it will not be construed so as to pass more than he himself was entitled to. Nor can the devisee take more. He is not a purchaser for value, and can stand on no better footing than a voluntary grantee. The devise is the voluntary act of the debtor implying no contract or stipulation with the creditors whose debts are thus provided for. And the maxim non det qui non habet must apply.

In this case, Coke's will was made before the present Code took effect, and the case therefore falls within the influence of that of 1819, Code of Va. ch. 122, § 22. By the Code of 1819 whilst it avoided fraudulent devises, devises for payment of debts were expressly saved: and the creditors here must claim as devisees whose rights are protected by the fourth section of the act of December 18, 1789 (1 R. C. 1819, p. 392). So claiming, they can only take what Coke could devise, and this is the equity of redemption in the subject covered by the deed of trust. What they must claim is an equitable interest only and the relief they must seek is through the administration of equitable assets. Black v. Scott, 2 Brock. R. 325; 1 Sto. Eq. Jur. § 550, 552, 553; Miller Eq. Mort. 126, (42 Law Lib. 126); Newton v. Bennett, 1 Bro. C. C. 135; Silk v. Prime, Ibid. 138, n; Baily v. Ekins, 7 Ves. R. 319; Rutger's ex'ors v. Leroy, 4 John. Ch. R. 651; Nimmo's ex'or v. Commonwealth, 4 Hen. & Munf. 57. And this being the footing on which they must

636 stand, *they cannot successfully ask the aid of a court of equity to take from a creditor having at least an equal equity with them and who has moreover stipulated for and obtained a specific lien upon the real estate of the common debtor, the preference thus intended to be secured to him.

From what has been said it may be deduced that after the death of a mortgagor it is not necessary to record the mortgage to protect the lien against general creditors. In this case in point of fact the deed of trust was recorded after the death of Coke, and there is nothing in the language of the act prohibiting the recording of a deed after the death of the grantor or restricting the right to record to the lifetime of the grantor. When the execution of the deed is authenticated in the manner required by the law it is the duty of the court or clerk to admit it to record without enquiry whether the grantor be in life or otherwise. Nor is any good reason perceived why such recording will not suffice to bring the case within the terms of the law, and render the deed good against creditors from that time. And it may be urged that as the creditors had acquired no specific lien by judgment or otherwise in the lifetime of the grantor and as they took none either under the devise in the will or the act rendering real estate assets for payment of debts, they could not successfully assail the lien secured by the deed of trust. I do not dwell upon this view however because as I think the creditors acquired nothing in the nature of a specific lien either under the will of Coke or the statute making real estate assets, and as after Coke's death they could acquire no lien upon his real estate, I conceive that recording the deed of trust after his death was wholly unnecessary as to them.

It remains to consider in this con-

637 nection, the effect *of the 11th section of chapter 118 of the Code. This section provides that the words "creditors" and "purchasers" where used in that chapter and in chapter 119, shall extend to and embrace all creditors and purchasers, who but for the deed or writing, would have had title to the property conveyed or a right to subject it to their debts. And it is insisted that creditors claiming under a devise for payment of debts or under the statute subjecting real estate, are within this description. I do not think this the correct construction of the section. It was not designed to make any change in the kind or character of the debts which would entitle creditors to assail an unrecorded deed, but to define the class of creditors as to whom if their debts were of the kind and character authorizing them to call it in question, an unrecorded deed would be void. This is apparent from the context, for the section declares that the words "creditors" and "purchasers" where they occur, are not to be restricted to the protection of creditors of and purchasers "from the grantor," but are to embrace all who but for the deed would have had title to the subject or a right to subject it to their debts. It was intended to settle by statutory provision the question so much controverted in the cases of Pierce v. Turner, 5 Cranch's R. 154;

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Land v. Jeffries, 5 Rand. 211; and Thomas v. Gaines, 1 Gratt. 347; and which was decided in the last named case in conformity to the decision in Anderson v. Anderson, 2 Call 198; and overruling Pierce v. Turner and the opinions of Judges Carr, Coalter and Brooke in Land v. Jeffries; but it made no change in the well settled rule which required a creditor who would assail an unrecorded deed to show that he had some lien by judgment or otherwise entitling him to charge the subject conveyed, specifically.

I think the Circuit court erred in
638 its opinion upon *both of the questions which I have thus considered, and am of opinion to reverse the decree.

ALLEN, P., and MONCURE, J., concurred in the opinion of Lee, J.

DANIEL and SAMUELS, Js., concurred in Judge Lee's opinion as to Mrs. Byrd's heirs; but they dissented as to the validity of the deed of trust.

Decree reversed.

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639 *Roberts v. Roberts.

January Term, 1857, Richmond.

(Absent, LEE, J.)

1. **Judicial Sales—Inclement Weather—Few Bidders—Sale Set Aside.**—A sale of a tract of land made by a commissioner under a decree of the Chancery court, on a day so inclement that persons intending to be present and to bid for a part of the land, are deterred from attending, and when there was but one bidder present, who lived at the place, will be set aside, without weighing the evidence, which is conflicting, as to the sufficiency of the price at which it was sold.
2. **Same—Objections—Setting Aside Sale—Discretion of Court.***—According to the practice in Virginia, upon objection to a sale of land made by a commissioner, it is not necessary to ask that the biddings may be opened by the offer of a substantial advance upon the price reported. But the court will consider the objections to the sale, and confirm or set it aside as the merits of the case may require.

This was a bill filed in the Circuit court of Nelson county by John T. Roberts in his own right and as executor of John M. Roberts, against the other heirs of John M. Roberts, for the sale of a tract of land which was undisposed of by the will of his testator. The court made a decree appointing the plaintiff a commissioner to sell the land, which consisted of a tract of mountain land of about one thousand acres. The commissioner subsequently reported that he had offered the land for sale on the 3d day of December 1852, when it was purchased by Ann T. Roberts at the price of two dollars and sixty-two and a half cents per acre, and that she had complied with the terms of sale.

On the return of the report of the commissioner some of the heirs excepted to it, and objected to the confirmation of the sale, on the ground that the day
640 *of sale was very inclement; it raining all day, so that there were no persons present except the family living on the place, and except the commissioner, the crier and one other person; and that consequently the price was far below its real value.

It appeared from the evidence that it rained all day; and that there were no persons present except the family living on the place, the crier and one man who had gone there the evening before; and there was no bidder but Ann T. Roberts, who was one of the heirs. Several witnesses said that the day was so bad as to deter persons from going to the sale; and one who was authorized to buy some thirty-five acres of the land at seven dollars, was prevented by the weather from attending.

As to the value of the land the witnesses differed very much in opinion. Some thought the land was worth from three to four dollars per acre; whilst a number thought that it was sold for its full value, and some for even more than it was worth.

When the case came on to be heard upon

***Judicial Sales—Setting Aside Sale—Discretion of Court.**—For the proposition that, setting aside a judicial sale is within the discretion of the court, the principal case is cited in Magann v. Segal, 92 Fed. Rep. 262, where it is held that where the failure to bid was due to accident such as, together with the inadequacy of price realized, justified the court, in refusing to confirm the sale and ordering a new one.

It is also held in Kabell v. Mitchell, 9 W. Va. 492, citing the principal case, that the court may, in the exercise of a sound discretion, either affirm, or set aside, the sale, where from the facts, evidence, and circumstances before it, it appears clearly that the sale was made at a greatly inadequate price, or, it may set aside the sale upon any evidence or facts before it, which clearly show that the land sold at a greatly inadequate price.

Same—Cloud on Title.—For the proposition that a court of equity will refuse to make a sale of land where there is a cloud on title (until such cloud is removed), the principal case is cited in Parsons v. Snider, 42 W. Va. 521, 26 S. E. Rep. 287. See also, Rossett v. Fisher, 11 Gratt. 492; Curry v. Hill, 18 W. Va. 370; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775.

The principal case is distinguished in Græme v. Cullen, 23 Gratt. 287.

Same—Objections in Lower Court.—In Teel v. Yancey, 23 Gratt. 698, it is said, that, it is nowhere proved, or even charged that the conduct of the commissioner was not perfectly fair and impartial nor was it asked in the court below that the commissioner be substituted by another, nor was the sale objected to on account of the commissioner being a party to the suit. The objection is made for the first time in the appellate court, and comes too late, even if it could have availed the party in the court below. See Goddin v. Vaughn, 14 Gratt. 102; *Roberts v. Roberts, 13 Gratt. 639.*

See generally, on this whole subject, monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

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the exceptions to the report, they were sustained by the court; and the sale was set aside, and another sale by other commissioners was directed. And from this decree Ann T. Roberts applied to this court for an appeal, which was allowed.

Patton, for the appellant.
Robinson, for the appellee.

SAMUELS, J. It is the right of every party concerned in interest in property, when about to be sold at public auction, to have it offered for sale under such circumstances as afford an opportunity for fair competition amongst all who may be disposed to buy. Doubts about the identity or title of the subject to be sold may prevent prudent men from offering to
641 buy, *and are therefore enough to justify any one charged with the duty of making a sale, in postponing the sale until such doubts may be removed and the danger of sacrifice be avoided. See Rossett v. Fisher, 11 Gratt. 492; Goare v. Beuhring, 6 Leigh 585; 1 Lom. Dig. 425 top, 323 marg. Without going into an enumeration of the many causes for which public sales have been set aside, yet we see that many of them are founded on the principle that fair competition has been prevented, and sacrifice may have been incurred to the prejudice of those interested. This principle rules in cases of sales by auctioneers, executors, administrators, trustees, commissioners, and all others having authority to sell. 2 Rob. Prac. 65, old edition. Although the irregular action of the person making the sale may not always avoid it, still wherever the sale itself is allowed to stand, the delinquent in duty must make compensation to the party injured.

In the case before us a sale of land was made by a commissioner acting under a decree of the Circuit court of Nelson county. It was the right of the appellees as well as of the appellant, the parties interested, to have the benefit of fair competition. Yet the sale was made on the 3d of December 1853, a day which was so inclement because of rain, that several persons who wished to attend were prevented by the weather from doing so. There is a conflict of evidence on the question, Whether the inclemency of the day was such as ought to prevent any one who might wish to do so from attending? There is no conflict however as to the fact that some persons did stay away who had intended to be there, some of whom wished to buy the land or a part of it. There is moreover no conflict of evidence as to the fact that the appellant was the sole bidder; that the commissioner, the crier and one other, were the only persons drawn to the place in expectation
642 *of a sale; that the appellant who became the buyer, and her brother lived at the place. The case before us differs from Fairfax v. Muse's ex'ors, 4 Munf. 124, in this, that in that case there were five bidders present, including the plaintiff's agent and the defendant: in our case but one bidder was present. In our case, besides the commissioners and crier, there was but one other person in attendance, because of the expected sale, and that other had no intention to buy. In the case in 4th Munford, the report states that a "considerable number" were there. In our case persons who wished to attend were prevented by the weather from doing so. In the case in 4th Munford it is not shown that any one staid away because of the cloudy and rainy day, who desired to be at the place of sale. The marked difference in the facts of the cases in my judgment requires a difference in their decision. Seeing that the duty of the commissioner was plainly violated; that the sale reported in effect was one by private contract, the court should not go into an enquiry upon the conflicting evidence whether the price was a fair one.

It was said in the argument here that if the sale under consideration could be set aside at all, that it could only be done by opening the biddings by the offer of a substantial advance upon the price reported; that this practice of the English chancery courts should be followed here in cases like this; and that the exceptions to the commissioner's report in this case for this reason should be disregarded. This objection I think is not well taken. The commissioner is the officer of the court, and acts under its supervision. His errors, when brought to the notice of the court, or appearing on the face of his proceedings, may be corrected. Such has hitherto been the practice in Virginia without question as to its propriety; its convenience and
643 *justice are manifest, and it should not be disturbed. In Fairfax v. Muse's ex'ors, above cited, the Chancery court, in a summary way, revised the action of its commissioners, and confirmed it; and this court upon appeal affirmed the decision of the Chancery court.

I am of opinion to affirm the decree.

The other judges concurred in the opinion of Samuels, J.

Decree affirmed.

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644 *Brown's Adm'r v. Johnson.

Isbell's Ex'or v. Johnson.

January Term, 1857, Richmond.

1. **Joint Bond—Surviving Obligor—Competency as Witness.**—In an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant.

2. **Same—Same—Interest of—Competency as Witness.**—Where a witness is offered as competent on the ground that though interested in favor of the party offering him, his interest is equal or greater the other way, this last interest must be as direct and immediate as the former.

3. **Same—Same—Same—Same.**—In an action against one of two obligors in a bond, the interest of the other arising from his liability to the defendant

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for contribution is more direct and immediate than his liability as obligor in the bonds to the obligee; and he is therefore an incompetent witness for the defendant.

4. **Same—Obligors—Competency as a Witness.**—If the liability of one obligor in a bond is defeated on a ground not personal to himself, (as infancy, bankruptcy or death,) the liability of all the obligors is at an end; and therefore one obligor is an incompetent witness for his co-obligor in an action on the bond.

5. **Same—Same—Action against Personal Representative of One—Statute.***—The statute, 1 Rev. Code, ch. 98, § 3, p. 359, Code, ch. 144, § 13, p. 582, in relation to joint obligations, though it gives an action against the personal representative of a deceased joint obligor, does not affect the principle that the defeat of the remedy against one joint obligor upon a ground not personal to himself, defeats it as to all the obligors.†

6. **Same—Same—Two Actions Pending—Deposition.**—There are two actions pending by the same plaintiff against obligors in the same bond; a deposition taken by the defendant in one of the cases, can under no circumstances, be competent evi-
645 dence for the defendant in the other.

*7. **Same—Release of Obligor—Case at Bar.**—A covenant by the obligee in a bond with one of three joint obligors, that if after judgment against all the parties the money is not paid by the other two, he will relieve him from the payment of it, is not a release, and will not bar an action on the bond against all the obligors.

These were two actions of debt in the Circuit court of Appomattox county, the first brought in August 1853 by John Johnson, assignee of John H. Johnson, against the administrator of James Brown deceased; and the second by the same plaintiff against the executor of William Isbell deceased. Both actions were founded on the same bond, which was executed to John H. Johnson by William Isbell as principal, and James Brown and William J. Dunn as his sureties. This bond bore date the 10th day of April 1844, and bound the obligors jointly, to pay to John H. Johnson the sum of eight hundred and eighty-seven dollars and fifty cents, with interest, on or before the 1st of April 1847. The defendants each pleaded usury; and a release by John H. Johnson, before the assignment, to their co-obligor William J. Dunn; whereby they insisted they were released.

Upon the trial of the first named case, after the plaintiff had introduced the bond declared on, the defendant offered to introduce in evidence the deposition of Dunn, who was proved to be dead. The plaintiff objected to the evidence on the ground that Dunn was interested; and to obviate that objection the defendant offered in evidence a writing under the hands and seals of Dunn and Johnson, whereby, upon a consideration therein stated, Johnson covenants with Dunn that in the event that the bond declared on shall not be paid by the said Isbell and Brown after judgment obtained against all parties, he, the said John H. Johnson, will relieve him from the payment of the same and every cent thereof. It was admitted that this paper was genuine
646 and in full force; and that Isbell *at the time of taking the deposition was dead leaving an estate ample to pay all his debts and liabilities, including this.

But the court sustained the objection and excluded the deposition, on the ground that the said Dunn by reason of his interest was incompetent to testify: And the defendant excepted.

On the trial of the second case the same deposition was offered in evidence under the same circumstances; the only difference in the case being that the deposition was regularly taken in the first case, when the plaintiff was present and cross-examined the witness; and it was offered as evidence in the second case though only taken in the first. It was again excluded by the court; and the defendant excepted.

There was a verdict and judgment in both cases for the plaintiff; and the defendants each applied to this court for a supersedeas, which was allowed. They came on here to be heard together.

The Attorney General, for the appellants.
Garland, for the appellees.

LEE, J. The question in these cases is whether in an action under our statute against the representative of one who was jointly bound in an obligation with another who survives, and upon an issue to the merits going to the validity of the obligation and the right of the plaintiff to recover upon it, the surviving obligor is a competent witness for the defendant.

Isbell was the principal debtor and Brown, and Dunn whose testimony was offered, were jointly bound with him as sureties. In the case first named, then, that of Johnson v. Brown's adm'r, the witness Dunn has a direct and immediate interest to defeat the recovery against Brown's estate, because by so doing he prevents any demand against himself on the part
647 of Brown's estate *for contribution of his share of the amount recovered: and if this interest be not released or in

*Bonds—Joint Obligors—Discharge of One—Effect.—For the proposition that, if the liability of one obligor in a bond is defeated on a ground not personal to himself (as infancy, bankruptcy or death), the liability of all the obligors is at an end, the principal case is cited and followed in Steptoe v. Read, 19 Gratt. 10, and *foot-note*, where there is a collection of cases and the above proposition is discussed at length.

See generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

†Code, ch. 144, § 13, p. 582. "The representative of one bound with another, either jointly or as a partner, by judgment, bond, note or otherwise, for the payment of a debt, or the performance or forbearance of an act, or for any other thing, and dying in the lifetime of the latter, may be charged in the same manner as such representative might have been charged, if those bound jointly or as partners had been bound severally as well as jointly, otherwise than as partners."

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some way overcome, he would upon general principles be clearly incompetent. Moreover, if he were in any way relieved from the debt and interest, still he would be liable to contribution for the costs, because the statute gives contribution for the party's share of the whole amount for which the judgment or decree is rendered, which of course includes the costs. Code of Va. ch. 146, § 8, p. 588. And such a liability would render the witness incompetent. Hall v. Cecil, 6 Bing. R. 181; Jones v. Raine, 4 Rand. 386. That the statute gives the remedy only in case the principal be insolvent will not vary the case. By procuring a verdict and judgment for the cosurety, the witness puts an end to all question upon this subject, and that verdict and judgment will be evidence for or against him in any proceeding of the cosurety for contribution.

But it is said the interest of the witness is greater against the cosurety than in his favor because by procuring a verdict and judgment for him, he makes himself liable for the whole amount of the joint obligation, whilst the effect of a verdict and judgment against him would be to subject him to contribution for a moiety, only. This might be so, if the liability in the former case were as immediate and direct as that in the latter. But it is not so. The liability in the former case arises out of the party's executing the joint obligation and the relation in which he stands to the obligee, whereas in the latter case the liability to contribution grows out of the judgment or decree against the cosurety itself by the terms of the statute. And to counterbalance or outweigh an interest in the witness in one way by an equal or greater in the opposite, the latter must be also direct and immediate. For where the one is direct and the other contingent, the former must prevail. Goodacre v.
648 *Breame, Peake's N. P. Cases 232; Hall v. Cecil, 6 Bing. 181, (19 Eng. C. L. R. 47). Now the interest depending upon the liability of the witness to be sued for the whole, if the action failed as to his cosurety is an uncertain and contingent interest and not immediate and direct. As said by the judges in Slegg v. Phillips, 4 Adolph. & El. 852, (31 Eng. C. L. R. 203,) the recovery might depend on many contingencies; and the witness comes to prove the note a nullity, a defense which might be equally available for himself; and thus as said by Lord Denman, C. J., "it is not in the defendant's mouth to say" that the witness would be benefited by the recovery against the defendant.

Under the English practice for want of a statute making the representative of one who was jointly bound with another liable to an action at law, the precise question in these cases could not occur, as the remedy at law lies only against the survivor. But a very similar question has occurred in cases where the parties were bound jointly and severally, and also in cases of partners where one has been sued without the other being joined; and it has been held in such cases that a party thus bound jointly or jointly and severally, with the defendant, was not a competent witness in his behalf. Thus in Russell v. Blake, 2 Mann. & Grang. 374, (40 Eng. C. L. R. 418,) which was an action against one of the makers of a joint and several promissory note, another of the makers was offered as a witness for the defendant; and it was admitted both by the counsel and the court that he would be incompetent except for the act 3 & 4 W. 4, ch. 42, which however it was held did remove the objection to his competency. In a previous case against one of the makers of such note the same question had been made and had been decided against the competency of the witness who was another of the makers, without reference
649 *to the statute of W. 4, although it had passed in the year previous to the trial: but it seems not to have been adverted to either at the bar or by the court. Slegg v. Phillips, 4 Adolph. & Ellis 852, (31 Eng. C. L. R. 203). So in cases of partners, one who is proved or admitted to be a partner of the defendant but who has not been sued, cannot be examined as a witness on the part of the defendant. Goodacre v. Breame, Peake's N. P. Cases 232; Young v. Bairner, 1 Esp. R. 103; Cheyne v. Koops, 4 Esp. R. 110; Hall v. Cecil, 6 Bing. R. 181, (19 Eng. C. L. R. 47). So in an action against the acceptor of a bill drawn for the accommodation of the drawer, held the drawer was not a competent witness for the defendant. Jones v. Brooke, 4 Taunt. R. 464.

In these cases the witness was rejected because of the interest which he was supposed to have by reason of his liability over, and such liability for costs only was deemed sufficient to exclude him. And in Slegg v. Phillips, the same argument was pressed that was made here, that the witness had a greater interest to procure a verdict and judgment against the defendant than one in his favor; but that interest was held to be uncertain and contingent and not to counterbalance the direct interest to avoid contribution.

In this view, therefore, according to the authorities, I think Dunn was not a competent witness for the defendant in the case of Johnson v. Brown's adm'r: and as to the case of Johnson v. Isbell's ex'or, I think it was a sufficient reason for rejecting his deposition that it was not taken in that case but in the other; and that Johnson had the opportunity to cross-examine the witness when it was taken does not remove the objection. For it could not have been used by Johnson against Isbell's ex'or, and therefore for want of mutuality could not be used by the latter against the former: as a man who cannot be prejudiced by a
650 deposition, *or proceeding in a suit shall never receive any advantage from it. Gilb. Ev. 55; 1 Stark. (Phil. ed. 1830,) p. 264; Hard. 472; Paynes v. Coles, 1 Munf. 373, 394; Chapmans v. Chapman, Id. 393, 403. But there is another and

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broader ground, common to both cases, upon which the objection to the testimony may be rested: and this is that the witness Dunn by procuring a verdict and judgment for the defendant was in effect protecting himself against a suit for the same cause of action. For the obligation of these parties having been in its inception, joint, to enable the plaintiff to recover there must be a continuing subsisting liability on the part of the joint obligors and the representatives of those who were dead. For wherever several are bound jointly, if the right of action be gone or suspended as to any one for a cause not personal to him (as in case of his infancy, or bankruptcy or death,) the joint liability being at an end, the others may avail themselves of this suspension or discharge whether produced by the act of the party or by operation of law at the instance and by the act of the creditor. Thus in a case in which judgment had been recovered against two persons as partners, and suit was subsequently brought on the same cause against them and two others as after discovered partners, held that the joint contract of all was merged in the judgment. Robertson v. Smith, 18 John. R. 459. So a judgment on a promissory note against one, was held to bar a subsequent action against him and another alleged to be a dormant partner. Ward v. Johnson, 13 Mass. R. 148. And the same doctrine is asserted in the cases of Smith v. Black, 9 Serg. & Rawle 142, and Willings v. Consequa, 1 Pet. C. C. R. 301. The case of Sheehy v. Mandeville, 6 Cranch's R. 253, which would seem to countenance a contrary doctrine has yet not been deemed an authority controlling these cases. See the remarks of Judge Stanard in Ward v.
651 Motter, 2 *Rob. R. 536, 566. So a judgment against one joint trespasser is a bar to an action against the others. Wiles v. Jackson, 2 Hen. & Munf. 355. So where the creditor takes the specialty of one partner for the debt, held that the action against an after discovered dormant partner was extinguished by the specialty. Ward v. Motter, 2 Rob. R. 536. To a similar effect is Pudsey's Case, cited 2 Leon. 110, and Tom v. Goodrich, 2 John. R. 213. And if a verdict and judgment for the plaintiff against one of several who are jointly bound may be admitted in evidence in an action against another as a bar, it would seem to be a necessary corollary (if the deduction be not a fortiori) that a verdict and judgment against the plaintiff in the former action upon an issue going to the merits and ascertaining that the plaintiff never had any cause of action against that defendant, would be admissible as a bar to a subsequent action against another so jointly bound. For the joint obligation would clearly be at an end as to the former, and therefore as we have seen, as to all the others. See opinion of Washington, J., in Willings v. Consequa, 1 Pet. C. C. R. 301.

That this would be so where all the parties jointly bound are in life will not perhaps be questioned, and I think our statute making the representative of a deceased party liable to an action at law will not change the rule. The act it is true provides that such representative may be charged in the same manner as if those jointly bound had been bound severally as well as jointly. This was however for the purpose of the remedy merely because the action against the representative must be a several action as the jugdment is de bonis, &c.; but it does not convert the obligation into a joint and several one for other purposes. If three or more be jointly bound and one die, the action against the survivors must be against all. If one only be sued he may plead
652 the nonjoinder of the other *survivors or take advantage of the variance; and the principle which holds all who were bound by joint obligation discharged when the joint contract is put an end to as to any one by some matter not personal to him still has its effect. The object of the statute is to save the necessity of a resort to a suit in equity, but not to take away from any party any legal defense which he might otherwise make to the action excepting from. the representative of the deceased party the legal discharge upon his death leaving others jointly bound still surviving.

As to the supposed release which is relied on, I think it only necessary to say, that if it was a good release, it would not meet the objection of the witness's liability to contribution: but in point of fact, it is no release nor could it be pleaded as such by Dunn himself in bar of an action against him. To be available as such, the release must be express and not merely a constructive release. 7 Bac. Abr. (Bouv. ed.) "Obligations" D, p. 254. This was a mere covenant on the part of Johnson, that at a future period after judgment should have been recovered against all the parties, he would relieve Dunn from the payment of the same, thus expressly negativing the idea of any bar to an action even against Dunn.

On the whole I think the court did not err in excluding the evidence in either case and am of opinion to affirm the judgments.

The other judges concurred in the opinion of Lee, J.

Judgments affirmed.

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653 *Humphrey v. Foster & Wife.

January Term, 1857, Richmond.

1. **Deeds—Construction of—Case at Bar.***—A deed conveys land to the grantee forever, to hold for life. As the premises would only convey a fee by virtue of the statute, and by the statute the whole deed is to be looked to to ascertain what estate is

*Deeds—Construction of.—For the proposition that, in the construction of a deed under the statute (1 Rev. Code 1849, ch. 99, sec. 27), the whole deed should be looked to in order to ascertain the intention of the grantor, and consequently what

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intended to be passed, the *habendum* in this deed is not void, but only a life estate passes by the deed.†

2. **Chancery Practice—Bill for Partition—Prayer for General Relief.**‡—On a bill claiming a share of a tract of land, and asking for a partition, and for general relief, the plaintiff's right to partition being established, under the prayer for general relief there may be a decree for an account of rents and profits.

3. **Appellate Practice—Errors in Decree for Account—How Corrected.**§—Errors in the details of a decree for an account are not a proper subject for appeal and correction in the appellate court; but they may be corrected by exceptions to the commissioner's report.

By deed bearing date the 23d of June 1820, Edmund Humphrey, in consideration of natural love and affection, and for divers other good causes and considerations, granted to his wife Elizabeth Humphrey forever, the tract of land on which he lived, and apparently all his personal property. To have and to hold and enjoy all and singular the said lands, goods and chattels for life. Mrs. Humphrey survived her husband and lived until 1843 or 1844. She held the land, &c. in possession; and in July 1842 she executed a deed, by which she, for natural love and affection and one dollar, conveyed the land to her grandson William H. Humphrey, reserving to herself the possession during her life.

After the death of Mrs. Humphrey Thomas Foster and his wife, who was a daughter of Edmund Humphrey,
654 *filed their bill in the circuit court of Louisa county, against William H. Humphrey and the other heirs of Edmund Humphrey, in which they set out the deed to Mrs. Humphrey, which they charged gave her but an estate for life, her death, and that the land had been since that time in the possession of the defendant William H. Humphrey, who had taken the rents and profits to his own use. And the prayer of the bill was for a partition of the land; and for general relief.

William H. Humphrey demurred to the bill, and also answered, insisting that Mrs. Humphrey took a fee in the land; and that she had conveyed the same to him.

Upon the hearing in September 1853, the court overruled the demurrer, and held that Mrs. Humphrey took but a life estate in the land; and made a decree directing a commissioner of the court to take an account of the rents and profits from the end of the year in which Mrs. Humphrey died to the end of the year 1854. From this decree William H. Humphrey obtained an appeal to this court.

John G. Williams, for the appellant, insisted:

1st. That the conveyance being to Elizabeth Humphrey forever, she, by the operation of the act of 1785 dispensing with words of limitation, took a fee: And therefore the habendum for life being repugnant to the grant, is void. Baldwin's Case, 2 Coke's R. 18 and 23. That this was the doctrine of all the old authorities; and it has not been denied by the modern cases; but a distinction has been taken. Thus where a conveyance is to A and his heirs, habendum to A and the heirs of his body, the habendum is held to be valid as not being inconsistent with the grant. Goodtitle ex dem. Dodwell v. Gibbs, 12
655 Eng. C. L. R. 359; Doe ex *dem. Timmiss v. Steel, 45 Eng. C. L. R. 662; Ingram v. Porter, 4 McCord's R. 198; S. C. 1 Harper's R. 492; 3 Gill's R. 198; 2 Lom. Dig. 215 marg.

2d. He submitted the question as to the propriety of the decree for an account, under the pleadings in the cause.

Holladay, for the appellee, upon the last point said there was a prayer for general relief, and that would authorize the decree for account.

Upon the first point made by the counsel for the appellant, he admitted that the old rule was as it had been stated. That rule is that where the conveyance clearly in technical language conveys a fee, the habendum for life is repugnant and void. But according to the rules of the common law the word "heirs" is necessary to convey a fee; and the rule was founded on the idea that there were two intents clearly expressed, and that the latter was therefore void. But if the

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estate was intended to be granted, the principal case is cited and followed in Mauzy v. Mauzy, 79 Va. 538; Bank of Berkeley Springs v. Green, 45 W. Va. 171, 174, 31 S. E. Rep. 261, 262.

See Code of Va. 1887, sec. 2430; Code of W. Va., ch. 71, sec. 8.

In Blair v. Muse, 83 Va. 240, 2 S. E. Rep. 31, it is said, that Humphrey v. Foster, 13 Gratt. 652, is not in conflict with the case under consideration, in which case there were two clauses, irreconcilable and repugnant, and it is held that the last was invalid and the first would prevail.

†See JUDGE ALLEN'S opinion for the statute.

‡**Chancery Practice—Bill for Partition—Prayer for General Relief.**—For the proposition that, on a bill asking for partition and for general relief, the right to partition being established, under the prayer for general relief there may be a decree for an account of the rents and profits, the principal case is cited and followed in Sturm v. Chalfant, 38 W. Va. 253, 18 S. E. Rep. 453; Rust v. Rust, 17 W. Va. 907.

See, in accord, Pickens v. Kniseley, 36 W. Va. 794, 15 S. E. Rep. 997.

§**Appellate Practice—Errors in Decree for Account—How Corrected.**—In Rust v. Rust, 17 W. Va. 912, it is said: "Errors in the details of a decree for an account are not a proper subject for an appeal and correction in the appellate court; but they may be corrected by exceptions to the commissioner's report. Humphrey v. Foster, 13 Gratt. 653. Of course this means by proper and sufficient exceptions. And on this subject, see McCarty v. Chalfant, 14 W. Va. 531, 558, 559."

The principal case is quoted with approval in Hyman v. Smith, 10 W. Va. 318.

See generally, monographic *note* on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 23 Gratt. 376.

premises did not convey a fee by clear technical language, the habendum was not void.

In this case the deed would not pass the fee at common law; and we must therefore look to the whole instrument to ascertain the intent of the grantor. Our statute which dispenses with words of limitation, leaves the intent to be ascertained from the whole deed. And the authorities cited on the other side show that where the premises and the habendum can stand together they will be so construed. 2 Lom. Dig. 217. Here the deed on its face shows that the grantor only intended to give an estate for life.

ALLEN, P. At the common law, the words "heirs" was necessary to create a fee simple in all feoffments and grants to natural persons, and conveyances to natural persons taking effect as transfers of the
656 legal estates by the operation of the statute of uses. *Littleton, § 1; Lom. Dig. 218, m; 4 Kent's Com. 5. And as deeds are to be taken most strongly against the grantor, when by the premises an estate is conveyed to one and his heirs habendum to him for life, the habendum is repugnant and void, as it cannot perform the office of devesting an estate already vested by the premises. 2 Lom. Dig. 216; 4 Kent's Com. 468.

These familiar doctrines have not been controverted in argument; but their application to the present case is denied. E. Humphrey by his deed of the 23d of June 1820 conveyed to his wife forever certain "lands and other property, to have and to hold and enjoy all and singular the said lands, goods and chattels for life." Elizabeth Humphrey, by deed of the 19th of July 1842, conveyed the land in controversy to the appellant in fee; and afterwards departed this life. And the question in the case is, Whether by the deed from her husband she took an estate for life or in fee simple? At the common law the estate would have been for life, as the word heirs was wanting; for says Littleton, § 1, If a man purchase lands by the words "to have and to hold to him forever," he hath but an estate for term of life, for that there lack these words (heirs) which words only make an estate of inheritance in all feoffments and grants. By our statute, 1 Rev. Code, ch. 99, § 27, p. 369, in force at the date of this deed, it is enacted, "that every estate in lands, which shall hereafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." In virtue of this clause the grantee in the deed under consideration would have taken a fee simple if the words in the premises stood alone. But it could be treated as a fee simple in virtue of the statute only,
657 and by *the statute the whole deed must be looked to for the purpose of ascertaining whether there is any qualification or limitation upon the generality of the first provision; for such a deed can only operate to convey the fee simple if a less estate be not limited by express words, &c. In the present case we perceive by the habendum that an estate for life was expressly limited; and as the object under the statute is to ascertain what estate was intended to be granted by the deed, if a less estate than a fee is limited by express words in any part of the deed, it must control and qualify the general words used in the premises. I think, therefore, the deed from E. Humphrey conveyed but a life estate to his wife.

As to the second error assigned, that no account for rents and profits having been specifically asked in the bill none should have been ordered, it is sufficient to say that the bill contained the usual prayer for general relief, and a recovery of rents and profits would in general be incident to the recovery of the land. As to the details of the order of accounts, the decree is interlocutory, and all objections as to the time of commencing the said account or terminating it may be raised upon exceptions to the report. The appellant will not be precluded by the order directing the account from presenting such objections by exceptions to the commissioner's report.

I think the decree should be affirmed.

The other judges concurred in the opinion of Allen, P.

Decree affirmed.

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658 *Hale v. Chamberlain, &c.

January Term, 1857, Richmond.

Motion to Recover Money on Contract—Return—Docketing of Causes.*—In a proceeding under the Code, ch. 167, § 5, p. 640, to recover money due upon contract, by notice, the notice must be returned forty days before the commencement of the term, and put upon the docket of the court, or it cannot be tried at that term.†

By a notice dated January 6th, 1854, Chamberlain & Bacon gave notice to Elias Hale that on the 10th of March they would move the Circuit court of Richmond for a judgment against him for six hundred and twenty-nine dollars and fifteen cents and

*Motion to Recover Money on Contract—Return—Docketing of Causes.—In Higginbotham v. Haselden, 3 W. Va. 273, it is said: "By section 1 of chapter 177 of the Code, 1860, p. 730, the clerk is required to make out a docket of the causes ready for trial on hearing before the commencement of such term of the circuit court, and it follows that no case not matured and ready for trial before the commencement of a term can be put on the docket or tried at such term. Hale v. Chamberlain, 13 Gratt. 658."

The principal case is also cited in Hanks v. Lyons, 92 Va. 32, 22 S. E. Rep. 813; Long v. Pence, 98 Va. 587, 25 S. E. Rep. 593. See also, 2 Va. Law Reg. 647.

†See the statute in the opinion of JUDGE ALLEN.

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costs, upon a bill of exchange, &c. This notice was served on Hale on the 7th of January, and was filed in the clerk's office of the Circuit court on the 16th.

On the 23d of March the cause was taken up, when the defendant moved the court to remove the same from the docket, on the ground that it was founded on a notice bearing date on a day subsequent to the commencement of the then term of the court, and that it was filed in the office during said term. But the court overruled the motion, and proceeded to hear the cause; and there was a verdict and judgment for the plaintiffs. Thereupon Hale applied to this court for a supersedeas, which was allowed.

Howard & Sands, for the appellant.

Blackwell and Randolph, for the appellees.

ALLEN, P. Prior to the Code of 1849, summary remedies were given by various statutes for the recovery
659 *of claims due to the commonwealth, and for many claims due to individuals by motion on ten days' notice. The revisors seeing that these proceedings had worked well, proposed to extend the remedy by motion on notice to all cases in which a person was entitled to recover money by action on contract. The motive for such extension was to simplify and shorten pleadings and other proceedings. To obviate the objection that judgments for debts generally, should not be rendered so promptly, as in those cases wherein by the existing laws judgments were allowed by motion, they suggested that the notice of a motion for a judgment for such debts should be longer, and that as it required two or three months to get an action on the docket, two or three months' notice of such a motion could be required. In accordance with these views they reported a section allowing such motions. The plan recommended underwent some modifications in the legislature, and as modified is found in the Code, ch. 167, § 5, p. 640, to be taken in connection with some other provisions of the Code bearing upon the subject and necessary to be looked to for the purpose of ascertaining the intention of the legislature. The section referred to allows "any person entitled to recover money by action on any contract, by motion before any court which would have jurisdiction in an action otherwise than under the 2d section of the 169th chapter, p. 641 of the Code, to obtain judgment for such money after sixty days' notice, which notice shall be returned to the clerk's office of such court forty days before the motion is heard. A motion under this section which is docketed under the 1st section of chapter 177, p. 670, shall not be discontinued by reason of no order of continuance being entered in it from one day to another, or from term to term." The 1st section of chapter 177 directs that before every term of the General court or a
660 Circuit court and every *quarterly term of a County and Corporation court, the clerk shall make out a docket of the following cases pending, to wit: First, cases of the commonwealth; and secondly, motions and actions in the order in which the notices of the motions were filed, or in which the proceedings at rules in the actions were terminated, docketing together as new cases, those not on the docket at the previous term. He shall under the control of the court set the cases to certain days, and the docket shall be called, and the cases on it tried or disposed of for the term in that order. The provision as to making out the docket is substantially the same as that contained in the 1 Rev. Code 1819, p. 507, § 76, varied so far as was necessary to provide for motions. The law then as now provided that the docket was to be made out before the term, and it followed that no cause could be put on the docket in which there was an office judgment, unless such office judgment had been obtained before the term; and where the office judgment was obtained on the same day the term commenced, the cause could not be put upon the docket at that term. White v. Archer, 2 Va. Cas. 201; Green v. Skipwith, 1 Rand. 460.

In regard to cases of that description, where there is an office judgment, it was not pretended in argument that the case could be placed on the docket unless the office judgment was obtained before the term. This results as well from the provision requiring the docket to be made out before the term as from the law giving the defendant until the next term after the office judgment was confirmed, to set it aside. The provision requiring the docket to be made out before the term applies as well to motions as to actions: the phraseology used is the same as to both; they are treated as cases pending, because they have been matured for their position on the trial docket before the term, by the
661 service and filing of *the notice in the time prescribed, where the proceeding is by motion; by the confirmation of the conditional judgment at rules where the proceeding is by action at the common law. The object had in view was, as suggested by the revisors, to simplify and shorten pleadings and other proceedings; and this was to be effected by substituting the notice for the writ and pleading in the common law action. It was not the intention of the legislature, as it is disclosed by the various provisions recited above, to empower parties to mature cases during the continuance of the term. The revisors had adverted to the time required, two or three months, to get an action on the docket; and referred it to the legislature to determine how long the defendant should have notice of a motion, as I understand their suggestion, to accomplish the same object, of getting the motion on the docket. The legislature, from analogy to the time usually required to get an action on the docket, fixed the time of the notice at sixty days, to be filed forty days before the motion is heard.

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By this construction the symmetry of the system is preserved. The law is general; applicable to all the circuit courts and the quarterly terms of the county and corporation courts. The circuit courts are held semiannually, and where the proceeding is by action, it must be matured for a place on the docket before the term; and it is apparent the legislature did not contemplate that when the proceeding was by notice, it could be commenced and matured during the term. The circumstance could occur only in regard to the courts of the city of Richmond; and there is nothing indicating an intention to afford suitors in that court an advantage over those in the other circuit courts. That it was not intended to place notices of this kind on the footing of the usual ten days' notice, is manifest from the fact that the notice was to be given
662 sixty *days and filed forty days; that it was to be docketed before the term, and that in the county and corporation courts, the notices provided for by § 5 of ch. 167, and actions, are made cognizable only at the quarterly terms. Code, ch. 157, § 4, p. 610. In the last particular the section reported by the revisors gave jurisdiction to the county and corporation courts at the monthly terms. It was changed in the legislature; and from the terms used in the law referring to this new proceeding for the recovery of debts generally, then first provided for, and making it and actions at law cognizable only at a quarterly term, the intention is manifested to maintain the agreement between these two modes of proceeding as to the time of docketing and trial. Great inconvenience would follow from any other construction. The clerk before the term is to make out the docket of the cases pending, and set them to certain days, and the cases are to be tried or disposed of for the term in that order, unless for good cause the court should take up any out of term.

A certain time is allowed before the term to get the case on the docket that the defendant may prepare for a trial; and it is set to a certain day on the docket, that he may know when to summon his witnesses. But if a case may be matured during the term, there is no provision for placing it on the docket; and there would be no propriety in hearing it on the day named, so as to interrupt the regular calling of the docket, and so to give a preference over cases entitled from their place on the docket to a priority. The case would have to be called on the day named, and continued to some day at the end of the days set, or the defendant would be required with his witnesses to be constantly in court to be ready whenever at some leisure interval the case should be called up for trial.

The legislature, I think, never contemplated such a proceeding; and an examination of the various provisions
663 *contained in the Code has satisfied me that the only object was to simplify the pleadings; but that a proceeding of the kind authorized by § 5 of ch. 167, must be in a condition to be docketed before the term to authorize the court at that term to give judgment. When so docketed it is a case in court; and by the last clause of the section shall not be discontinued by reason of no order of continuance being entered in it from one day to another or from term to term. The object of this clause, like the other provisions of these laws, is to keep up the analogy between the two modes of proceeding. The docketing supersedes the necessity of calling and continuing the motion, and it remains like actions at law, a case in court to be called, and disposed of in the regular calling of the docket.

I think the court erred in overruling the motion of the defendant to remove the motion from the docket, as set forth in the first bill of exceptions taken by the defendant, and in proceeding to hear and render judgment on said motion, being founded on a notice bearing date on a day after the commencement of the term at which the motion was heard and judgment was rendered. The judgment should be reversed, and the cause remanded for the notice to be docketed and cause proceeded in.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

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664 *Ramsey & als. v. Ramsey's Ex'or.

January Term, 1857, Richmond.

[70 Am. Dec. 488.]

Wills—Olograph—Signing—Name of Testator at Commencement.*—The name of a testator at the commencement of an olograph will is an equivocal act, and unless it appears affirmatively from something on the face of the paper that it was intended as his signature, it is not a sufficient signing under the statute. Code, ch. 122, § 4, p. 516.*

At the April term 1856 of the Circuit court of Charlotte, a paper was propounded

*Wills—Olograph—Signing—Name of Testator at Commencement.—For the proposition that, the name of a testator at the commencement of an olograph will is an equivocal act, and unless it appears affirmatively from something on the face of the paper that it was intended as his signature, it is not a sufficient signing under the statute, Code 1849, ch. 122, sec. 4, the principal case is cited and followed in Roy v. Roy, 16 Gratt. 419, and *note*; Warwick v. Warwick, 86 Va. 602, 10 S. E. Rep. 843: McBride v. McBride, 26 Gratt. 479, and *note*.

Upon the question of the signing of a will, see discussion in 2 Va. Law Reg. 469, where the principal case is cited. The principal case is also cited in French v. French, 14 W. Va. 479. In Perkins v. Jones, 84 Va. 364, 4 S. E. Rep. 838, citing the principal case, it is held that a will wholly written, signed and sealed by the testator, who is of sound mind, *containing an attestation clause unsigned by witnesses*, is valid.

†See the opinion of JUDGE DANIEL for the statute.

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for probat as the will of Thomas Ramsey, and the probat thereof was opposed by several of his children. The only question in the cause was, Whether the name of the testator at the commencement of the will, which was wholly written by the testator, was a sufficient signing under the act, Code, ch. 122, § 4, p. 516? The paper commenced as follows: "I, Thomas Ramsey of Charlotte, do hereby make my last will and testament in manner and form following." He then directs the payment of his debts; disposes of his whole estate, and concludes as follows: "Lastly. I do constitute and appoint my friend Col. Thomas Pugh the executor of this my last will and testament, hereby revoking all other and former wills or testaments by me heretofore made, this sixteenth of July 1855."

This paper was found in the pocket book of the deceased which was locked up in his drawer, and when found it was folded up in the form of a letter, and sealed with a wafer, without endorsement of any kind.

The testator left a widow and several children by a former, and one by the present, wife. Having received all his estate with his last wife, by his will he
665 *left it to her for her life, and at her death, with the exception of some merely nominal legacies to his other children, he gave it to his son by her.

The court below admitted the paper to probat; and the contestants applied to this court for an appeal which was allowed.

Bouldin, for the appellants.
R. T. Daniel, for the appellee.

DANIEL, J. The fourth section of the chapter on wills, in the Code of 1849, p. 516, declares that "no will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover unless [it] be wholly written by the testator, the signature shall be made or [the will] acknowledged by him in the presence of at least two [competent] witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

On comparing this section as it now stands in the Code, with the corresponding section reported by the revisors, (see Report of Revisors, p. 624,) it will be seen that the legislature have adopted the precise language of the revisors in all that relates to the manner in which the signature of the testator is to be made—the only departures, in the section as enacted, from the same as reported, being, that in the second clause the revisors refer to the will by the terms "the instrument," whilst the legislature use for the same purpose the demonstrative pronoun "it;" that whilst the revisors required that "the signature" should "be made or acknowledged," the section as adopted declares that "the signature shall be made or the will acknowledged"
666 *in the presence, &c.; that the legislature have inserted the word "competent" before the word "witnesses," and have substituted the words "attest and subscribe" by the word "subscribe" alone; and have also dropped from the section the last clause or sentence found in that reported by the revisors, declaring that "a will so executed shall be valid without any other publication thereof."

It will be further seen on looking to the report of the revisors, p. 624, that in a note to the first clause of the section, they say, "This conforms to the decision in Waller v. Waller, 1 Gratt. 454, and is thought to be better than an arbitrary rule requiring the signature at the foot or end of the paper."

In Waller v. Waller the will was wholly in the testator's handwriting, and commenced, "In the name of God, amen. I, John Waller," &c. It disposed of all the testator's property, and was in all respects formal and complete, with the exception that it concluded, "In witness whereof, I have hereunto set my hand this day of 1841." "Signed and acknowledged in the presence of:" and that it was never attested by witnesses nor further signed by the testator. This court reversed the sentence of the Superior court of Henry admitting the will to probat. The substance of the opinions of the several members of this court, and of the decision, is succinctly and correctly stated by Judge Lomax in the 3d volume of his Digest, (new ed.) at p. 39, 40. He says, "In the opinion delivered by Allen, judge, with the concurrence of Baldwin, J., the principle of Lemayne v. Stanley, in relation to olograph wills in Virginia, was much discussed. According to that opinion the finality of the testamentary intent must be ascertained from the face of the paper, and extrinsic evidence is not admissible either to prove or disprove it. The signing of a will, to be a sufficient signing under the statute.
667 *must be such as upon the face and from the frame of the instrument appears to have been intended to give it authenticity. It must appear that the name was regarded as a signature, and that the instrument was complete without further signature; and the paper itself must show this. Stanard, J., expressed no opinion but concurred with the other judges in favor of reversing the judgment of the court below which had admitted the instrument to probat as a will. Brooke, J., dissented. Cabell, P., said that the paper propounded as the will of John Waller bore upon the face of it internal evidence that he did not regard it as a final and concluded act. It was manifest from the paper itself, that he intended something further to be done; that it should be signed and acknowledged in the presence of witnesses. He did not therefore intend that paper, which was not signed (by subscription) and acknowledged, to be his will. To that extent we may suppose there was an agreement of all the judges, who con-

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curred in the judgment of reversal, which was rendered."

The difference between the opinions of Judges Allen and Cabell would thus seem to be that the former held no signing of an olograph will to be sufficient except when it appeared affirmatively upon the face or from the frame of the instrument that the signing was intended to be a signing to give authenticity to the paper; whilst the latter, without indicating whether he could or could not go to that extent, was of opinion that when it appeared from the face of the paper that the testator intended something farther to be done, (which intention he held was made apparent in that case by the presence of the "In testimonium" clause and the absence of any attestation by witnesses and of any subscription or further signature of his name by the testator,) the paper ought not to be regarded as a final and concluded act. In the opinion
668 *of the former the signing in the body of the instrument was from its nature an equivocal act, which required to be explained by some further evidence, apparent on the face of the paper, of the testator's intention thereby to authenticate it, before it could have that effect, whilst the opinion of the latter went only to the extent of holding that when, in such case, the finality of the act was negatived by other internal evidence that the testator did not regard the instrument as a concluded act the signature in the body of the will was not sufficient. And as Baldwin, J., alone concurred in the opinion of Allen, J., and Stanard, J., gave no reason for concurring in the judgment reversing the sentence admitting the will to probat, whilst Brooke, J., dissented, the decision, it must be conceded, cannot be held as declaring any principle broader than that announced in the opinion of Judge Cabell. Still, when it is considered that the decision in Lemayne v. Stanley, though generally followed in England and in most of the states of the Union, where the act of 29 Charles 2 has been adopted, has been regarded by some of the most learned and eminent elementary writers and judges in both countries, as at war with the plain and obvious meaning of the statute, letting in many of the most serious evils which it was the design of the statute to avoid; that, in order to cure these evils and to shut out all doubt as to the meaning, office and force of the signature, it became necessary in England so to change the law by legislative enactment as to require that the "will shall be signed at the foot or end thereof;" that like enactments with the like end in view, had been passed in New York and Pennsylvania; that the law upon the subject in this state, (at least in respect to olograph wills,) had been left, by the cases of Selden v. Coalter, in the General court, 2 Va. Cas. 553, and Waller v. Waller, in this court, in a most unsettled condition;
669 *that Judge Allen, in the course of his opinion in Waller v. Waller, adverted to the recent statutory changes just mentioned; that he declared himself in favor of a rule requiring that the signature should be so made as that upon the face and from the frame of the instrument it should appear to have been intended to give authenticity to the paper, and argued to show that such a rule was preferable to a statute requiring the paper to be signed at the foot or end; assigning as a reason that the statute would be inflexible, whilst cases might arise of a signing at some other place, under such circumstances apparent on the face of the instrument, as would be equally entitled to produce the belief that the signing was intended to authenticate the will; that the revisors, in their note already cited, whilst referring to the case of Waller v. Waller, also made evident allusion to the provision of the 9th section of ch. 26, 1 Vict. requiring the will to be signed at the foot or end, and recommended the scheme which they reported as better calculated to attain the end in view—When due weight is given to these considerations, there arises, I think, a fair inference that the legislature, in requiring that the will shall be signed "in such manner as to make it manifest that the name is intended as a signature," designed not merely to enact what had been decided in Waller v. Waller, but to furnish a rule in respect to the signature, which, whilst it would have all the certainty of the British statute, would yet let in wills, which, though not signed at the foot or end, might be signed in such manner as to afford internal evidence of authenticity equally convincing.

This view is sustained by Judge Lomax in the recent edition of his Digest. In commenting on the section of the Code now under consideration, he says, "It now requires, in addition to what was expressed under the former law, that it shall be
670 signed in such *manner as to make it manifest that the name is intended as a signature." "This expression was probably inserted in approbation of the principle that was decided (but in which decision it may seem there was not an unanimity of the judges) in the case before referred to of Waller v. Waller, and to settle as far as general expressions can settle the law of particular cases, the doubts and difficulties in Selden v. Coalter, and which may often occur in cases of olograph wills. The design is probably the same in effect as that which the English statute requires when it says that 'it shall be signed at the foot or end thereof by the testator.' The manifest intention of the signature wherever placed being the rule of the Virginia statute; the signing at the foot or end being alone the index of the intention as the rule of the English statute of Victoria." 3 Lom. Dig. 2d ed. § 35, p. 70. Whether in the effort to construe the words in question we look alone to their ordinary import and the context, or seek their interpretation in the state of the law existing at the time when the act was passed, and shown to have been brought to the notice of the legislature, and in the design which

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we thence deduce to have been contemplated by them, I think there is no serious difficulty in coming to the conclusion that the act recognizes no will as sufficiently signed unless it appears affirmatively from the position of the signature, as at the foot or end, or from some other internal evidence equally convincing, that the testator designed by the use of the signature to authenticate the instrument.

And as in the case under consideration the signing at the top alone, which from its nature is an equivocal act, is aided by no other evidence or explanation, on the face of the paper, showing that such signing was used for the purpose of ratifying and authenticating the contents of the instrument, I am of the opinion that the requirements of the act have not been com-
671 plied *with, and that the Circuit court erred in admitting the paper to probat.

I think that the sentence of the Circuit court should be reversed, and probat of the paper refused.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

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672 *Ballow & als. v. Hudson & als.

January Term, 1857, Richmond.

1. **Wills—Probate Proceedings—Conclusiveness of—Case at Bar.***—A paper is propounded for probat to the County court of C, as the will of B, and is rejected on the ground that B was incompetent to make a will. Afterwards the paper is propounded for probat to the Circuit court of C, and that court, with knowledge that it had been rejected in the County court, admits it to probat. The sentence of the County court is conclusive against the will, and the sentence of the Circuit court is a nullity.

2. **Same—Bill to Set Aside—Case at Bar.**†—Bill to set aside a will states the facts showing the probat is a nullity, but asks for an issue *devisavit vel non*, and for general relief. The court may disregard the prayer for an issue, and give the proper relief under the prayer for general relief.

In December 1846 Hyram Hudson and others, claiming to be next of kin to Jesse Ballow deceased, filed their bill in the Circuit court of Halifax county, in which they state, that after the death of Jesse Ballow a certain paper writing purporting to be his last will was offered for probat in the County court of Cumberland, and probat thereof was refused by the court; whereupon the parties offering said will applied for probat of the same to the Circuit court of Cumberland, when the said paper was admitted to probat. They charge that the probat was procured by fraud, the parties who had opposed the probat in the County court having been bought out; and the plaintiffs, one of them residing out of the state, and the others having been infants at the time. That Jesse Ballow was incompetent to make a will, and had been so all his life; one of the persons named as executor in the will having been his committee for many years. They make the executors and other parties in interest
673 defendants, *and ask for an issue of devisavit vel non; and for general relief.

The executors and legatees in the will answered the bill denying the fraud; insisting that Jesse Ballow was competent to make a will; and relying upon the judgment of the Circuit court admitting the paper to probat as conclusive upon the parties; that proceeding having been had under the act of March 24th, 1838, Sess. Acts of 1837-38, p. 71; and all the parties having been proceeded against, either by regular service of process or order of publication.

In June 1852 the plaintiffs were permitted to amend their bill. In their amended bill they set out more distinctly the facts stated in their original bill; and they especially set out the fact that the paper had been offered for probat in the County court of Cumberland by the executors therein named, and that the court after hearing the evidence was of opinion that Jesse Ballow was not of sound and disposing mind and memory, and refused to admit the paper to probat. And they state that some time afterwards two of the legatees in the will offered the paper for probat in the Circuit court of Cumberland, and that it was there admitted to probat. The other facts and charges set out in the original, are repeated in this amended bill; and the prayer is that the judgment of the Circuit court may be declared null and void; that the judgment of the County court may be held as conclusive; that all proper accounts may be taken; and for general relief.

***Wills—Probate Proceedings—Conclusiveness of.**—Upon the question of the conclusiveness of probate proceedings, the principal case is cited and followed in Connolly v. Connolly, 32 Gratt. 664, and *note*.

See further on the subject, Schultz v. Schultz, 10 Gratt. 358; Coalter v. Bryan, 1 Gratt. 18; Wills v. Spraggins, 3 Gratt. 555; Robinsons v. Allen, 11 Gratt. 785; Burnley v. Duke, 2 Rob. 102; Fisher v. Bassett, 9 Leigh 119.

†**Chancery Practice—Bill to Set Aside Will—Prayer for General Relief.**—In Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. Rep. 31, it is said: "It only remains, now, to consider whether the bill in this case is sufficient to warrant the granting of the relief to which the plaintiff therein is entitled. The relief herein indicated as proper and equitable is not embraced in the special prayer, but the bill contains a prayer for general relief, and, inasmuch as every fact necessary to establish the relief to which the plaintiff is entitled is set out fully in the bill, there would be no difficulty in administering it under the prayer for general relief, by referring the cause to a commissioner, with such orders and instructions as should be equitable (Woods v. Fisher, 3 W. Va. 536; Ballow v. Hudson, 13 Gratt. 672); but for the fact that the necessary parties are not before the court."

See *foot-note* to Humphrey v. Foster, 13 Gratt. 653.

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The executors and legatees again answered, referring generally to their former answers. The records of the proceedings in the County and Circuit courts were filed in the cause. The first shows the judgment of the County court, rejecting the paper propounded by the executors named
674 therein, on the *ground that the testator was not of sound and disposing mind and memory.

The record of the proceedings in the Circuit court commences with an order in which reciting that "it appearing to the satisfaction of the court that the clerk of the County court of Cumberland has in his possession as clerk the will of Jesse Ballow deceased, bearing date on the 3d of December 1839, which said will was offered for probat in said County court at September court 1844, and rejected by the court," the clerk is directed to bring up the paper. And he having produced the paper, it was propounded for probat by two of the persons named in it as devisees and legatees.

The only parol testimony filed in the cause was to show that the plaintiffs were of the next of kin of Jesse Ballow, and that some of them were infants when the paper was admitted to probat in the Circuit court.

The cause came on to be heard in May 1854, when the Circuit court held that the judgment of the County court of Cumberland refusing to admit the will of Jesse Ballow to probat, was conclusive to establish that the will then offered was not the will of said Jesse Ballow. That the proceedings in the Circuit court were not of an appellate character, but original; and that the judgment of said court did not affect the judgment of the County court. And the court proceeded to order accounts preparatory to a final decree. From this decree the executors and legatees applied to this court for an appeal, which was allowed.

Hughes, for the appellants.
P. Roberts, for the appellees.

SAMUELS, J. This case grows
675 out of a contest *about the succession to the estate of Jesse Ballow deceased; the appellees, who were complainants and are of the next of kin, allege an intestacy; the appellants, defendants below, claim under an alleged will.

It is averred in the original bill, that the paper called the will of Jesse Ballow, had been propounded for probat, in the County court of Cumberland county, by William T. Ballow and Jane Booker, two of the legatees named therein, and that probat thereof was refused by that court: That the will was at a subsequent day again offered for probat in the Circuit superior court of law and chancery for Cumberland county, by which court the paper was admitted to probat; and that the property of the decedent had been sold by the persons named as executors in the will. This bill prays for an issue devisavit vel non, and for general relief. The amended bill avers substantially the same facts with more minuteness of detail, and prays for an account of the estate, and for general relief; waiving every thing in the original bill inconsistent with the amended bill.

It may be conceded that a bill praying an issue devisavit vel non ought properly to ask for nothing else; yet if it should go into a statement of facts which show that the issue is not necessary, but that other relief would be appropriate, I am of opinion the court should not dismiss the bill for multifariousness, but should retain it for a hearing upon the merits. In this case, upon the facts stated in the original bill, and repeated in the amended bill, under the prayer for general relief in each, the Circuit court was warranted in hearing the case on its merits.

It appears in the record of the proceedings of the County court in the matter of Jesse Ballow's will, which is made part of this record, that the will was propounded for probat by parties claiming interest under it; that a contest was had about
676 its validity; *and that the court rejected it because of Jesse Ballow's incompetency to make a will. From this sentence and judgment no appeal was taken, nor any writ of error or supersedeas sued out. At a later day the same paper was propounded for probat by the parties claiming interest under it in the Circuit superior court of law and chancery for Cumberland county, by which court the paper was admitted to probat. The record of the Circuit court, (made part of this record) shows that the proceeding was had therein in the exercise of its original jurisdiction, as distinct from its appellate jurisdiction. It moreover appears that the Circuit court acted with full knowledge of the previous sentence and judgment of the County court.

Thus the question is presented, whether the sentence of a court of competent jurisdiction rejecting a will, is conclusive upon all courts of concurrent original jurisdiction; and whether a court of concurrent original jurisdiction, which has also appellate jurisdiction, may, in the exercise of original as distinct from appellate jurisdiction, annul such sentence, not by reversing it, but by pronouncing an inconsistent sentence?

In considering these questions, I shall regard the will as disposing of both real and personal estate; not deeming it material to enquire whether the decedent owned any real estate, and if he did, whether the paper propounded, if good as a will, disposed of such estate.

At an early period of the law there was a wide difference in the mode of proving a will of real estate and one of personal estate. Whenever the existence of the former was drawn in question, it was necessary to prove it. There was no tribunal with authority to stamp it in advance with verity; and it was therefore necessary to prove it according to the law of evi-
677 dence *as often as occasion required;

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nor did such proof have any effect beyond the particular case in which it was heard. The law in regard to a will of personal estate was widely different. Such will was governed by the ecclesiastical law; and that law provided tribunals which had exclusive cognizance of all questions touching the factum of such will. A sentence of one of these tribunals admitting it to probat, was conclusive on all parties and others, and upon all courts, until revoked or reversed according to the practice of those courts. So a sentence declaring the nullity of an alleged will was in like manner conclusive until revoked or reversed according to the same practice. See 4 Burns' Ecclesiastical Law 176, title Probat.

It would be difficult if not impracticable to ascertain when and by what authority jurisdiction in the matter of probat of wills of either kind was first conferred on the temporal courts in Virginia. We may suppose, however, that it was first done by the colonial council acting under authority of royal charters and instructions from the crown. Whether jurisdiction over both classes of wills was conferred at the same time or at different times, it would be useless to enquire, even if enquiry would be likely to lead to any result.

At an early day we find that the General court at James City had jurisdiction over the probat of wills of both classes; and soon thereafter, we find this jurisdiction conferred also upon the county courts. See Hen. Stat. at Large 302, act 9; 2 Id. p. 359, act 11; p. 391, act 8; 4 Id. p. 12, chap. 2; 5 Id. p. 231, chap. 6; p. 454, chap. 5.

As the effect of a sentence rendered by a court of probat of wills of personalty, was well defined and well known, it is but reasonable to infer that when wills of realty were required to undergo the same
678 *ordeal, they should in all things stand upon the same footing as wills of personalty, except in so far as otherwise provided. That this result would have followed, the general assembly obviously thought, and therefore provided the means of securing to the heir at law a more deliberate and careful trial before his inheritance should be taken from him by a will. See statutes above cited.

There is, however, nowhere to be found in the early legislation on the subject, any provision whereby a devisee or legatee might again propound a will which had been once rejected by a court of probat. Possibly the general assembly may have supposed that the powers of a court of probat as originally constituted, would extend over the new subject brought under its jurisdiction, and that a sentence of nullity might be revoked by the court which pronounced it. Or they may have intended to give the heir at law and next of kin the benefit of a sentence against the propounders, who, in their own time, after such preparation as they thought proper to make, offered a will for probat which they could not sustain. It is useless in this case to consider whether a repropounding might have been had before the County court of Cumberland, as it was not attempted.

This court has decided, very frequently, that if a court of competent jurisdiction shall admit a will to probat as a will of lands, which appears upon its face, or upon the record of the probat, not to have been duly executed as a will of lands, still the sentence is binding upon all concerned in interest, and upon all courts as long as the sentence remains in force. That such is the law is regarded as well settled. See Bagwell v. Elliott & wife, 2 Rand. 190, Judge Green's opinion; West v. West's ex'ors, 3 Rand. 373, 386; Nalle v. Fenwick, 4 Rand. 585; Vaughan v. Green's lessee, 1 Leigh 287; Street's heirs v. Street, 11
679 Leigh 498; Parker's *ex'ors v. Brown's ex'ors et als., 6 Gratt. 554; Robinsons v. Allen and others, 11 Gratt. 785.

It seems to be equally true that the sentence of such court rejecting a will, even if duly executed, must be conclusive until reversed. To hold otherwise would be to hold that the conclusiveness of a judgment is not to be determined by looking to the jurisdiction of the court in which it was rendered, but by looking to the fact whether the sentence is for or against the will; if for the will, it is binding; if against it, then it is open for inquiry. This, however, is not admissible in regard to any judgment, and least of all in regard to judgments in matters of probat.

We have the authority of most respectable legal opinions, in addition to the judicial sanction of this court, for maintaining that the conclusiveness of a sentence in a matter of probat, is not limited to a case in which the will is admitted to probat, but that it extends also to cases in which wills have been rejected. See 3 Lom. Dig. p. 86, new ed. In Bagwell v. Elliott, 2 Rand. 190, 200, Judge Green says, "if a will offered for probat was contested and rejected, this might be used thereafter as the decision of a competent judicial tribunal, and would condemn it forever." In Coalter v. Bryan, 1 Gratt. 18, 76, 77, 78, Judge Baldwin expresses the opinion that the sentence of a probat court whilst in force is binding upon all persons and courts, whether the will be of realty, or personalty, or both, and this whether the will be admitted or rejected. The case of Wills v. Spraggins, 3 Gratt. 555, cannot be regarded as having the authority of a binding precedent. There were four judges upon the bench, one of whom dissented. Another put his concurrence in the judgment upon the ground that looking into the record of the first judgment he was of opinion it was rightly rendered, and therefore the judgment overruling
680 *the attempt to obtain a different decision should be affirmed. Another concurred in the results of the opinion delivered. Thus, the reasons for the opinion can be regarded as those of only the judge who delivered it. Yet we must give to those reasons, so far as applicable to the facts of this case, their just weight, and, in my

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judgment, they show conclusively that the sentence of the probat court rejecting the will before us, being not reversed, is binding upon all persons and upon all courts in which the question comes up collaterally.

The case of Schultz v. Schultz, 10 Gratt. 358, decides that the sentence of a probat court, when acting within its jurisdiction, rejecting a will when offered for probat, is conclusive against the exercise of original probat jurisdiction in the same court, and it would seem a fortiori against such jurisdiction in another court.

It was said in the argument here, that this court must have regarded the second sentence in Schultz v. Schultz as having some effect, otherwise it would not have reversed it; that it would have been absurd to reverse a mere nullity. The answer to this argument is obvious; the proper parties were before the court; the subject within its jurisdiction: the court could therefore do nothing but affirm or reverse. The court below decided that the unreversed sentence rejecting the will of 1828 was not binding, and overruled the defense founded thereon; it further decided to take cognizance under its original jurisdiction of the matter passed on by the first sentence, and rendered a different sentence, the first not having been reversed. It was the duty of this court to correct all errors in the record, and to pronounce such sentence as the court below should have pronounced. In the judgment of this court it was error to disregard the sentence of rejection then in full force; to overrule the
681 *defense of the contestant founded on that sentence; to take cognizance of the case as it stood; to pronounce an original sentence in a matter over which no probat court could any longer exercise original jurisdiction. To correct these errors it was necessary to reverse the sentence; for if the appeal had been merely dismissed as improvidently allowed as the counsel suggest, the judgment of the court below would have remained untouched. The contestant had shown a valid defense against the last sentence, yet the defense was erroneously overruled, and judgment rendered. It was the right of the appellant to have it removed out of her way at once, and not to have it left as the means of getting up further litigation involving a question as to the comparative force of the conflicting sentences.

This case, in my judgment, is a conclusive authority to show that the sentence of a court of probat of competent jurisdiction rejecting a will when propounded for probat is conclusive whilst it remains in force. The two judges who dissented in the case did not differ from the majority in regard to the general principle; but upon the ground that in the particular case the reasons of the judge below—placing his judgment upon the want of jurisdiction and not upon the merits, should be looked to; and that therefore the rejection was not final and peremptory.

The cases in this court in regard to grants of administration, although not bearing directly upon the question here, yet seem to illustrate the general principle that the judgment of a court of general jurisdiction over the subject is conclusive until it is avoided, or expires by its own limitation; and this although the facts of the particular case were not such as to give the court jurisdiction over that case. Fisher v. Bassett, 9 Leigh 119; Burnley's rep. v. Duke, 2 Rob. R. 102.

682 *Considerations of public policy require that all questions of succession to property should be authoritatively settled. Courts of probat are therefore organized to pass on such questions when arising under wills; and a judgment by such court is conclusive whilst it remains in force, and the succession is governed accordingly. A judgment of this nature is classed amongst those which in legal nomenclature are called "judgments in rem." Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons, and all courts. 3 Lom. Dig. 86, new ed.; 1 Starkie on Evi. 228; Coalter's ex'or v. Bryan, 1 Gratt. 18; Wills v. Spraggins, 3 Gratt. 555; Schultz v. Schultz, 10 Gratt. 358.

In my opinion, the Circuit court correctly decided that Jesse Ballow was dead intestate, and that his next of kin were entitled to an account of his estate at the hands of parties claiming under color of a will, who had taken possession of the estate.

I am of opinion to affirm the decree.

The other judges concurred in the opinion of Samuels, J.

Decree affirmed.

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683 *McArthur v. Chase & als.

January Term, 1857, Richmond.

1. **Limited Partnership—Statutes—Meaning of Word "Insolvency."***—In the act of March 29, 1837, Sess. Acts 1836-7, p. 41, in relation to limited partnerships, the word "insolvency," in § 20 of said act, means that the partnership has not sufficient property and effects to pay all its debts.†

2. **Same—Deed of Trust to Pay Debts of—Case at Bar.**—A deed made by a limited partnership conveying all its property in trust to pay a debt to a firm of which the special partner is a member, at a time when the debts of the partnership exceeded the value of its property, and when the acting partners knew that the partnership must stop business unless the special partner or his firm would advance money to enable them to carry on the business, and without an undertaking on his part to make such advances, though they may have had

*Limited Partnership—Statutes—Meaning of Word "Insolvency."—For the proposition that, the word "insolvency," as used in Session Acts 1837, sec. 2, p. 41, means that the partnership has not sufficient property and effects to pay all its debts, the principal case is cited and followed in Wolf v. McGugin, 37 W. Va. 557, 16 S. E. Rep. 798.

†See the opinion of JUDGE DANIEL for the provisions of the statute.

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some expectations that he would do it, is void as to the other creditors of the partnership.

3. **Same—Same—Confession of Judgments in Favor of Some Creditors.**—Under such circumstances confessions of judgments in favor of some creditors in order to give them a preference, are void as to the creditors.†

4. **Same—Same—Case at Bar.**—A special partner taking a deed of trust to secure a debt due to a firm of which he is a member, under such circumstances, makes himself liable as a general partner to the creditors of the partnership.†

5. **Same—Distribution of Assets—Case at Bar.**—In the distribution of the assets of such a partnership among its creditors, a debt due to a firm of which the special partner is a member, is to be paid ratably with the debts due to other creditors.

6. **Chancery Practice—Suit to Set Aside Fraudulent Conveyance—Jurisdiction of Equity Court.‡**—A court of equity having obtained jurisdiction of a suit by creditors to set aside a deed improperly made to give preference to a certain creditor of the partnership, and to have a distribution of the assets of the partnership among all the creditors, may proceed to do complete justice in the cause, and to make a personal decree against the special partner who has made himself liable as a general partner, in favor of the creditors, for the balance due them respectively after distributing the assets of the partnership ratably among them.

7. **Same—Same—Judgment at Law against General Partners—Effect as to Special Partners.**—The fact that the creditors have recovered judgment at law against the general partners, will not defeat their remedy against the special partner.

684 *8. **Same—Share of Special Partner—Application of.**—The share of the special partner in the debt due to the firm of which he is a member, will be retained under the control of the court, and applied to the satisfaction of the creditors of the partnership.

9. **Same—Same—How Ascertained.**—To ascertain what is the share of the special partner in said debt the court will direct an enquiry into the ability of the firm of which he is a member to pay their debts independent of their claim upon the partnership, and into the interest of the special partner in said firm; and will direct that if no evidence is offered, it shall be presumed that the firm is able to pay its debts, and that the special partner has an equal interest in the concern.

†See the opinion of JUDGE DANIEL for the provisions of the statute.

‡**Chancery Jurisdiction—Complete Relief.**—In Miller v. Wills, 95 Va. 340, 28 S. E. Rep. 337, it is said: "And, where a court of equity has properly acquired jurisdiction, it will, in order to prevent a multiplicity of suits, go on to do complete justice, though in doing so it has to try title, or settle boundaries and administer remedies which rightly pertain to courts of law. 1 Pom. Eq. J., sec. 181; Anderson v. Harvey, 10 Gratt. 386; McArthur v. Chase, 13 Gratt. 683; Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271; Miller v. L. & N. R. Co., 83 Ala. 274, and DeVeney v. Gallagher, 20 N. J. Eq. 33." The principal case is also cited and followed in Walters v. Farmers' Bank, 76 Va. 19.

In Rothchild v. Hoge, 43 Fed. Rep. 102, it is said that the principles laid down in McArthur v. Chase, 13 Gratt. 683, are approved so far as applicable to the case at bar.

In May 1848 John E. Penman and Daniel Penman purchased of James Bean two tracts of land in the county of Frederick, for which they were to pay him ten thousand dollars; four thousand dollars to be paid on the 1st of December following, and the balance of six thousand dollars was to be paid in four equal annual payments, with interest from the last date. The object of this purchase was to establish a furnace for the making of iron. On the first day of June in the same year a partnership was entered into between the two Penmans and Richard Thompson, under the name and style of Penman, Thompson & Penman, for the purpose of carrying on the business of making iron, and of conducting a mercantile establishment in connection therewith; in which it was agreed that John E. Penman, being without means, should give his attention to the preparing the buildings and other works connected with the business, and should superintend the making of iron, and the other two should each put in the sum of fifteen hundred dollars as capital, and all were to be equally interested; and they also agreed to advance to the firm as a loan a sum not exceeding one thousand dollars, if necessary to put the works into efficient operation, and also whatever sum might be necessary to enable the firm to pay to Bean the sum of four thousand dollars, which would be due to him on the 1st of December of that year. All these parties were from the 685 city of New York, and *Daniel Penman and Thompson were residing in that city at the time the partnership was formed, and so continued until some time in the year 1849.

By deed bearing date the 13th of January 1849, John E. and Daniel Penman conveyed to Thompson and Marion Penman, each one-fourth of the land and other property of the partnership. In this deed it was recited that the furnace had been erected. And it was further recited that Marion Penman had advanced the sum of four thousand dollars to pay to Bean the amount due to him on the 1st of December 1848, and it was agreed that she should be a dormant partner of the concern, and each should be interested one-fourth in the property and business of the partnership. This deed was not executed by Marion Penman, and she denied that she had ever assented to it, or agreed to become a partner. And so the court held.

Some time in the spring of 1849 Daniel Penman and Thompson removed from New York to the iron works in Frederick county, and Thompson became the financial agent of the partnership, and the manager of the store. He seems to have been acquainted in New York with the firm of McArthur & Co.; and before the 2d of August of that year he contracted a debt with them for goods purchased, exceeding the sum of two thousand dollars. On that day articles of partnership were entered into between the two Penmans and Thompson and William McArthur, of the firm of McArthur

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& Co. whereby it was agreed that he should become a special partner, and should put into the partnership the sum of five thousand dollars: the business to be conducted under the old name of Penman, Thompson & Penman, and each of the partners to be interested one-fourth, both in the property and business. The steps prescribed by the act of March 29th, 1837, in forming a
686 special partnership, seem to *have been pursued; and McArthur advanced his five thousand dollars, a part of which was applied by the direction of Thompson, to the payment of the debt due to McArthur & Co. and the balance was paid up in money.

The original parties having commenced their business with very inadequate capital, the partnership was in difficulties from the commencement of their operations; and previous to McArthur's becoming a partner, in order to obtain accommodations at the Farmers Bank of Virginia at Winchester, the partners, on the 19th of April 1849, conveyed their partnership property to trustees to secure several notes or drafts which had been discounted for them at bank, and also to secure future accommodations. After McArthur became a partner he was compelled to make advances for them to enable them to meet their engagements. These advances were made by his firm; and by the 6th of April 1850, Penman, Thompson & Penman were indebted to McArthur & Co. about twelve thousand dollars. This included the debt of four thousand dollars due to Marion Penman, and also a debt of one thousand dollars lent to the partnership by James Penman of New York, both of which had been transferred to McArthur & Co. At that day the debts of the partnership amounted to between thirty-five and forty thousand dollars, and their own estimate of the value of their property was about forty-five thousand dollars. It was sold, however, during the summer of that year, and the whole partnership property produced the sum of twenty-two thousand and fifty-one dollars and sixty-seven cents; and this seems to have been considered by all the witnesses examined on the subject, except some of the partners, to have been its full value.

In this condition of the partnership the two Penmans and Thompson, being
687 the general partners, conveyed *the whole partnership property real and personal to trustees in trust to secure the debt due to McArthur & Co. And there was no doubt that this deed was executed at the instance of William McArthur. The deed recited that it was the purpose to provide for the payment of the debt due to McArthur & Co. and also for any further advances or acceptances which McArthur & Co. might make for the partnership. But it provided for a sale whenever Penman, Thompson and Penman should fail to pay any of the debts secured, when due, or if then due, when McArthur & Co. should require the trustees to sell. When this deed was executed there seems to have been some expectation by the general partners that McArthur & Co. would make further advances for them so as to enable them to go on with the business. McArthur in his answer in this case says that Thompson proposed to him that his firm should make further advances, and informed him that their prospects of getting along and making money were better than before. That the respondent who conducted the correspondence, informed Thompson that before he could submit the proposition to his partner the firm of Penman, Thompson & Penman ought to secure the firm of McArthur & Co. To this they agreed, and the deed of trust was executed. That after the execution of the deed, McArthur & Co. required an exhibit of the indebtedness of the firm and of the expenses monthly in working the furnace, and the quantity of iron made, &c., before they would decide upon making further advances to them; and upon receiving this exhibit McArthur & Co. not perceiving that money could be made at the business, declined to advance any thing more for the partnership. And it appears from the evidence that the deed was executed by Penman, Thompson & Penman with some expectation that they would
688 be further *aided by McArthur & Co. and also with the knowledge that without that aid they must fail in business.

Soon after the deed in favor of McArthur & Co. was put upon record, a large number of the creditors of Penman, Thompson & Penman procured judgments by confession against them, under an agreement between the creditors and the firm that the creditors were to be preferred in a certain order agreed upon. Among these preferred creditors, were the plaintiffs in this suit. These creditors having their judgments, filed their bill in behalf of themselves and the other creditors of Penman, Thompson & Penman, against the partners of said firm. William McArthur, William McArthur & Co. and Marion Penman, in which they insisted that under the act of March 29, 1837, in relation to limited partnerships, the deed of trust to secure McArthur & Co. was void, and that McArthur, by taking said deed, had rendered himself liable as a general partner, to the creditors of Penman, Thompson & Penman; and they insisted that Marion Penman was also a partner; and they prayed that the deed might be declared void; that McArthur and Marion Penman might be held liable to the creditors as general partners; that the property of the partnership might be subjected to the payment of the debts of the concern; and for general relief.

Marion Penman answered, denying that she was or had been a partner. McArthur insisted in his answer upon the validity of the deed to secure to the debt due to McArthur & Co. and denying his liability as a general partner. He said that the property of the partnership had been sold by the trustee in the deed to secure the Farmers Bank, and was sold for much less than its cost; and that if it had been sold at its cost or

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its estimated value when he became a special partner, it would have amounted to
689 largely more than *all the debts of Penman, Thompson & Penman, including that due to McArthur & Co. That so far as he knew, the deed to secure McArthur & Co. was not made in contemplation of insolvency; that if the firm was then insolvent it was not known to him, and he is satisfied that the members of the firm all believed that it was not insolvent, and that it was worth more than its indebtedness; and that was certainly the representation made to him by Penman, Thompson & Penman. Two of the partners, Thompson and Daniel Penman, expressed in their answer the same opinion as to the value of the property, and the great sacrifice made by the sale of it. They say that the improvements put upon the lands cost largely more than the whole lands, including improvements, sold for.

The cause came on to be heard in June 1852, when the court below dismissed the bill as to Marion Penman; declared the deed in favor of McArthur & Co. to be null and void; and also that the judgments confessed by Penman, Thompson & Penman subsequent to the deed, were also void; and that all the creditors, including McArthur & Co. were entitled to share ratably in the assets of the partnership, including in the assets the proceeds of the sale of a part of the personal property sold by the sheriff under executions issued on the judgments of the plaintiffs. The court held further, that McArthur was to be treated as a general partner, and as such was liable personally to all the creditors of the firm for any portions of their claims not satisfied out of the partnership assets; and that the creditors were entitled as against McArthur to have his interest in the share of the assets applicable to the debt due to McArthur & Co. retained and applied to the satisfaction of their debts; and to have the amount of his interest ascertained by a commissioner. And it was decreed that a commissioner should take an account of the debts of
690 Penman, *Thompson & Penman, and for this purpose summon the creditors before him in the manner prescribed in the Code of Virginia; that he also take an account of the assets of the partnership, treating the money made upon the plaintiffs' executions as a part thereof; and that he also report a ratable distribution of the assets among the creditors, showing the balance which will remain unpaid of each creditor's debt. And the commissioner was further directed to ascertain and report to the court whether the firm of McArthur & Co. are solvent and have sufficient assets (exclusive of the debt claimed in this cause) to satisfy their creditors, and what interest and share in the said firm William McArthur has as partner. In considering the two last questions the commissioner was to hear any evidence which might be offered by either party; but if no evidence was offered, he should presume the solvency of the firm, and that McArthur had an equal interest as partner.

On the 20th of November 1852 the cause came on to be finally heard upon the report of the commissioner, to which there was no exception, when the court made a decree in favor of each of the creditors for his ratable proportion of the assets of the firm of Penman, Thompson & Penman, and a personal decree against McArthur for the balance of the debts due each of the creditors as reported by the commissioner. From this decree McArthur obtained an appeal to this court

The case was argued orally by Patton, for the appellant, and in a printed note, by Conrad & Tucker, for the appellees.

DANIEL, J. The first assignment of error raises the question as to the validity of the deed of trust of April 6th, 1850, made for the benefit of William McArthur & Co.

691 *The 20th section of the act of 29th March 1837, concerning limited partnerships, declares that every sale, assignment or transfer of any property or effects of such partnership made by such partnership, when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner, over other creditors of such partnership, and every judgment confessed, lien created, or security given by such partnership, under the like circumstances, and with the like intent, shall be void as against the creditors of such partnership. Sess. Acts 1836-7, p. 41. And the questions which we have to consider under this section are, Was the firm of Penman, Thompson & Penman insolvent at the date of the execution of the deed? Or did they make the deed in contemplation of insolvency? And in either event, was the deed made with an intent to give to McArthur & Co. a preference over other creditors of the partnership?

As preliminary, however, to the examination of the first of these questions, we have to ascertain the sense in which the term "insolvent" has been here used by the legislature.

On the part of the appellants it is contended that the legislature were looking to insolvency in the technical sense of the term, or open and notorious inability to pay; and in support of this view we have been referred to the cases of United States v. Hooe, 1 Cranch's R. 73, and Prince v. Bartlett, 8 Id. 431, in which the Supreme court of the United States have so defined the term in construing certain acts of congress fixing the priority of the United States over other creditors, of its debtors, claiming under conveyances, assignments, &c. made by the latter.

On the other hand, the counsel for the appellee contends that the statute is
692 analogous to a bankrupt law; *and that in construing it we should rather be guided by decisions ascertaining the meaning of the words as employed in such laws; and refers to the

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case of Bayly v. Schofield, 1 Maule & Selw. 338, and to an anonymous case reported in a note to Moss v. Smith, 1 Camp. Cas. 352. In the former of which the term "insolvency" as used in the bankrupt law of England in respect to a trader, was held to mean that he was not in a situation to make his payments as usual; and it was said that it would not follow that he was not insolvent because he might ultimately have a surplus upon the winding up of his affairs. And in the latter of which Lord Ellenborough held that the "insolvency" mentioned in the statute must mean a general inability in the bankrupt to meet his engagements.

I have examined these cases, but I have been unable to perceive that any of them furnish a rule to guide us in the decision of this. No such resemblance is shown between the statute under consideration and the law of congress on the one hand, or the English bankrupt law on the other, on which the decisions referred to were founded, as to justify the supposition that the legislature, in using the term in question, had a reference to the sense given to it in any one of said decisions. Showing however as they do that the word has received various and widely different interpretations, dependent on the character and object of the laws in which it is found, these decisions do serve the purpose of negativing or of tending to negative the conclusion that there is any well ascertained, generally received technical meaning so attached to the word as to require the courts to adopt it rather than its primary meaning, or some other sense to be gathered from the circumstances and connection in which the word is used.

In England limited partnerships of the kind sanctioned by our act of 1837,
693 (unless they have been *very recently introduced,) are unknown. Hence in the examination of such questions we are without the aid usually derived from a reference to the English reporters. Our act is, I believe, taken from that of New York, which was passed in 1822, and which, it is stated in a recent work on the subject, (Troubat on Limited Partnerships, p. 48,) was borrowed from the Commercial Code of France. Such partnerships are now authorized by statutes similar to our own, in most of the states of the Union. But the counsel have not cited, and I have been unable to find, any case in which the precise question before us has been decided. In the Code of 1849, p. 583, the legislature have used the term in its ordinary or primary sense, or have rather put such sense in the place of the term itself, by declaring, in the 10th section of the chapter on partnerships, &c. (which comprises substantially the provisions of the 20th and 21st sections of the act of 1837,) that "no sale, &c. of the property of any such partnership shall be valid if made at a time when it has not sufficient property or effects to pay all its debts, for the purpose of giving a preference to one or more of its creditors over any other creditor."

One of the objects and designs of such provision is to secure in case of the failure of the partnership a pro rata distribution of its property among all its creditors. To declare that open and notorious bankruptcy is the true and only test of insolvency, would, as was argued by the counsel for the appellees, defeat in most cases the design of the law, inasmuch as the desire of a firm in failing circumstances to sustain itself as also to prefer its special friends, would generally result in sales and assignments of most of its property, made to insure those ends, before such bankruptcy would occur. To say on the other hand that the firm shall be held to be insolvent whenever from any cause it may fail to meet its engage-
694 ments in the *usual course of business, would seem to be harsh, and might tend greatly to discourage the formation of such partnerships. In a country like ours, where so much of its commercial business and trading enterprise are based on borrowed capital, and where sudden and unexpected expansions and contractions of the currency are matters of frequent occurrence, it may often happen that the most prudent firm, by the unexpected failure of some of its debtors to meet their payments, or other like causes, may find itself unprovided with available means to meet its own bills and notes as they mature, though possessed of assets amply sufficient to satisfy, ultimately, all its debts and liabilities. A law declaring it incompetent in a partnership so situated, to discharge its more pressing engagements by sales or assignments of portions of its property and credits to certain creditors, to pay or secure their demands, might, and most probably would, often occasion the stoppage and winding up of such concerns at times when the safety of the creditors would demand no such sacrifice.

The leading design and policy of the acts of 1837 and 1849 would seem to be essentially the same; and I have been unable to discover any good reason for supposing that the legislature, in declaring in the former, certain assignments made by such partnerships "when insolvent," to be void, intended any thing more or less than that which they have plainly manifested in the latter, by the declaration that such assignment shall not be valid "if made by the partnership at a time when it has not sufficient property or effects to pay all its debts."

Taking the insufficiency of its property to pay its debts to be the true test of the insolvency of the partnership, I do not think that any serious doubt can be entertained as to the insolvency of the firm in this case at the date of the deed.
695 The commissioner's *report (from the consideration doubtless that it was not excepted to) has not been made a part of the transcript of the record, and I have not thought it necessary to compile from the pleadings, exhibits and depositions a statement of the precise amount of the indebtedness of the concern. It is sufficient

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for the purpose in view to observe that the record shows the amount of the debts at the date of the deed to have been little, if any, less than the sum of forty thousand dollars. The sale of the property conveyed was made so soon after the execution of the deed, as when taken in connection with other circumstances and proofs, to negative the conclusion that there was any very material depreciation in the value of the property between the two events. The sale is shown to have been well attended and fairly conducted. And we have the opinions of witnesses whose capacity, business experience and knowledge of the value of such property, entitle their judgments to the greatest weight, that the property was well sold, and brought its full value. The entire proceeds of the sales are shown to be some twenty-two thousand dollars—a little more than half the aggregate of all the debts.

The deed was made at a time when the concern was confessedly greatly embarrassed. It contains a sweeping conveyance of the whole of the partnership property. It is made to secure the large debt of twelve thousand dollars—a debt nearly large enough (as the result has shown) to absorb the entire residue of the proceeds of the property, after discharging prior liens. Most if not all of the items of which the debt was composed, were then due. By the terms of the deed a sale is to be made whenever there shall be a failure to pay any part of the debt due or to become due, and McArthur & Co. shall require a sale to be made. It is said, it is true, that there was an expectation that McArthur & Co. would make further advances, by the
696 aid of *which and other means the firm could hope to relieve itself ultimately from its embarrassments, and proceed successfully with its enterprise; and the deed recites the desire and intention of the grantors to provide not only for the payment of the existing debt, but also for any further advances or acceptances which McArthur & Co. might make; and, on providing for the application of the proceeds in the event of a sale, directs the payment to McArthur & Co. of all debts due to them, or for which they are bound, or may be bound when the sale is made.

There is, however, I think, no proof of any assurance or promise by McArthur & Co. upon which a prudent firm could have reasonably built the expectation of further acceptances or advances by them. In this state of things, it is difficult to suppose that the parties did not contemplate as a probable result the events which speedily ensued the execution of the deed, viz: the stoppage and failure of the concern. I am satisfied that the deed was not only made at a time when there was an insufficiency of property to pay the debts of the firm, but was also made with the expectation of a winding up of the concern, at no remote period, with a deficiency of assets to pay its engagements; and so in contemplation of insolvency.

The deed, as has been already stated, conveys all the property of the partnership; and it provides for the payment of the debt of McArthur & Co. and for the payment of that debt alone. From these facts, and what has been already established in respect to the character and design of the deed, the further conclusion follows naturally, that the deed was made with the intent to give to McArthur & Co. a preference over other creditors; and that the judge of the Circuit court properly decreed the deed to be void as to them. That the Circuit court also decided correctly in declaring that the judgments confessed by the firm in favor
697 of *certain of their creditors subsequently to the execution of the deed of the 6th April 1850, were also void as to the other creditors, is, I think, equally clear. The twentieth section of the act, as we have seen, embraces in terms "every judgment confessed" "under the like circumstances, and with the like intent;" and the judgments in question were not only confessed after the execution of the deed and when the firm was notoriously insolvent, but were confessed under an agreement ascertaining the order in which they should rank in the distribution of the assets.

The twenty-second section of the act declares that every special partner who shall violate any provision of the twentieth and twenty-first sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner. The execution of the deed was suggested by McArthur, and he is a party to it. That he was at one time liable as a general partner is therefore obvious.

The twenty-third section provides that in case of the insolvency or bankruptcy of the partnership, no special partner shall under any circumstances be allowed to claim as a creditor until the claims of all the other creditors of the firm shall be satisfied; and it was contended in the court below that inasmuch as the debt of twelve thousand dollars was due to a firm of which McArthur was a partner, such debt could not participate in the distribution of the assets of the concern of Penman, Thompson & Penman. The Circuit court very properly held, I think, that the section did not intend to exclude from such participation debts due to concerns of which the special partner might be a member. A debt due to McArthur & Co. is not a debt due to McArthur individually. The rights of McCrery, the other partner of the concern of McArthur & Co. stand obviously out
698 of and beyond the reach of *the terms and spirit of the section. Whilst McArthur's interest as a member of the concern of McArthur & Co. in the ratable proportion of the assets assignable to the debt due that concern, might, when ascertained, be reached by the creditors of the concern of Penman, Thompson & Penman, McCrery's interest therein, upon every principle of equity, occupied the same common ground with debts due to any other creditors having no connection with McArthur.

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Upon the general principles governing the jurisdiction of courts of equity, and upon the reasoning of the chancellor in Innes v. Lansing, 7 Paige's R. 583, I think the jurisdiction taken by the Circuit court in this case is clear. We have had no controversy here, and the record discloses no evidence of any in the court below, between those judgment creditors, if any, who may have obtained their judgments in invitum, and those who obtained theirs by confession. There being thus no question in the case in respect to legal priorities, except such as have been shown to be void as to creditors, I do not perceive that there was any difficulty in the way of the court's proceeding, as it has done, to decree a ratable distribution of the assets of the firm among all the creditors.

And as the court had jurisdiction of the case for the purpose of protecting and distributing the assets, it had, in my opinion, a right to go on and give complete relief, and, to that end, to render such personal decrees as the rights and liabilities of the parties required. And if McArthur still remained liable as a general partner, I can see no objection to a decree against him to enforce that liability. The case of Haggerty v. Taylor, 10 Paige's R. 261, cited by the counsel of the appellant, in his written note, does not seem to me to conflict with this view; as, in that case, it was held that the complainants had shown no right to any share of the assets which they
699 were seeking to subject. *In that case the complainants were seeking to participate in the funds of a limited partnership which was to terminate at a particular period, on account of a debt contracted after such period with the general partners, who, without complying with the requisites of the act in respect to notice of a renewal or continuance of the partnership, had undertaken to continue the business.

The court held that the creditors of the firm, previous to the period fixed for the expiration of the partnership, were entitled to a preference, and should be paid ratably out of the property which then belonged to the limited partnership, and refused to appoint a receiver at the instance to the complainants. And as to any personal responsibility which the complainants had a right to assert against the defendants on account of transactions subsequent to the termination of the original partnership, they were remitted to their remedy at law. The distinction between the two cases is obvious. In Haggerty v. Taylor, the only relief to which the plaintiffs were entitled, if any, was one of a legal nature; whilst in the one before us the plaintiffs succeeded in establishing a right to the jurisdiction of the court on equitable grounds: And having done so the question for the court was whether it should go on and end the controversy, or put the parties to the expense and delay of numerous suits at law to fix a personal responsibility growing out of the same transaction, and to be established by the very proofs on which was founded the equitable relief sought by the plaintiffs and given by the court.

A doubt, however, has been suggested whether the judgment creditors, by proceeding at law against the other partners alone, have not thereby lost the right which they at one time had (as has been shown) to hold McArthur liable as a general partner. In order to solve this doubt, a further reference to the provisions
700 *of the act is necessary. The second section declares that such [limited] partnerships may consist of one or more persons who shall be called the general partners, and who shall be jointly and severally bound as partners now are by law, and of one or more persons who shall contribute in actual cash payments a specific sum or capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by them. By the third section the general partners only are authorized to transact business and sign for the partnership, and to bind the same.

In the fourteenth section it is declared that suits in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partners; and the special partners shall be liable to and suable by the firm for debts contracted with it in the same manner as if they were not partners. The eighth section, however, it will be seen, after providing that no such partnership shall be deemed to have been formed until the certificate and affidavit in respect to the nature of the business of the firm, &c. required in previous sections, shall have been made and recorded, declares that if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners. And we have already seen in case of a concurrence by the special partner in the violation of the twentieth and twenty-first sections by the execution of the assignments, &c. therein prohibited, he is made liable as a general partner by the twenty-third section.

Without stopping to note the many points in which the relation borne by the members of such an association towards their associates and the public varies from that which exists in an ordinary partner-
701 ship, it is sufficient *for our purpose to observe some of the more important differences which distinguish the two kinds of partnership in respect to the remedies given to creditors.

In the case of an ordinary partnership, a creditor is required to sue all the members of the firm in respect to any claim against the concern. And if he omits any one of the members, he may be met and defeated of his action by a plea in abatement. In the case of a limited partnership, he is expressly authorized to proceed against the

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general partners alone, in relation to any business of the partnership, in the same manner as if there was no special partner. And it is only when it is sought to make the latter liable personally on account of some violation of the statute which renders him liable as a general partner, that the creditor has any right to proceed against him.

In all cases where the creditor takes a judgment against one or more of the members of a general partnership, omitting others, he loses thereby all recourse at law against the latter, even though they be dormant partners, and unknown at the time to the creditor. The joint contract is held to be merged in the judgment as to the members against whom it is obtained; and being so merged, is equally barred as to the others, since no joint suit can be maintained upon it. Collyer on Part. 659, and cases cited in notes; Ward v. Motter, 2 Rob. R. 536.

On the other hand, it is obvious that there may be cases growing out of limited partnerships, in which it would be absurd to hold that a judgment against the general partners could be pleaded as a merger of the liability of the special partner. For it may often happen that the general partners may violate the provisions of the twentieth section by the execution of conveyances and assignments therein prohibited after judgments obtained against them. In a
702 suit brought *to make the special partner liable for his concurrence in such violation, the repugnancy to all legal reasoning, in allowing a previous judgment against the general partners to merge and bar the liability of the special partner, is too manifest to require comment.

So again, a falsehood in the certificate of partnership in respect to the capital contributed by the special partner, may never come to light till after a creditor proceeding under the fourteenth section has obtained his judgment against the general partners.

To declare that the judgment should bar a suit against the special partner, would not only be obviously unjust but in conflict with the terms of the eighth section, declaring all the persons interested in the partnership liable in such case as general partners. Yet in the case of a general partnership, (as has been already stated,) consisting of ostensible and dormant partners, a judgment against the ostensible partners completely bars all recovery at law against the dormant partners, though unknown to the plaintiff until after his judgment was obtained.

I deem it unnecessary to pursue the contrast further, as the points of variance already exhibited are sufficient to show that the technical rules, which so often embarrass and sometimes defeat the creditor in prosecuting at law his demands against the members of general partnerships, especially in cases where there are dormant partners, can have little application in regulating the remedies given by the statute against the members of a limited partnership.

In a case like the one before us, where the act, by the assent to which by the special partner, his liability as a general partner was incurred before the creditors had obtained their judgments, I do not doubt that the creditors might have united all of the partners in their several suits. The general partners were bound as such as well by their contracts as by their violation
703 of the *statute; and as the special partner by his concurrence in the execution of the prohibited conveyance, had also made himself liable as a general partner, no objection could have been made to joint actions against all the partners. But it by no means follows that the creditors were compelled to bring such actions. In a suit by a creditor against the general partners alone on the contract, it would have been an anomalous plea in abatement by them, wherein they should have alleged that since the execution of the contract they had united in an illegal effort with another, who was not made a party to the suit, to deprive the creditor of the benefit of his contract by the assignment of their effects to pay exclusively the debt due to another creditor.

It is obvious that the remedy upon the contract cannot be merged in the cause of action arising out of the wrongful act of the partners. And it seems to me that the question, whether in such case the creditor, by instituting his action against the general partners alone, and upon the contract, had elected to waive his remedy against the special partner for the violation of the act, would turn not upon the doctrine of technical merger, but upon the proofs in respect to his real intentions. The only case in which the analogy to be drawn from the law in respect to the remedies against general partnerships would seem to apply, would be when the creditor should, by the frame of his pleadings, show that he was proceeding on a cause of action arising out of the violation of the statute, and for which all the partners were liable; and should yet take a judgment against the general partners alone.

If, however, there be doubt as to whether if sued at law McArthur might not have pleaded the judgments against the general partners as a merger of the demand against him, it requires, I think, no extension of the principles recognized by this court
704 in the cases of *Sale v. Dishman's ex'or, 3 Leigh 548; Galt's ex'or v. Calland's ex'or, 7 Leigh 594; Weaver v. Tapscott, 9 Leigh 424, and Niday v. Harvey & Co., 9 Gratt. 454, to hold that such plea cannot avail in a court of equity. And the consideration that the creditors might possibly have encountered embarrassment and difficulty in the pursuit of the demand at law, serves but to furnish an additional argument why the Circuit court, instead of exposing them to such hazards, should have proceeded, as it has done, to give complete relief.

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Having disposed of those questions, which from their novelty and difficulty seemed to me to call for more especial notice and remark by the court, the length to which I found it necessary to extend my opinion in doing so, induces me to forbear any further observation in respect to the other questions raised in the pleadings, than that, after having given to the whole record a careful examination, I have been unable to discover any error in the decrees of the court.

I think the decree should be affirmed.

The other judges concurred in the opinion of Daniel, J.

Decree affirmed.

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705 *Towner v. Lucas' Ex'or.

January Term, 1857, Richmond.

1. **Evidence—Valid Written Instrument—Parol Evidence to Vary.***—Parol evidence will not be received to engraft upon or incorporate with a valid written contract an incident occurring cotemporaneously therewith, and inconsistent with its terms.
2. **Same—Same—Same—Proof of Fraud.**—The fraud which will let in such evidence must be fraud in the procurement of the instrument which goes to its validity, or some breach of confidence in using a paper delivered for one purpose and fraudulently perverting it to another.
3. **Same—Same—Same—Case at Bar.**—Parol evidence is not admissible to prove, in behalf of one of three sureties in a bond, that he was induced to sign the bond upon the express promise of the obligee that he should not be required to pay any part of it, and that said obligee would give the said surety a written indemnity to save him harmless.
4. **Chancery Practice—Bill by Surety for Relief against Judgment—Case at Bar.**—A bill is filed by the surety for relief against a judgment recovered on the bond, which sets out such a parol promise as the ground of relief: As proof to sustain the case made by the bill would be inadmissible, the bill is demurrable.
5. **Evidence—Written Instruments—Admission of Parol Evidence Discussed.**—The principles upon which parol evidence to affect a written contract is admitted or excluded, investigated and stated by ALLEN, P.

This was a bill filed in the Circuit court of Jefferson county, by Edward Lucas, and afterwards on his death revived by his executors, against Benjamin T. Towner. The bill states that Towner had recovered three judgments against Lucas on three single bills executed by George Reynolds, Jacob W. Reynolds, Joseph McMurran, Conrad Billmyer and himself. That these single bills were given for a previous debt of George and Jacob W. Reynolds, the principals, and that before they were signed it was agreed between them and their three friends, McMurran, Billmyer and Lucas, that all were to sign or none were to be bound. That they were prepared and signed by the
706 Reynoldses *and the other two sureties, and before they were delivered to Towner they where presented to Lucas for his signature, who refused to sign them; he having in the meantime consulted with his friends, and having learned the extent of his previous liabilities for said Reynolds, which greatly exceeded those of the other parties, he changed his mind and refused to sign them. That nevertheless Towner got possession of the said bonds, and applied to Lucas for his signature, who again and repeatedly refused to sign them, until some eight months after they had been in the possession of Towner, when being in Towner's store, he was again urged by Towner to sign them, he alleging that Conrad Billmyer was talking disrespectfully of Captain Reynolds, and injuring Towner's credit; and that he wished to stop Billmyer's mouth, and pledged his honor that if Lucas would sign said bonds he should never be required to pay any part of the debt, and that he would give Lucas his written indemnity so as to save him harmless.

That Lucas being no lawyer and entirely ignorant of the legal consequences to the others of the delivery without his signature, and totally unapprised that by signing said bonds he might possibly jeopardize his friends, but ignorantly supposing that Towner having gotten possession of the bonds with the signatures of the others, they were already bound, and that therefore the addition of his name would not affect them, he permitted himself to be overcome by the importunities and representations of Towner as to his credit, and signed the bonds upon his promise of indemnity.

That as the said single bills fell due Towner instituted suit on them, and Lucas relying on Towner's promise put in no plea, and consequently Towner obtained judgment against him by default. The Reynoldses having taken the benefit of the bankrupt law, were exempted; and McMurran and Billmyer put in the plea of non est factum, and they were discharged.

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*Evidence—Valid Written Instrument—Parol Evidence to Vary.—In a *foot-note* to Woodward v. Foster, 18 Gratt. 200, it is said: "There is no principle of law better settled than the broad general rule that parol evidence is not admissible to contradict, vary, add to, or alter the terms of a valid written instrument."

Then follows the long list of cases and references to other *foot-notes* in support of the rule laid down above.

In addition to the cases there cited the principal case is cited and followed in Long v. Perine, 41 W. Va. 316, 23 S. E. Rep. 612; Chapman v. Persinger, 87 Va. 586, 13 S. E. Rep. 549.

In the following cases the principal case is cited and the rule there laid down is approved, but they are distinguished from the principal case on the ground that to explain written instruments parol evidence will be admitted: Knick v. Knick, 75 Va. 19; Tuley v. Barton, 79 Va. 392; Snavely v. Pickle, 29 Gratt. 30, and *note*; McLean v. Ins. Co., 29 Gratt. 373, and *note*; Harvey v. Skipwith, 16 Gratt. 415; Johnson v. Burns, 39 W. Va. 658, 20 S. E. Rep. 687; Vance v. Snyder, 6 W. Va. 31.

707 *That after the suit was instituted on the first of the single bills Lucas applied to Towner for the indemnity he had promised as the condition of Lucas' signature, who then advised Lucas to keep quite and wait a while. Afterwards Lucas called again in company with his son, and demanded the promised indemnity, and was assured by Towner that he would fulfill his promise, but that he would not commit himself, and that Lucas had nothing to fear but his death.

The prayer of the bill was that the court would compel Towner to execute and deliver to Lucas a proper indemnity and release from the said judgments; that he and all others might be enjoined from proceeding to enforce the same; and for general relief.

Towner demurred to the bill: And he stated for cause of demurrer among others, that the bill sets up a parol agreement in conflict with and in contradiction to a written agreement. The court, however, overruled the demurrer; and Towner then answered, saying that he had no knowledge of the alleged agreement of the parties, except as he had since heard from them. He was no party to and had no knowledge of any condition before the complete execution and delivery of the bonds. He denied the statement of the bill relative to the alleged promises to Lucas that he should never be required to pay any part of the debt, and that the defendant would give him a written indemnity so as to save him harmless. He denies that in any conversation with Lucas he never admitted any such promise of indemnity. There were conversations on the subject, but not such as alleged in the bill: the substance of them was a denial by the defendant that he had ever made such promise, with a declaration that he would fulfill any promise that he had ever made.

The plaintiff filed testimony tending to prove a parol promise by Towner to
708 give to Lucas a written *indemnity against these bonds; and when the cause came on to be heard, the court directed an issue to try whether Towner did induce Lucas to sign the bonds by promising him that he should never be required to pay any part of the debt, and that he would give him a written indemnity to save him harmless. This issue was found in favor of Lucas. And the judge having certified that he was satisfied with the verdict, the court thereupon decreed that Towner should execute and deliver to Lucas' executor a bond indemnifying and releasing the estate of Lucas from the judgments in the bill mentioned; and that Towner be perpetually enjoined from proceeding to enforce the same. From this decree Towner obtained an appeal to this court.

Patton and Patton, jr., for the appellant, insisted:

1st. That the demurrer to the bill should have been sustained. That the parol promise relied on was not such as could be set up against the written contract contained in the bonds. That it did not come within any of the classes of cases in which parol evidence was held to be admissible to defeat a written contract. It did not tend to prove fraud in the procurement of the bonds. It did not add another term to the written contract, but went to defeat it entirely. It did not set up a subsequent parol agreement as a substitute for the prior written contract. And it was not the case of a defendant in equity opposing the specific execution of a contract. These are the exceptions to the general rule excluding parol evidence, within none of which this case falls. They referred to Stevens v. Cooper, 1 John. Ch. R. 425; Clarkson v. Hanway, 2 P. Wm. R. 203; Crawford v. Jarrett, 2 Leigh 630; 2 Stark. Evi. 761; Philips' Evi. 56, 481, 762, 785; Hoare v. Graham, 3 Camp. R. 59; Hogg v. Snaith, 1 Taunt. R. 347; Hare v. Shearwood, 1 Ves. Jr. R. 241; Moseley
709 v. Hanford, 21 *Eng. C. L. R. 156; Rogers v. Payne, 2 Wils. R. 376; Blake's Case, 6 Coke's R. 43; Watson v. Hurt, 6 Gratt. 633; Heagy v. Umberger, 10 Serg. & Rawle 339.

2d. That it was error to direct the issue. That all the evidence was by the plaintiff and referred to a parol contract, which could not be set up in the case; and was not sufficient in itself to outweigh the answer, which was responsive to the bill, and explicitly denied the promise therein stated. They referred to Wise v. Lamb, 9 Gratt. 294; Smith v. Betty, 11 Gratt. 752.

Steger, Mason and A. Hunter, for the appellee, insisted:

1st. That this was not a case in which it was proposed to add to or vary the terms of the written contract, but to set up the whole agreement. They admitted the general rule excluding parol evidence offered to add to or vary a written agreement; but they said there were numerous exceptions to that rule as well established as the rule itself. One is where part only of the agreement had been reduced to writing. 1 Greenl. Evi. § 284, a; Jeffery v. Walton, 1 Stark. R. 267, 2 Eng. C. L. R. 385; Brent v. Richards, 2 Gratt. 539. Another exception is where there is a new additional parol agreement. 1 Greenl Evi. § 303, 304. Another exception is where the written agreement is void by reason of fraud, &c. 1 Greenl. Evi. § 284, 296; 1 Story's Equ. Jur. § 153, 154, 155, and note 1 to § 154; Clark v. Grant, 14 Ves. R. 519; Hill v. Ely, 5 Serg. & Rawle 363; Miller v. Henderson, 10 Id. 290; the last cases being precisely like the present; Lyon v. Huntingdon Bank, 14 Id. 283; Pember v. Mathers, 1 Bro. C. C. 52. They also referred to the classes of cases in which parol evidence is admissible to convert an absolute deed into a mortgage; to cases of which King v. Smith, 2 Leigh 157, is one, in which a party is permitted to prove
710 that he signed a bond as surety *on condition that another should also sign it; and to cases in relation to the exchange of bonds.

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2d. That it was proper to direct an issue in the case. They endeavored to show that this case did not come within the influence of the principle of the cases of Wise v. Lamb, 9 Gratt. 294; and Smith v. Betty, 11 Gratt. 752; and they insisted that by a reference to the pleadings and proof it was shown that the issue was properly directed.

ALLEN, P. It was said by the court in the Countess of Rutland's Case, 5 Coke's R. 25, "that it would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth and agreement of the parties, should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory." In Stevens v. Cooper, 1 John. Ch. R. 425, Chancellor Kent remarks, "that there is no rule of evidence better settled than that which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement. Such testimony is not only contrary to the statute of frauds, but to the maxims of the common law; and the rules of evidence on this as on most other points, are the same in courts of law and of equity." See Fell v. Chamberlain, 2 Dick. R. 484; Woollam v. Hearn, 7 Ves. R. 211; Jordan v. Sawkins, 3 Bro. C. C. 388. In Crawford v. Jarrett, 2 Leigh 630, Green, J., states the rule in these words: "Parol evidence cannot be admitted (unless in case of fraud or mistake) to vary, contradict, add to or explain the terms of a written agreement, by proving that the agreement of the parties was different from what it appears by the writing to have been." In Watson v. Hurt, 6 Gratt. 633, 644, Judge Baldwin announces the rule in the following terms: "It is perfectly well settled that the terms of a written
711 contract *cannot be varied by parol evidence of what occurred between the parties previously thereto or cotemporaneously therewith." In 1 Greenl. Evi. § 275, the author observes that the rule as now briefly expressed is, "that parol cotemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." The rule thus announced as a rule of the common law at so early a day has been uniformly adhered to by the courts both of England and this country ever since; but in the application of it to different instruments, difficulties have arisen. Courts, while laying down the rule as unquestioned and unquestionable, and professing to recognize its wisdom and binding authority, have drawn distinctions to take particular cases of apparent hardship from without its operation, which at first view would seem to violate the rule itself. An examination of the cases, however, I think, will show that no case has been decided in which such oral evidence has been received to engraft upon, or incorporate with, the contract an incident occurring cotemporaneously therewith, and inconsistent with its terms.

Thus, in Crawford v. Jarrett, 2 Leigh 630, it was held that in cases of equivocal written instruments, the circumstances under which they were made may be let in to explain their meaning; and in that case parol evidence of the time and manner of the execution and delivery of the written promise was admitted to show, that a party who had signed but whose name was not in the body of the instrument, was jointly bound with those named. There no new words were added to the instrument. The proof was consistent with the terms of the instrument, and the only effect of the oral evidence was to enable the court to read the writing by the light of surrounding circumstances, that it might ascertain the meaning of the parties.

So in Wigglesworth v. Dallison,
712 Doug. R. 201, it *was decided that a custom that a tenant, whether by parol or deed, shall have the way going crop at the end of the term, is good if not repugnant to the terms of the lease; Lord Mansfield observing that the custom did not alter or contradict the lease, but only added something to it. Perhaps a more satisfactory reason for not applying the rule to such a contract is given by Park, B., in Hutton v. Warren, 1 Mees. & Welsb. 466, that such evidence is left in upon the principle of presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to the known usage. He doubted the wisdom of the relaxation of the common law rule, but as between landlord and tenant it had been too long settled by authority to change the practice.

So with reference to commercial transactions, proof of usage is admitted either to interpret the meaning of the language of the contract, or to ascertain its extent, in the absence of express stipulations, or where the language is obscure. As where a promissory note is payable with grace, evidence of the established and known usage of the bank where it is payable, is admissible to show on what day the grace expired. Renner v. Bank of Columbia, 9 Wheat. R. 581. Oral evidence is also admitted to prove that a person who signed as principal was in reality an agent, when offered for the purpose of charging the principal with the contract: Upon the ground we are told in 2 Smith's Leading Cases 307, of assimilating this case of a dormant principal, to that of a dormant partner. The latter is liable on the ground of agency, and if they trade under the name of A, that name when used in a contract relating to such trade, comprehends both. And if one may contract jointly with another in the name of that other, he may contract individually in the same way;
713 and parol evidence is admissible *to show the agent so contracted for him. It is not to contradict or change the terms of the written contract, but to show the import of the signature.

So where oral evidence is admitted to show in an action on a promissory note acknowl-

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edged to be for value received, a want of consideration for the promise, or that the instrument was void by reason of fraud or illegality, these may be proved as distinct independent facts collateral to the contract, but not tending to vary or contradict the terms of it. Nor, as it seems, does the rule apply where the contract was reciprocal, and the part applicable to one party only has been reduced to writing. Of this class was the case of Brent v. Richards, 2 Gratt. 539. That was a parol contract for the sale of a slave at a reduced price, with a condition if the purchaser desired to sell, the seller should have him at the price he received. The vendor executed a bill of sale which was silent as to the condition to repurchase. The purchaser afterwards sold to a stranger at a higher price. In a suit by the seller against the purchaser this court held, that the deed was not an estoppel in evidence of any matter not inconsistent with and contradictory of it. That the deed was merely the execution of the contract on the part of the vendor, and put the property in the condition in which the contract sued on began to operate.

So oral evidence of a subsequent contract varying the terms of a previous contract on a new consideration, or of a discharge thereof, does not contradict or change the terms of the contract, but establishes independent facts, to avoid the effect of it.

And so in the cases relied on where a court of equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, the party to be charged is permitted to show by oral testimony, that under the circumstances the plaintiff
714 is not entitled to *have the agreement enforced. Woollam v. Hearn, 7 Ves. R. 211; Clark v. Grant, 14 Ves. R. 519; Ramsbottom v. Gosden, 1 Ves. & Beame 165. And this because parol evidence may be received to rebut an equity, and specific performance is not decreed ex debito justitiæ, but rests in discretion.

And so with respect to such evidence to prove an attempt to convert into an absolute sale that which was intended as a security for a loan; it is the fraudulent attempt of the grantee, and perhaps on the ground of a resulting trust in favor of the grantor, that such evidence is re-
715 ceived.* The latter is probably *the true reason for the relaxation of the rule in this instance. To let in oral evidence to prove that the parties intended a deed to be a mortgage which purports on its face to be absolute, is to establish a different agreement by parol testimony, in the violation of which the fraud consists. Unless this case be an exception to the general rule, I can find no case which determines that oral cotemporaneous evidence is admissible to contradict the terms of a written agreement, or substantially vary the legal import thereof, provided the instrument was a valid instrument, and the party designed to execute it in its existing form. The fraud which will let in
716 such proof, *must be fraud in the procurement of the instrument, which goes to its validity, or some breach of confidence in using a paper delivered for one purpose and fraudulently perverting it to another. In such cases the oral evidence tends to prove independent facts, which if established avoid the effect of the written agreement by facts dehors the instrument, but do not tend to contradict or vary it.

It is reasoning in a circle, to argue that fraud is made out, when it is shown by oral testimony that the obligee cotemporaneously with the execution of a bond, promised not to enforce it. Such a principle would nullify the rule: for conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written agreement according to its terms, would always be guilty of fraud. The true question is, Was there any such agreement? And this can only be established by legitimate testimony. For reasons founded in wisdom and to prevent frauds and perjuries, the rule of the common law excludes such oral testimony of the alleged agreement; and as it cannot be proved by legal evidence, the agreement itself in legal contemplation, cannot be regarded as existing in fact. Neither a court of law or of equity can act upon the hypothesis of fraud where there is no legal proof of it. Thus although for the reasons given, parol evidence that a person who signed as principal was in truth an agent, is admissible when offered for the purpose of charging the principal with the contract; such evidence can never be received for the purpose of exonerating an

Note by the Judge.—In Russell v. Southard & als., 12 How. U. S. R. 139, the question was, Whether the deed was a mortgage or conditional sale?

CURTIS, J., delivered the opinion of the court. "It is insisted on behalf of the defendants, that this question is to be determined by inspection of the written papers alone, oral evidence not being admissible to contradict, vary or add to their contents. But we have no doubt extraneous evidence is admissible to inform the court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be." He refers to Conway v. Alexander, 7 Cranch 238. Then he says, "And in Nixon v. Rose, 1 How. U. S. R. 126, it is stated, the charge against Nixon is, substantially, a fraudulent attempt to convert that into an absolute sale which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face."

"These views are supported by many authorities." And he cites a number.

After stating that if the courts of Kentucky had decided differently, the Supreme court would not be controlled by them, he proceeds: "But we do not perceive that the rule held in Kentucky differs from that above laid down. That rule, as stated in

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agent who has entered into a written contract in which he appears as principal; for such evidence would alter the written contract. Higgins v. Senior, 8 Mees. & Welsb. 834; Hunt v. Adams, 7 Mass. R. 518; Stackpole v. Arnold, 11 Mass. R. 27.

Numerous examples of the cases in
717 which *such evidence has been rejected may be found referred to in 1 Greenl. Evi. § 281. Amongst the cases cited are some deciding, that where the instrument purported to be an absolute engagement to pay at a specified day, parol evidence of an oral agreement at the same time, that the payment should be prolonged, or depend upon a contingency, or be made out of a particular fund, is inadmissible. The case of Watson v. Hurt, 6 Gratt. 633, is a striking instance of the application of the rule. There a promissory note to the plaintiff, payable on demand, was endorsed by a stranger which entitled the plaintiff to fill up the blank endorsement with a guarantee by the defendant for the payment of the money according to the terms of the note. As the note was payable on demand, an action on it was barred by the statute of limitations. But the making of the note and the endorsement were cotemporaneous acts, part of the same transaction, and this court decided that it was inadmissible to show by oral testimony a parol agreement at the time of the execution of the note by the principal and endorsement by the guarantor, that the note instead of being payable on demand and absolutely, was payable only conditionally upon the happening of a future event. That such evidence would have been inadmissible as against the maker and much more so as against the guarantor. And the consequence was the defeat of the action by the statute of limitations in contravention and fraud of the cotemporaneous parol agreement, provided there could have been any legal proof of the existence of such agreement.

Cases have been cited from 5th and 14th Sergeant and Rawle's Reports, establishing a different principle, as it has been argued, and they have been much relied upon. An examination of the cases satisfies me that the court did not intend to come in conflict

with the general rule, which was ex-
718 pressly recognized, but supposed *the facts of the cases withdrew them from its operation. In the case of Hill v. Ely, 5 Serg. & Rawle 363, notes were delivered to the plaintiff by the defendant in payment of goods purchased at the time of giving the notes; the notes were endorsed by the defendant, who being sued as endorser was permitted to prove by oral testimony, that at the time of the endorsements it was expressly agreed that the defendant was not to be held responsible as endorser for the payment of the notes, but that the endorsement was made for the purpose of enabling the plaintiff to collect the money from the maker. The court held that the endorsee stood not as an endorsee with a full endorsement, but with a blank endorsement, which he had no authority to fill up with a full endorsement so as to render the endorser liable for payment; that the endorsement being made merely to enable the plaintiff to collect the notes, he received them in trust for this purpose alone; and the case was held to fall within the principle of cases deciding that notes delivered to an agent to be discounted for the use of the principal, discounted for his own use to persons having knowledge, should be delivered up, and other cases deciding, as between parties to negotiable paper, that no consideration or fraud may be shown. Of this case it may be remarked that the mere endorsement did not pass title; it was the contract of which the endorsement was the evidence. And the contract being conditional, made with one intent, it was a fraudulent perversion of it to use it for another purpose. The evidence did not contradict but was let in

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Thomas v. McCormack, 9 Dana 109, is that oral evidence is not admissible in opposition to the legal import of the deed and the positive denial in the answer, unless a foundation for such evidence had been first laid by an allegation and some proof of fraud or mistake in the execution of the conveyance, or some vice in the consideration.

"But (the judge continues) the enquiry still remains what amounts to an allegation of fraud or some vice in the consideration: and it is the doctrine of this court, that when a loan on security was intended, and the defendant sets up the loan as the payment of purchase money, and a conveyance as a sale, both fraud and vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage."

The opinion of the court in the case referred to from Kentucky, of Thomas v. McCormack, is free from doubt as to what was meant by the phrase "of the allegation and proof of fraud or mistake in the execution of the conveyance or vice in the consideration." In a subsequent paragraph, the chief justice says, "In this case there is neither allegation nor proof of either fraud or mistake in the execution of the deed, nor is there any suggestion of an illegal or immoral consideration. On the contrary, there can be no doubt the grantor intended the deed to be absolute on its face when he signed it; and that the grantee was guilty of no fraud in procuring such a deed; and that the consideration for it was valuable and legal." Thus showing the fraud referred to, was fraud in the procurement or execution of the deed, or the consideration was vicious because immoral or illegal; and therefore such proof was not in opposition to the legal import of the deed, but on the contrary was proof of a matter collateral to it and impairing its validity as a deed. In Floyd v. Harrison, 2 Rob. R. 161, 175, the question was alluded to by JUDGE BALDWIN, who remarked in substance, that such extrinsic evidence may be received when it may be fairly referred to fraud, accident or mistake. But he does not say distinctly whether the fraud should relate to the execution of the deed; or whether it could be established by evidence of a cotemporaneous oral agreement varying the import of a valid instrument which the party knew to be an absolute deed when he executed it. The illustrations which he gives relate chiefly to the execution of the instrument.

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to show what were the terms of the contract, and when filled up actually or by supposition, it was a qualified endorsement.

In the case of Heagy v. Umberger, 10 Serg. & Rawle 389, the opinion was delivered by the same learned judge who delivered the opinion of the court in Hill v. Ely.

It was an action against the assignor
719 for the *insolvency of the maker.

The assignment showed no guarantee of solvency, but the contrary was expressed. Duncan, judge, observed that the courts had gone far enough in admitting parol evidence where the contract was in writing; that where there was no fraud alleged, or mistake, or omission by the scrivener, and the writing expressly excluded all guarantee of the solvency of the maker, to admit parol evidence to contradict it, would be contrary to every rule of law, and would render all writings worse than useless; that whatever is reduced to writing, that is to be considered as the evidence of the agreement, and every thing resting in parol becomes thereby extinguished.

In the case of Lyon v. Huntingdon Bank, 14 Serg. & Rawle 283, the bank agreed to loan upon the credit solely of certain bonds, but in compliance with the rules of the bank required a note with an endorser for form sake to be put in, and assured the party that the note was a mere matter of form without responsibility on the signers. Tilghman, Ch. J., said that where there is an agreement in writing, parol evidence of the same agreement is inadmissible, but the evidence offered did not fall within the rule. It was not pretended that any thing was wrong in the note or that any alteration whatever should be made in it. In point of fact it was never executed and made as an effective operative security, to bind the parties. It was a matter of form required by the officers to show a compliance on their part with the rules of the bank, and it was a fraud to attempt to set it up as a valid security. It was evidence of independent facts to avoid the effect of what purported to be a valid security, but not to contradict or vary the terms of it. How far the distinction taken was well

founded might be a question; the case
720 was decided *because the court considered it did not come within the influence of the general rule.

With this view of some of the authorities in regard to the application of the rule of evidence, it remains to enquire whether by the case as made by the bill the appellee seeks relief by oral evidence of an agreement additional to, but consistent with, the terms of the written agreement, or by proof of fraud in the procurement thereof, or of a breach of confidence in perverting what was delivered conditionally or diverso intuitu, and using it as a valid instrument; or by proof of any mistake or omission and a fraudulent attempt to take advantage thereof.

The bill alleges the recovery of a judgment by the appellant against the appellee's testator Edward Lucas, in the Circuit court of Jefferson county on three single bills executed by George Reynolds, Jacob W. Reynolds, J. McMurran, C. Billmyer and the said Lucas. That these papers were given for a previous debt due by the two Reynoldses the principals, and that before they were signed, it was understood and agreed between the two principals and their three friends McMurran, Billmyer and Lucas, that all were to sign or none would be bound. That subsequently the said notes were prepared by J. W. Reynolds, and after they were signed by G. Reynolds, J. W. Reynolds, McMurran and Billmyer, and before their delivery to the appellant, they were presented to the appellee's testator, who refused to sign them, in consequence of consultation with his friends, and learning the extent of his previous liabilities for said Reynolds greatly exceeding those of the other parties. That nevertheless the appellant contrived to get possession of the bonds, without the signature of the appellee's testator, and applied himself to the appellee's testator for his signature, who again

and repeatedly refused to sign the
721 bond until *some eight months after

they had been in possession of the appellant, when being in the appellant's store, the latter again urged him to affix his signature, alleging that Billmyer was talking disrespectfully of Captain Reynolds, and injuring the appellant's credit; that he wished to stop Billmyer's mouth, and pledged his honor that if the appellee's testator would sign the bonds, he should never be required to pay any part of the debt, and that he would give the appellee's testator his written indemnity so as to save him harmless. That not being a lawyer and entirely ignorant of the legal consequences to others of the delivery without his signature, unapprized that by signing the bonds he might possibly jeopardize his friends, but ignorantly supposing that the appellant having got possession of the bonds with the signature of the others, they were already bound, and that therefore the addition of his name would not affect them, he permitted himself to be overcome by the importunities and representations of the appellant as to his credit, and signed the said bonds upon his said promise of indemnity.

The bill further avers that as the bonds become due the appellant put them in suit, and that still relying on the appellant's promise, no plea was put in by the appellee's testator, and judgment went against him by default. That the principals were bankrupt, and that the other defendants McMurran and Billmyer put in pleas of non est factum, and were discharged.

It is further averred in the bill that after the suit was brought upon the first bond, the appellee's testator applied to the appellant for the indemnity he had promised as the condition of his signing, and the appellant advised him to keep quiet and wait a while; that afterwards he called again in company with his son, and demanded the promised indemnity, and was

assured by the appellant that he would fulfill his promise, but that he would not commit himself, and that
722 *the appellee's testator had nothing to fear but his death. The bill concludes with a prayer to require the appellant to comply with his promise to execute and deliver a proper indemnity and release from the said judgments, for an injunction, and for general relief.

To this bill the appellant demurred. The rule of evidence which excludes parol evidence tending to vary or contradict the terms of a written agreement is the same in equity as at common law. And the question is presented whether parol evidence tending to prove the oral contract set up in the bill would not vary or contradict the bonds executed by the obligor. No fraud is alleged in the procurement of the bonds; it is not averred that the appellant was apprised of the alleged understanding and agreement that all were to sign or none; the consideration of the bonds was a previous debt, and it is not pretended that they were not executed and delivered as valid securities.

What does the bond import? That the obligor binds himself to pay the money at a certain day; and the law, with reference to which the parties contracted, declares that he may be compelled to pay. If the bond or writing contained on its face and as part of the instrument a clause providing that payment should never be demanded or enforced, such stipulation would go to the whole obligation, and it would possess no validity. Without a provision of that kind, it is an obligation to pay which the obligee could enforce; with such a stipulation it is utterly worthless. The writing is but evidence of the agreement, and if it can be established and set up by oral evidence, the agreement when once proved must have the same effect. It shows that that which from the face of the instrument would appear to have been intended as a valid security, was by an agreement co-temporaneous with its execution, de-
723 signed to be of no *validity as an obligation. The promise alleged is, that he should never be required to pay any part of the debt, and that he would give his written indemnity so as to save him harmless, and that he signed upon his said promise of indemnity. Treating it as equivalent to a promise not to sue, or a promise to save him harmless, it could, if in writing under seal, have been relied on as a release or defeasance, and would in effect have discharged the obligor from the obligation of his bond. The case as made by the bill cannot be brought within the principle of any of the cases withdrawn from the operation of the rule of evidence under consideration, unless it be that class where the original contract was verbal and entire, and part only of it was reduced to writing. But in this case there was no such verbal contract with the appellee's testator; his contract as set forth, was to be manifested by his signature to the bond. No consideration passed to him, no contract bound him, upon which an action could have been maintained until he executed the bond. His liability and the extent of it rests upon the bond alone. The case therefore wants an essential constituent of the cases under this head, relied upon in argument. The hirer of a slave agrees to pay a certain price, and to employ him in a certain manner. The contract is oral and complete without writing, and an action could be maintained for a breach. The execution of a note for the price would not extinguish so much of the contract as related to the mode of employment. In this class of cases too, the oral evidence does not vary, contradict or in any way affect the written instrument; it consists with it; and by admitting the evidence of the additional matter, full effect is given to the entire parol contract. The case of Brent v. Richards, 2 Gratt. 539, was decided on a principle somewhat analogous. But the case as made by the bill in this case,
724 fails in both respects. There *was no such entire original parol agreement upon which an action could have been maintained if no bond had been executed; and the proof, instead of consisting with the writing, leaving it to operate fully according to its terms, abrogates and utterly avoids it.

The case cannot be brought under any head of fraud, except by proof of the co-temporaneous agreement inconsistent with the written instrument; and, for the reasons already given, no proof of that kind can legitimately be received. No such agreement in legal contemplation exists, and no fraud can be imputed to the obligee for insisting on the terms of his bond. If it be averred, that although a note is on its face payable on demand and unconditionally, there was a cotemporaneous oral agreement, that the time for payment should be postponed, or required only upon the happening of a certain contingency, parol evidence of such an agreement is inadmissible. Mosely v. Hanford, 21 Eng. C. L. R. 156; Free v. Hawkins, 8 Taunt. R. 92; Hanson's trustees v. Stetson, 5 Pick. R. 506; Spring v. Lovett, 11 Pick. R. 417; Watson v. Hurt, 6 Gratt. 633. Yet it might be argued with the same force, that this oral agreement may have induced the party to sign the note, and that it is a gross fraud to attempt to enforce it according to its terms. And so it would be if the existence of the agreement could be judicially established. But there being no legal proof of it, there is nothing of which fraud can be affirmed. The rule is founded in wisdom, and a different principle would weaken confidence in all securities for debts. Matters in writing, instead of finally importing the certain truth and agreement of parties, would be a snare and delusion. The party relying on an instrument in writing as the final result in which all previous negotiations have centered, would be met and "controlled by an averment to be proved by the uncertain testimony of

slippery memory." The principle of
725 the decision *in Waston v. Hurt, and the other cases referred to, would seem to be decisive against the pretensions of the testator of the appellee. As no evidence of the cotemporaneous agreement set out would have been legitimate, the bill, which is a bill for relief in equity, stating a case of which there can be no legal proof, shows no ground for relief, and the demurrer should have been sustained. If we look beyond the bill to the pleadings and proof, the answer expressly denies the alleged promise relied on, and there was nothing but oral evidence tending to establish it. Instead of directing an issue, the case should have been dismissed at the hearing. The application of the rule of evidence referred to removes from under the case of the appellee the ground on which it rests; being incurably defective, no amendment could help him.

I think the decree should be reversed, and a decree entered dismissing the bill.

The other judges concurred in the opinion of Allen, P.

Decree reversed.

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726 *Lee v. Hodges.

January Term, 1857, Richmond.

1. **Seduction—Action by Father—Relation of Master and Servant.***—The action by a father for the seduction of his daughter is founded on the relation of master and servant, and not that of parent and child.
2. **Same—Same—Same—Declaration Must Allege.**—In such action the declaration must allege the relation of master and servant, or it will be fatally defective on demurrer.
3. **Same—Same—Same—Need Not Prove Loss of Services—Statute.**—The only change made by the act, Code, ch. 148, § 1, p. 589, in relation to the action of seduction, is to dispense with proof of the loss of service: The act does not give the action in any case where it did not lie at common law.†
4. **Same—Same—When Will Not Lie—Case at Bar.**—Where a daughter over the age of twenty-one years, who lives away from her father's house, under a contract for her services made by herself after she came of age, for her own benefit, is seduced, the action by the father will not lie either at common law or under the statute.

This was an action on the case in the Circuit court of Franklin county by Elijah Hodges against Charles C. Lee, for the seduction of the plaintiff's daughter. The declaration contained two counts, the first of which charged the seduction of the plaintiff's daughter, Julia F. Hodges, by the defendant, by which the plaintiff was deprived of his domestic peace and happiness, and his comfort in the society of his daughter; and that he had been obliged to pay a large sum of money about the nursing of her; but did not charge the loss of her services. The second count was in the usual form.

The defendant appeared and demurred to each count of the declaration, and pleaded "not guilty," and the
727 *plaintiff joined in the demurrer, and took issue on the plea. There does not appear to have been any judgment upon the demurrer; but the cause came on to be tried upon the issue joined on the plea.

On the trial after the evidence had been introduced which is stated in the opinion of Judge Daniel, the defendant moved the court to instruct the jury, that if they believed from the testimony in the cause that the said Julia F. Hodges was, at the time of the said alleged seduction, more than twenty-one years of age; that she was then residing with the defendant, and not with the plaintiff, under a contract made with the defendant by her to render him service in his own house for twelve months, for a consideration agreed by the plaintiff to be paid to said Julia F. Hodges, for her own use; and that such contract was made after the said Julia F. Hodges had attained the age of twenty-one years, they must find for the defendant. But the court refused to give the instruction; and the defendant excepted.

The jury found a verdict for the plaintiff for four thousand five hundred dollars; which the defendant moved the court to set aside on the ground that the damages were excessive; but the plaintiff having in open court released fifteen hundred dollars, parcel of the said damages, the court overruled the motion, and rendered a judgment for three thousand dollars. The defendant thereupon applied to this court for a supersedeas, which was allowed.

The case was argued orally by Patton, and in writing by Wootton, for the appellant. There was no counsel for the appellee.

DANIEL, J. The action by which a father recovers for the seduction of his daughter is founded not on the relation of parent and child, but on the relation
728 *actual or constructive of master and servant. The loss of service which he has sustained or is supposed to have sustained in consequence of the debauchment of his servant, is the ground on which his legal right to damages rests at the common law; though when this prerequisite to the maintenance of the suit is established, the damages which he is allowed to recover are not measured by the value of the services which have been lost or are supposed to have been lost to him, but find their standard rather in the magnitude of the wrong which has been done to his feelings as a father.

Where the daughter is a minor at the

*Upon the question of "Seduction," see *foot-note* to Clem v. Holmes, 33 Gratt. 722, where there is a collection of all of the cases that cite the principal case. See also, *foot-note* to White v. Campbell, 13 Gratt. 573.

†Code, ch. 148, § 1, p. 589. "An action for seduction may be maintained without any allegation or proof of the loss of the service of the female."

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time of the seduction, the rules which have been adopted by the courts in this country in respect to the nature of the facts and circumstances necessary to prove the relation of master and servant and loss of service to the father, vary in some important particulars from those which have hitherto prevailed in England. Where, however, the daughter is above the age of twenty-one years, there is no difference between the English and American cases as to the necessity of the father's showing generally, in order to maintain his suit, that the daughter was living with him or was in his service at the time of the seduction; though any acts of service, however slight, have been held sufficient. Nickles v. Stryker, 10 Johns. R. 115; 2 Rob. Pr. 559 (new ed.); Postlethwaite v. Burke, 3 Burr. R. 1878; Bennett v. Allcott, 2 T. R. 166. An exception to this rule was however allowed in the case of Speight v. Oliviera, 3 Eng. C. L. R. 445, where the defendant, under the false pretense of hiring the plaintiff's daughter as a servant, induced her to leave her father's house where she was rendering service in domestic matters, and afterwards seduced her whilst she was remaining in his the defendant's house. In that case, though the daughter was twenty-three
729 years of age, the father *was allowed to recover upon the ground that the absence of the daughter from her father's house and the interruption in her services were occasioned by the fraud and contrivance of the seducer.

In the case before us it appears from the evidence, as set out in the bill of exceptions, that the daughter of the defendant in error, at the time of the alleged seduction, was between twenty-three and twenty-four years old; that her general home was at the house of her father, but that she sometimes took service in the houses of families in the neighborhood, returning, at the end of the terms of such service, to her father's house; and that she was, at the time of the said alleged seduction, residing not with her father, but in the neighborhood, in the house of the plaintiff in error, under a contract, made by her with him, after she had attained the age of twenty-one years; by the terms of which contract she was to render him service in his house for the space of twelve months for a price to be paid her for her use; and that before her pregnancy became known to others, and before the end of the year for which she had contracted to live with the plaintiff in error, she left his house and service, and after living a short time at the house of another person, returned to the house of her father, where she was delivered of a child before the institution of the suit.

If we apply to this statement of the case the rules of the common law already mentioned, it is obvious that there is no ground on which to rest the refusal of the Circuit court to instruct the jury that the action could not be maintained.

The daughter was of full age, living away from her father's house, under a contract made by her and for her own exclusive benefit, after she had attained her majority, when she had a right to make her own contracts. There is an absence
730 of any evidence going to *show that improper means were used to induce her to enter into the contract, or that the plaintiff in error entertained any improper designs towards her when he engaged her services. It does not even appear that she was in the father's service, or that she owed him any service, or was living with him at the time when the contract was made. The fact that she returned to her father's house, and was there delivered of a child before the institution of the suit, does not make out a case. There is no evidence that the father paid or became in any manner liable to pay the expenses of her lying in. And indeed had there been such evidence, it would not have furnished under the circumstances a ground for the action.

It is suggested, however, in the petition for the supersedeas, (and I presume properly,) that the judge of the Circuit court, in refusing to give the instruction, was governed by what he supposed to be a change in the law, effected by a provision of the Code of 1849, declaring that "an action for seduction may be maintained without any allegation or proof of the loss of the service of the female by reason of the defendant's wrongful act."

The defendant in error has not been represented by counsel here; and I regret that in a case of such interest turning upon a statute, the construction of which is now for the first time made the subject for the consideration of this court, and to which such important effects have been attributed by the judge below, we have to proceed to a decision without the aid of the views which controlled his judgment.

On the part of the plaintiff in error the ground is taken in the petition for a supersedeas, that in an action for seduction at the common law, it is necessary to aver and prove not only the relation of master and servant, but also the fact of the loss of service; and it was urged as well in an oral as in a written argument pre-
731 sented *by his counsel, that the only design contemplated by the section in question is to dispense simply with what is familiarly known in pleading as the "per quod servitium amisit," and the proof to sustain its averments; and consequently, that it is just as essential now as it was before the enactment of the Code, to aver and prove the relation of master and servant; or the right (at least) of the plaintiff to the services of the female alleged to be seduced. In support of this view, it was said that such was evidently the design of the revisors in recommending the enactment of the section as shown in their report; and it was argued that as the legislature adopted the section without alteration, it was fair to infer they had the same design in passing it.

At page 734 of their report, in a note to this section, the revisors say, "The foun-

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dation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter, has been uniformly placed not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest. It has therefore been held in England that the loss of service must be alleged in the declaration and proved at the trial, or the plaintiff must fail. 'It is (says Chief Justice Tindal in Grinnell v. Wells, 7 Mann. & Gran. 1033, 49 Eng. C. L. R. 1033,) the invasion of the legal right of the master to the services of his son, that gives him the right of action for beating his servant; and it is the invasion of the same legal right and no other, which gives the father the right of action against the seducer of his daughter.' Yet in Revill v. Satterfit, 1 Holt's R. 442, 3 Eng. C. L. R. 153, it was conceded by Hullock, sergeant, for the defendant, that in most cases of this sort the condition of service was regarded as a mere conveyance to the
732 *action. It was the form through which the injury was presented to the court; and having obtained its admission upon legal principles, it brought along with it as parts of itself all the circumstances of the case. And Chief Justice Tindal, in the case referred to, says 'The damages recoverable by the father when he brings the action, are confessedly not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case.' It is obvious, then, that the ground of action is technical and the loss of service in a great degree a fiction; since the most trifling and valueless acts of service have been admitted as sufficient. In some cases indeed the action is placed upon the right to claim the services. In Hewitt v. Prime, 21 Wend. R. 79, Nelson, C. J., delivering the opinion of the Supreme court of New York, says, 'The old idea of loss of menial services, which lay at the foundation of the action, has gradually given way to more enlightened and refined views of the domestic relations. These are, that the services of the child are not alone regarded as of value to the parent. As one of the fruits of more cultivated times, the value of the society and attentions of a virtuous daughter is properly appreciated; and the loss sustained by the parent from the corruption of her mind and the defilement of her person by the guilty seducer is considered ground for damages.' The action being fully sustained in his judgment by proof of the act of seduction in the particular case, other circumstances come in by way of aggravating the damages. There being such opposite opinions as to what is necessary to afford a legal ground for the action, and the rule established in New York placing the action upon that which a jury look to in estimating the damages, we think it best that the same rule should be adopted in Virginia."

If after looking to the note of the
733 revisors any *doubt remains as to the end which they had in view in proposing the enactment, that doubt may, I think, be removed by noticing somewhat more particularly the cases to which they refer. In the first case, Grinnell v. Wells, the declaration alleged that the daughter of the plaintiff was a poor person, who maintained herself by her labor and personal services, and was unable to maintain herself except by her labor and personal services; that she was under the age of twenty-one years, and that by means of the seduction and her consequent pregnancy and sickness she became unable to work or to maintain herself, and that her father being of sufficient ability to maintain her, was forced and obliged to maintain her at his own charges, and incurred and paid divers expenses in maintaining, nursing and taking care of her during her sickness, &c.

It will be perceived that there was a failure to allege any loss of service to the plaintiff; and after a verdict in his favor for two hundred pounds, there was a motion in arrest of judgment, which was sustained. Tindal, C. J., after stating the character of the declaration, said that the right of the father to recover damages for the seduction of his daughter had been uniformly placed, not upon the seduction itself, but upon the loss of the service of the daughter. And in support of the propriety of the rule stated that the action rested on the same principle that governed the action of a master for the beating of his servant; and cited a passage from the opinion of the court in the case of Robert Mary, in which it was said, "If my servant be beaten, the master shall not have an action for this beating, unless the battery is so great that by reason thereof he loses the service of his servant; but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating
734 of *his servant but by reason of a per quod; viz: per quod servitium amisit; so that the original act is not the cause of his action, but consequent upon it, viz: the loss of the service is the cause of his action." And in concluding his opinion in support of the motion, he observes that if the liability of the father under the statute of Elizabeth to support his child when unable to support herself, would form a ground of action per se independently of loss of service, the anomaly would follow, that as the father is only liable under the statute when he is of sufficient ability to do so, and as the damages recoverable by the father where he brings the action are confessedly not limited to the actual expenditure of his money, but may be given according to the circumstances of aggravation in the particular case, the right of action to recover compensation would be confined to persons of ability to maintain the daughter, and would be denied to the poorer classes of the community.

In the case of Revill v. Satterfit, the

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second case referred to by the revisors, the daughter of the plaintiff had been at service in the family of the defendant's uncle. Some suspicion having attached to her intercourse with the defendant, she had been removed to another situation, from which she returned to her father's house. Here she had been in the habit of receiving the defendant and of sitting up with him at late hours of the night after the family had retired to rest. Another daughter of the plaintiff proved the acknowledgment of the defendant that he had seduced her sister, and that he was the father of a child which she had borne. The girl who had been seduced was not introduced as a witness. The counsel for the defendant contended that the case of the plaintiff left so bare of evidence, should be dealt with upon the strict legal principles on which the action was founded; and that the damages
735 should not exceed *the value of the services actually lost. He admitted that in most cases of this sort the condition of service was regarded as a mere conveyance to the action. It was the form through which the injury was presented to the court; and having obtained its admission upon legal principles, it brought along with it as parts of itself, all the circumstances of the case. But when the object of seduction was not herself produced, the strongest suspicion attached to the quality of the injury. He contended therefore that the jury ought not to estimate the damages upon the ordinary principles which obtained in cases of the kind. Mr. Baron Wood said that the plaintiff had his right of action for loss of the services of his daughter; a loss which he alleged he had sustained by the seduction of the defendant. It was not necessary to produce the daughter, though the withholding of her was open to observation. In strictness, the action being founded on the loss of service, the damages ought to have reference to the extent of the service. But that an injury of the kind was always complicated with circumstances; and it was difficult to separate one part from the other; and held that it was not necessary to produce the girl as a witness.

In the case of Hewitt v. Prime, the suit was brought by the plaintiff for the seduction of his daughter of the age of seventeen, whilst she was a member of his family. And the suit was brought after the daughter was discovered to be pregnant, but before the birth of the child. Such being the state of facts proved on the trial, the counsel for the defendant moved the court to instruct the jury that to sustain the action it was necessary that the plaintiff should have proved loss, expense or damage before suit brought, in consequence of the seduction. But the judge charged the jury that the daughter being in her minority, a member of the family of her father,
736 no loss, expense or *damage prior to the suit need be shown. And there being a verdict for the plaintiff, the question was, Whether there should not be a new trial on account of the charge given by the judge at the trial? It will be seen that in this last case cited by the revisors, there was no question raised as to the relation of master and servant. The daughter was a minor living with her father, a member of his family; and the motion to give such instructions as were asked, implied the concession that nothing was wanting to make out the case but proof of some actual loss of the services of the daughter, resulting from the wrongful act.

Upon this view of the character of the cases to which the revisors refer, and the grounds on which they were decided, it does not seem to me that there can be any serious doubt as to the design which they contemplated in recommending that the rule established in Hewitt v. Prime should by a provision of the Code be adopted as the rule in Virginia. The rule in Hewitt v. Prime goes to the extent of dispensing with proof of actual loss of the services of the daughter, but no further. And I do not think that the recommendation of the revisors shows a purpose to accomplish any thing more by the enactment of the statute which they reported to the legislature for its adoption. See 2 Rob. Pr. 562, (new ed.). Showing plainly that such is the view of Mr. Conway Robinson, one of the revisors, taken in the recent edition of his practice. It must be conceded, however, that the term employed in the act, loss of service, is sometimes used in a sense which would embrace as well the actual loss of service or inability of the female to render service, as the right of the plaintiff to such service; and if it is apparent from the language of the act, that the term is used in that sense, it would be our duty, I apprehend, so to construe it, though in doing so we
737 should be led *to results beyond those which we might infer were in the contemplation of the legislature, from the fact of their having passed the law as it came from the revisors.

The loss of service is the gist of the action, and it may be said, not incorrectly, and in the reports is, frequently, said that a plaintiff has failed to maintain his action, because he has failed to show that he has sustained any loss of service, in cases where the sickness and confinement of the female and birth of her child consequent upon the seduction, show her inability to render service; and the only defect is that the plaintiff has failed to show the relation of master and servant, or his right to the services. Yet, in pleading and in practice there are three constituents of the action, the presence of all of which is essential to its maintenance, viz: the relation of master on the part of the plaintiff to the female, her seduction, and the actual loss of her services as a consequence. This actual loss of service, though frequently spoken of in the text books and in the opinions of judges as a mere fiction or form, had rarely if ever been dispensed with either in England or in this country prior to the decision in Hewitt v. Prime. From the case of

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Grinnell v. Wells, decided in 1844, we have seen that it is still, or was, at the time of the enactment of the Code, indispensable to the maintenance of the action in England. And in the cases of Martin v. Payne, 9 John. R. 387, Clark v. Fitch, 2 Wend. R. 459, Hornketh v. Barr, 8 Serg. & Rawle 38, which, in opposition to the decision in Dean v. Peel, 5 East's R. 45, have established in this country the rule, that whilst the daughter is under twenty-one, she will, for the purposes of the action, be regarded as the servant of the father, though not living with him, but away from him, in the family and service of another, except where the father has renounced and abandoned her totally, and devested
738 *himself of all right to reclaim her services. In each of these cases the disability of the daughter to perform services, resulting from the act of seduction, was shown; and the legal right of the father to have damages for loss of service, was placed on the ground that the daughter was his servant de jure though not de facto at the time of the injury; and being his servant de jure, the defendant had done an act which deprived the father of his daughter's services—services which he might have exacted and she might have rendered but for that injury.

It is also worthy to be observed, that in the case of Hewitt v. Prime, Nelson, C. J., in taking the ground that proof of the actual loss of the daughter's services was not essential, after assigning the reasons stated in the portion of his opinion quoted by the revisors, thought it well to fortify his position by the further argument that the value of her services would be necessarily diminished by the defilement of her person and corruption of her mind.

From this view of the state of the law on the subject when the legislature came to pass the act, it will be seen that an important change in the law would still be affected, and the terms of the act satisfied, by giving to the words in question the restricted meaning contended for by the plaintiff in error.

That this is the true construction, is made still more apparent when we observe the obvious difficulty if not impossibility of giving any effect to that construction which would dispense as well with the necessity of proof of right to the services of the female as of proof of the actual loss of such services. The statute does not in terms confer the right to bring the action on the father or any one else; and as at the common law neither he nor any other person can maintain the action without showing his right to the services of the female who has been wronged, if the
739 statute is to be *construed as dispensing with the proof of such right, we should have the anomaly of an action maintainable without any ascertainment of the person or persons to bring it. And if by a strained inference we might otherwise intend that inasmuch as the action is one more generally used to enable a father to recover exemplary damages for the seduction of his daughter than for any other purpose, the legislature designed by the passage of the act to enable him to recover in cases in which at the common law he would be defeated by want of proof to establish the relation of master, or the right to the services of the daughter, we should still have to encounter objections of a character so serious as to forbid such a construction. For, as was argued by the counsel of the plaintiff in error, the statute does not take away the right of any one to maintain the action who before had it at the common law. And if the statute be construed to give to the father, as such, the right to sue in every case of the seduction of his daughter, the necessary consequence would follow that the defendant might be exposed to two or more recoveries of exemplary damages for the same act. As under such a construction neither loss of service nor right to the services is necessary to the maintenance of the action, no reason is perceived why the father might not maintain the action for the seduction of a married daughter, whose husband had already recovered damages for the injury done to him. Indeed it is now held that exemplary damages may always be allowed in this kind of action, in the discretion of the jury. Ingersoll v. Jones, 5 Barb. Sup. Ct. R. 665. If, therefore, in a case of the seduction of a daughter who has attained her majority, and who has passed from the control and protection of the father, and is at service with another person, we allow the father to maintain his suit, a defendant may be subjected to the double recov-
740 ery of exemplary damages, *in direct violation of the spirit of the rule by which the right of the master to recover such damages is maintained. For in the case just cited the distinction is taken between the case of an action by the master for the beating of his servant and that of an action or the seduction of his servant, in respect to the damages; and it is said that in the case of the assault and battery the servant has an action himself, and may recover exemplary damages; and that to allow such damages to the master would therefore subject the defendant to their payment twice; whilst for the seduction, the servant has no action.

And really I do not perceive any satisfactory answer to the argument of counsel, that if after the daughter has been fully emancipated from all parental control; after the father has parted with all legal interest in her services—all legal right to the comforts of her society and attentions—he may still maintain such a suit—the mother would also be entitled to a like action. And so in respect to the brothers and sisters. In such a state of things the father's right to the action could only rest on the injury done to his feelings: And no reason is seen why the right of the other members of the family to have their action would not be just as clear. There is no reason for supposing that the mother would be less deeply affected

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than the father by the loss of a daughter's virtue and the destruction of the peace and happiness of the domestic circle consequent upon it. A brother might feel just as acutely the wound inflicted on the honor of the family; whilst an unmarried sister just entering upon society, sharing as fully, in all other respects, in the common grief, might have her sufferings enhanced by the dread of uncharitable doubts and suspicions in respect to her own purity and innocence.

This view of the consequences which seem to me to result from that con-
741 struction on which the judgment *of the Circuit court is supposed to be found, coupled with the considerations already adverted to, have led me to the conclusion that the construction contended for by the plaintiff in error is the true one.

Under the latter construction, cases of an apparently aggravated character may in some instances go unredressed: And from the amount of damages given by the jury, we infer that in their belief and in the opinion of the Circuit court, who has rendered a judgment in conformity with the verdict, this is a case of that kind. We may regret that we can find no legal ground on which to sustain the action of the court and jury; but I do not think that we are at liberty to break through the forms of the law to reach what we may regard a case of hardship. So long as a daughter is a minor, subject to the father's control; indeed after she has attained her majority, so long as she lives with him and he has any legal right to command her services, her society and attentions, he has, under the construction I would give to the act, a right to bring his action for her seduction, and to found his claim for damages on the wrongful act, without any proof showing that there has been a failure or inability in the daughter to render him services in consequence of such act. But further than this I do not think the law has yet gone.

When the daughter has arrived to years of discretion, has left the paternal roof, has emancipated herself from all legal control on the part of the father, and become in all regards the mistress of her own conduct and actions, I think the law gives the father no action for her seduction. And as some apology for this supposed defect in the law, it is perhaps worthy of consideration, whether a reason for the failure of the lawgivers to allow an action in such case may not be found in the belief on their part that if in such a state of things the well established virtuous habits and character
742 *of the daughter, her own well matured sentiments of female purity and honor, and the discrete conduct and modest deportment which are their outward evidences, do not protect her against the arts of the seducer, no great additional safeguard to female virtue, no important additional security for the preservation of the public morals, would be afforded by a law conferring on the father or any one else a right to maintain a suit for her seduction.

Upon the whole, I think that the Circuit court ought to have rendered a judgment sustaining the demurrer to the first count in the declaration, and ought to have given the instructions asked; and that because of the error in these particulars the judgment should be reversed, the verdict set aside, the demurrer to the first count in the declaration sustained, and the cause remanded for a new trial.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

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743 *Watkins v. Hopkins' Ex'or.

January Term, 1857, Richmond.

(Absent, ALLEN, P.)

1. **Action on Bond—Plea of Equitable Set-Off—Affidavits.**—A plea of equitable offset under the statute, must show that the offset is such as may be set up under the statute, and must be verified by affidavit.

2. **Same—Same—Failure of Consideration—Case at Bar.***—In an action on a bond for five hundred dollars, given for the last payment of the purchase money of land, a plea that the plaintiff was to make defendant a good title to the land upon the payment of the bond, and that defendant had offered to pay it upon the making of the title, and that the plaintiff had failed and refused to make the title; by reason whereof the consideration had failed to the extent of two hundred and fifty dollars; is not a good plea in substance.

3. **Same—Same—Same—Same.**—In such an action a plea that the plaintiff had failed to give the defendant possession of two acres of the land; or a plea that plaintiff had failed to deliver possession of the land for two months after the time at which by the contract he was to deliver possession; or that he had not delivered the tenement in the plight and condition in which it was at the time of the sale, and in which by the contract he

*Action on Bond—Plea of Equitable Set-Off.—The rule laid down in the principal case, that in an action on a bond the defendant may, under the Act of 1831 (now § 3299, Code of 1887) plead, in an action at law, failure of consideration, etc., is followed and approved in the following cases, citing the principal case: Watkins v. West Wytheville Land, etc., Co., 92 Va. 9, 22 S. E. Rep. 554; Fisher v. Burdett, 21 W. Va. 630-1, following a similar statute, § 5, ch. 126, W. Va. Code.

Citing and distinguishing the principal case, the following cases hold that the plea is not good where there is a total absence of consideration and a rescission of the contract is asked: Williamson v. Cline, 40 W. Va. 206, 20 S. E. Rep. 921, where it is said: "As just stated, failure of consideration may be shown under that statute as defense to a sealed instrument. Fisher v. Burdett, 21 W. Va. 626. We must, under that section 5, draw the line of distinction between want of consideration and failure of consideration, as they are different. The words, 'failure in the consideration,' used in that section, refer to contracts where originally there was consideration subsequently failing, not to contracts wholly wanting consideration at their execution.

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was to deliver it, but delivered it in a damaged condition from injuries done or permitted in the mean time to the tenement and freehold; is a good plea, setting up a partial failure of the consideration.

This was an action of debt upon a bond for five hundred dollars in the Circuit court of Louisa county, brought in June 1854 by James P. Hopkins' executor against Robert B. Watkins. The defendant appeared and tendered five special pleas, which were objected to by the plaintiff, and rejected by the court; and the defendant excepted. The substance of the pleas are stated in the opinion of Judge Lee. There was then a judgment for the plaintiff for the amount of the bond and interest. And thereupon Watkins applied to this court for a supersedeas, which was allowed.

744 *Holladay, for the appellant.

There was no counsel for the appellee.

LEE, J. The pleas tendered by the plaintiff in error appear to be five in number and they were all rejected by the court; and the question here is were they all properly so rejected.

The fifth plea consists of a specification of items and the several amounts thereof, which the party claimed, with a general averment that the defendant in error was indebted to him in the same by way of offset. The items claimed are however all of an equitable character going to the consideration of the bond sued on, and could not constitute the subject of an offset under the general law of offsets, and the plea fails sufficiently to aver the elements which would constitute a good equitable offset under our statute, nor is it verified by affidavit as the statute requires. It was therefore properly objected to by the court.

The fourth plea avers (by reference to the first) that the bond sued on, was given for the third and last installment of the purchase money of two tracts of land sold by the defendant in error to the plaintiff, a complete title to which was to be made upon the payment of that installment. It then avers that the plaintiff in error had performed all parts of the contract on his part and had offered to pay the amount of the bond on the defendant's conveying the property by a sufficient legal title, which he had failed to do; by reason whereof the consideration of the bond had failed to the extent of two hundred and fifty dollars, for which failure he claimed compensation to that amount.

It is somewhat difficult to determine the exact gist of the plea or the precise scope which the pleader intended to give it. It is not a plea in bar of the action because of the failure of the defendant in error to comply with a precedent or concurrent
745 condition on *the performance of which or the offer to perform it, only, he would be entitled to his action. Nor is it the plea of a vendee of lands who waives his right to the specific execution of the contract at the hands of a court of equity and goes for complete reimbursement in the form of damages for the vendor's breach of the contract. For whilst it alleges the purchase of lands at a price of which the bond for five hundred dollars sued on was but the third and last installment, it claims only the sum of two hundred and fifty dollars as compensation for the breach of the contract. It must be regarded therefore that the party is claiming both the right to have the contract executed specifically by a conveyance of the title and also by this plea, compensation for the breach of the contract in the failure to make it. This I apprehend he cannot do. He cannot hold to both rights of action to wit, the one in equity for the conveyance of the title, and the other at law for damages for the breach of the contract in the failure to make it. It has been held upon the construction of this statute that in an action on a bond for the purchase money of land a plea of failure of consideration upon equitable grounds requiring a rescission of the contract and a reinvestment of the obligee with the interest sold to the obligor, is inadmissible. Shiflett, &c., v. The Orange Humane Society, 7 Gratt. 297. And, e converso, I think it equally clear that in such an action a plea of failure of consideration by the party's refusal or neglect to make a title according to his contract and showing that the vendee was entitled to a specific performance of the contract without a plain election to waive such relief and to go for entire damages for breach of the contract, would not be authorized by the statute. The party must make his election; and if he will claim the right to specific execution, he cannot also come with his action or plea under this statute for damages
746 *generally, for breach of the contract to make the title. Whether in a case in which special damage has been sustained by reason of the vendor's failure to make the title in due time according to his con-

Crouch v. Davis, 23 Gratt. 75; Cunningham v. Smith, 10 Gratt. 255; *Watkins v. Hopkins, 13 Gratt. 743*"; Mangus v. McClelland, 93 Va. 789, 22 S. E. Rep. 864; Harris v. Harris, 23 Gratt. 751; Sterling Organ Co. v. House, 25 W. Va. 79. See also, Shiflett v. Orange Humane Society, 7 Gratt. 297.

See 1 Va. Law Reg. 540, where there is a discussion of the plea of set-off under the statutes referred to above. See also, generally, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

See further, upon the question of equitable defences at law, the following cases: Murray Caldwell & Co. v. Pennington, 8 Gratt. 91; Isbell v. Norvell, 4 Gratt. 176; Pence v. Huston, 6 Gratt. 304; Cunningham v. Smith, 10 Gratt. 255; Burtners v. Keran, 24 Gratt. 42, and *note*; Huff v. Broyles, 26 Gratt. 283, and *note*; Thornton v. Thompson, 4 Gratt. 121; Keckley v. Union Bank, 79 Va. 458; Fleming v. Toler, 7 Gratt. 310; Brown v. Rice, 26 Gratt. 467, and *note*; Morrow v. Bailey, 2 W. Va. 326; Howell v. Cowles, 6 Gratt. 393; Calfee v. Burgess, 3 W. Va. 274; Knott v. Seamands, 25 W. Va. 99; National Bank v. Showacre, 26 W. Va. 48; Jarrett v. Goodnow, 39 W. Va. 602, 20 S. E. Rep. 575; Penn v. Reynolds, 23 Gratt. 518, and *note*.

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tract, the vendee may claim compensation in this form, it is not necessary to decide in this case, as nothing of that kind is alleged in this plea, the claim being for compensation, generally, for the vendor's breach of contract in failing to make the title. I think this plea was not authorized by the statute and was properly rejected.

The first, second and third pleas allege the contract for the sale of the two tracts of land and that the bond sued on was given for the third and last installment of the purchase money, and they aver a partial failure of consideration in the following particulars: the first, that the vendor had never delivered possession of a portion of one of the tenements sold; the second, that he did not deliver possession of either of the tenements sold for two months after the time at which by the contract he was to deliver possession, and the third, that he did not deliver them in the plight and condition in which they were at the time of the sale and in which by the contract he was bound to deliver them, but delivered them in a damaged condition from injuries done or permitted in the mean time to the tenements and freehold. Now possession of the whole subject sold and at the time and in the condition stipulated for in the contract, may fairly and legitimately be considered part and parcel of the consideration moving from the vendee, and if the vendor fail to make good his undertaking in these respects, there can be no reason why the vendee should not be entitled to compensation for the loss thereby occasioned. He does not get all which he stipulated for and for which he promised to pay the agreed price. The diminution in the value
747 of the subject by reason *of the vendor's short comings should therefore in some form be made good to the vendee, and I can perceive no good reason why compensation should not be made in this form by an equitable plea of offset under our statute. Indeed it seems a very appropriate mode by which the diminution in the value of the thing purchased may be compensated by a correspondent diminution of the price to be paid. There is nothing in the terms of the statute to restrict the plea of equitable setoff to contracts in relation to personalty. The terms of the act are general, "in any action on a contract," and it includes contracts by deed as well as by parol, and there can be no reason for excluding all contracts relating to the sale and purchase of real property from the operation. In a case indeed as we have seen where the equitable grounds relied on would require a rescission of the contract and a reinvestment of the vendor with the interest alleged to have been sold, a plea of failure of consideration under this statute could not be relied on. And upon the terms of the statute which authorize the plea in case of a breach of warranty of the title or soundness of personal property, it may be argued that such a plea is inferentially excluded in case of a breach of warranty of the title to real estate.

In Pence, &c., v. Huston's ex'ors, 6 Gratt. 304, this question was raised, but was not decided because the court thought that the matter of the plea showed that the defendant would have been entitled to relief either at law or in equity and constituted a substantial defense to the action. And as the plaintiff instead of objecting to the filing of the plea or demurring, had taken issue upon it and there had been a verdict for the defendant the question whether the defense was authorized by the statute did not arise, the defect, if any, being cured by the act of jeofails. But in this case, the claim is for compensation for a partial fail-
748 ure *of consideration only, and the matters shown in the pleas make no case for a rescission of the contract: in fact they proceed on the assumption that the contract has been in part executed, and in part is yet to be executed, and for a part as to which it has not been and cannot now be specifically executed, compensation is to be made. That the vendee claims to have specific execution by a conveyance of title constitutes no objection. This is in perfect consistence with the claim for compensation for the failure in those particulars as to which specific performance cannot be had. The vendor is bound to make good his contract in all its parts, and if in any he cannot now perform it specifically, he must make compensation. It will not do for him to say that if he makes the title and the vendee accepts his conveyance the latter thereby waives his claim to compensation for the failure to deliver possession at the time and in the condition stipulated for. In practice it has not been unusual where a vendee comes with a bill for specific execution for the court of chancery to decree the title and also to go on and give an account of rents and profits and for waste done to the inheritance during the time for which the possession was improperly withheld as well as compensation for deficiency in quantity upon the principles of that court, upon the ground that having possession of the subject it will give complete relief and save the necessity of further litigation. And if the correctness of this practice may be successfully questioned (as to which I express no opinion) certainly the vendee may maintain his action at law against the vendor for damages for his breach of the contract; and in either view, where he is sued upon the contract on his part, he may assert his claim against the vendor by plea in the nature of a setoff under the statute. The object of the statute is to save litigation by enabling the parties to settle all the matters in con-
749 troversy *in one suit, and to effectuate this purpose, it should where necessary receive a liberal construction.

No objection can be raised in this case upon the idea that the statute does not authorize the plea in the case of a breach of warranty of the title to real property, as the claim is founded on an executory contract of sale stipulating for the possession of the premises at a certain time and in a

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certain condition as well as for the conveyance of the legal title, and the alleged breach relates to the possession only and not in any manner to the title.

I think therefore the three first pleas set out in the bill of exceptions although in some respects defective in point of form are yet good in substance and should have been received by the court; and am of opinion to reverse the judgment and remand the cause with directions to permit them to be filed.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

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750 *Cocke v. The Commonwealth.

October Term, 1855, Richmond.

1. **Indictments*—Forgery—Case at Bar.**—An indictment charges the forgery of an endorsement on a negotiable note, which is described as to the amount, date, to whom payable and when due; but the indictment does not state who is the maker of the note or where it is payable. It is a good indictment.

2. **Same—Same—Evidence to Prove Note—Case at Bar.**—Upon a trial for the forgery of an endorsement on a note, the commonwealth having proved that the note went into the prisoner's possession, and notice to the prisoner to produce it, may prove the note and the forgery in its absence; and the note having been deposited in bank for collection, the original entries in the book of the note clerk of the bank, proved by the clerk to have been made by him from the note, are competent evidence to prove that the note and endorsement thereon was as described in the indictment.

3. **Same—Same—Verdict—Uncertainty of.**—The indictment charges in one count the forgery of a note, and in another count the forgery of an endorsement upon the note. The jury find the prisoner not guilty on the first count; and then say, "On the second count, viz: that of uttering a negotiable note knowing it to be forged, we find the prisoner guilty, and affix the term of his imprisonment for the term of two years." The verdict upon the second count is too uncertain to authorize any judgment upon it, and a *venire facias de novo* on that court should be awarded.

At the April term 1854 of the Circuit court of the city of Richmond, Edwin Cocke was indicted for forgery. The first count was for the forgery of an endorsement of the name of J. V. Crawford upon a paper purporting to be a negotiable note for the sum of ninety-five dollars and six cents, bearing date the 16th day of April 1852, payable to Crawford, or order, four months after date. The second count was for uttering as true the forged endorsement upon a note described as in the first count.

751 *When the prisoner was arraigned he moved the court to quash the indictment against him, and each count thereof; but the court overruled the motion; and the prisoner then pleaded "not guilty."

On the trial which commenced on the 30th of April 1854, the commonwealth called a witness, Robert Hill, and asked him if he knew any thing of the forgery charged against the prisoner of a certain note for ninety-five dollars and six cents, dated April 16th, 1852, payable to J. V. Crawford, or order, four months after the date of said note. Whereupon the prisoner by his counsel called for the production of the note, and objected to any evidence of its contents being given. But the attorney for the commonwealth produced a notice to the prisoner, dated the 12th of April, requiring him to produce before the court a note described as in the indictment, and for an endorsement of the name of Crawford, on which note he had been indicted for forgery; and stating that if the note was not produced he would offer secondary evidence of its contents: And the attorney stated that he proposed to prove by the witness that the note had gone into the possession of the prisoner. To this notice the prisoner objected as insufficient, it having been served on Saturday at 5 P. M. when the court commenced its session on the next Tuesday; and also as informal as not describing the paper described in the indictment. But the court overruled the objection to the notice, and admitted the secondary evidence of the contents of the note: And the prisoner excepted.

Hill deposed that the prisoner gave to him a note similar to the one described in the indictment, the date of which he could not recollect, for the sum of ninety-five dollars and six cents, purporting to be drawn by Edwin Cocke, and endorsed

752 by J. V. Crawford; *but that he could not say whether or not it was payable to order. That he sold it as a negotiable note, but could not say at what bank it was payable. That he sold the note to H. J. Christian, and paid the proceeds to the prisoner. That afterwards there was a rumor that the note was forged, and he had a conversation with the prisoner, in which the prisoner said it was genuine, and requested him to take the note back from Christian, and that he would convince Crawford it was genuine. That he paid Christian for the note, who gave witness his order on the bank for it; that under this order it was withdrawn from the bank; and he afterwards purchased a piece of property from the prisoner and gave the note as money. The note was in the Farmers Bank.

The commonwealth then introduced Charles B. Williams as a witness; who deposed that he was the note clerk in the Farmers Bank. That he recollected generally that he saw a note purporting to be drawn by Edwin Cocke, and endorsed by J. V. Crawford, but what was the amount of the note, or its date, or where it was payable, he could not say. That from his general knowledge of Crawford's signature, derived from seeing his checks and notes,

*See monographic *note* on "Indictments, Informations and Presentments."

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he suspected that the note which he saw was a forgery. And that he was unable from his own knowledge to give any other testimony in respect to said note; but that he had in court the book kept by him which contained a description of the note, which description was taken by him from the said note about the time it was deposited, and registered in said book as the original record of the particulars and identity of said note: and that the particulars of description set out in this book were sustained by another book, which was also an original record kept by the witness, and that the entries therein relating to said note
753 were taken from *the note itself, and made by him. But the entries in these books do not state in which of the banks at Richmond the note was payable.

The commonwealth then offered in evidence the books spoken of by the witness in connection with his evidence, so far as they related to said note. To the admission of these books the prisoner by his counsel objected; but the court overruled the objection and admitted the evidence: Whereupon the prisoner again excepted.

The jury having retired after the argument of the cause was concluded, came into court and rendered a verdict as follows:

We the jury in this case beg leave to state that on the first count of the indictment it is our opinion forgery is not clearly proven and we therefore find the prisoner not guilty on this charge.

On the second, viz: that of uttering a negotiable note, knowing it to be forged, we find the prisoner guilty, and affix his sentence to imprisonment in the penitentiary for the term of two years, the shortest allowed under the law.

But in consideration of the mitigating circumstances of the case, we each individually do earnestly recommend the said Edwin Cocke to the clemency of his excellency Governor Johnson.

After the reading of the verdict, the clerk of the court asked if he should put the verdict in proper form; and the counsel for the prisoner thereupon objected to any alteration of it, and insisted that it should be entered literally as the jury had rendered it. But the court permitted the clerk to put the verdict in the following form:

"We the jury find the prisoner not guilty upon the first count of this indictment; but we find him guilty upon the second count of the same, and ascertain the
754 *term of his imprisonment in the penitentiary at two years."

And directed the clerk to read it to the jury, to ascertain whether they would assent to it. To which opinion and action of the court the prisoner excepted.

The amended verdict only appears in the bill of exceptions; and it does not appear whether or not the jury assented to it. From the fact that their own verdict stands on the record as their verdict, it is to be presumed they did not assent to that prepared by the clerk.

The prisoner moved the court in arrest of judgment and for a new trial, but his motions were overruled; and sentence passed upon him in accordance with the verdict. From this judgment the prisoner obtained a writ of error from this court.

Crump and August, for the prisoner, insisted:

1st. That the indictment should have been quashed, because it does not state who made the note. That though under the English statute no fac simile of the paper is necessary, and it is sufficient to describe it as in larceny; still the indictment must so describe the paper that the judgment upon it shall be a protection to the prisoner against another prosecution for the same forgery. That whatever might be the case in England, certainly in Virginia the offense must be so accurately and fully stated, as that it will show for what he is prosecuted; and thus be evidence of what is the charge for which the prisoner has been tried.

2d. That the notice to the prisoner to produce the note, was not sufficient, and was not sufficiently explicit. Moreover that according to the bill of rights of Virginia the prisoner could not be required to produce a paper; and not having this right, the secondary evidence of the note was inadmissible.

3d. That the books of the bank were
755 not by themselves *admissible in evidence. Courtney's Case, 6 Rand. 666. And though it is said they may be given in evidence in connection with the evidence of the teller; that is where the teller is able to testify as to the facts. But where the witness knows nothing, as was the case with the witness in this case, the mere introduction of him as a witness cannot render the books admissible evidence.

4th. That the verdict was too uncertain to authorize a judgment upon it; or it should have been a judgment of acquittal. They referred to Starkie Crim. Pl. p. 383 to 395; Anonymous, 3 Salk. R. 373; 6 Comy. Dig. title Pleader, Verdict, § 20; 8 Bac. Abr. Verdict, C, p. 98; The King v. Woodfall, 5 Burr. R. 2661; Sharff v. The Commonwealth, 2 Binn. R. 514; Commonwealth v. Call, 21 Pick. R. 509; Dyer v. The Commonwealth, 23 Id. 402; 1 Archb. Cr. Pr. & Pl. Verdict, 176, note 4; Percavil's Case, 4 Leigh 686; Hatton's Case, 3 Gratt. 623; Marshall's Case, 5 Id. 663; Perkins' Case, 7 Id. 651; Powell's Case, 11 Id. 822.

The Attorney General, for the commonwealth, insisted:

1st. That the statute now dispensed with the necessity of setting out the paper forged; and allows a description which would be good in larceny. And in larceny as the paper is not in possession of the commonwealth it cannot be described minutely. He referred to 2 Russ. on Crimes 108, 109, 110, 372 to 385; Kearne's Case, 1 Va. Cas. 109; Pomeroy's Case, 2 Id. 342.

2d. That the notice was unnecessary; but

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when it was proved that the paper was in possession of the prisoner the proof of the paper was admissible. Indeed it was admissible without that proof; though if the paper was in possession of the
756 commonwealth, it *would be suspicious if it was not produced. Kirk's Case, 9 Leigh 627; Moore's Case, 2 Leigh 701.

3d. As to the books of the bank as evidence, he referred to 1 Starkie's Evi. 128, 129.

4th. That the verdict on the second count was guilty. That the videlicet referring to the count is repugnant not only to the count but to the verdict. The jury find expressly that on the second count the prisoner is guilty; and they have only added a matter under a videlicet, which is surplusage, and may therefore be disregarded. He referred to 1 Wms. Saund. 169; 2 Id. 290, note 1; Pomeroy's Case, 2 Va. Cas. 342; Boatright v. Meggs, 4 Munf. 145; Roane v. Drummond, 6 Rand. 182.

ALLEN, P., delivered the judgment of the court:

It seems to the court here, that the verdict of the jury upon the second count in the indictment is too uncertain to authorize any judgment upon the said verdict and finding on the second count of the said indictment, and that the judgment of the Circuit court on the verdict on said second count is erroneous. It further seems to the court, that there is no other error in said judgment. It is therefore considered that so much of said judgment as acquits and discharges the plaintiff in error from the felony charged in the first count of said indictment be affirmed, and that the residue of the said judgment be reversed and annulled; and it is ordered that so much of said verdict as relates to the said second count be set aside, and that this cause be remanded to the said Circuit court with directions to award a venire facias de novo upon the said second count of said indictment, and for further proceedings, &c.

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757 *Hunt v. The Commonwealth.

[70 Am. Dec. 443.]

October Term, 1855, Richmond.

1. **Criminal Law—Larceny—Possession of Lost Property—Presumption.**—Upon a trial for the larceny of a bank note, the property of G, of the value of twenty dollars, it is error to instruct the jury, that if they believe from the evidence that G lost a bank note of the value of twenty dollars, and that the same was afterwards found in the possession of the prisoner, they ought to find him guilty, unless his possession of the note was explained by testimony.

2. **Same—Same—Same—Same.***—The mere possession of goods which had been actually lost does not furnish any conclusive or even *prima facie* proof of guilt: of itself it does not raise the suspicion of guilt.

3. **Same—What Constitutes Larceny of Lost Goods.**†—To constitute larceny in the finder of goods actually lost, it is not enough that the party has general means by the use of proper diligence, of discovering the true owner. He must know the owner at the time of the finding, or the goods must have some mark about them understood by him or presumably known by him, by which the owner can be ascertained: And he must appropriate them at the time of finding with intent to take entire dominion over them.

This was an indictment against Calvin Hunt in the Circuit court of Mercer county, for the larceny of a bank note. The case is stated by Judge Allen in his opinion.

The case was submitted by the Attorney General, for the commonwealth.

There was no counsel for the prisoner.

ALLEN, P. The prisoner was indicted for stealing a bank note for the payment of twenty dollars, the property of Green Gore. The first count charges the stealing of a bank note for the payment of twenty dollars, without further description. The second count charges the stealing of a
758 bank note on the *Bank of the Valley of Virginia, issued at Winchester in Virginia, dated the — day of July 1853, for the payment of twenty dollars. On the trial the prisoner excepted to three instructions to the jury, given at the instance of the commonwealth's attorney. By the first the court instructed the jury that if they believed from the evidence, that Gore lost a bank note of the value of twenty dollars, and that the same was afterwards found in the possession of the prisoner, that then they ought to find him guilty, unless his possession of the stolen note is explained by testimony.

There is no statement of the facts which

*Criminal Law—Larceny—Possession of Lost Property—Presumption.—The mere possession of goods which had been actually lost does not furnish a conclusive or even *prima facie* proof of guilt: of itself it does not raise the suspicion of guilt. For the above proposition the principal case is cited and followed in Perrin v. Com., 87 Va. 557, 13 S. E. Rep. 76. In Walker v. Com., 28 Gratt. 976, and *note*, the above ruling is approved.

†Same—What Constitutes Larceny of Lost Goods.—To constitute larceny of lost property, the person finding it must know or have the means of knowing the owner, or have reason to believe that the owner may be discovered, and he must intend at the time of the finding of the property to appropriate it to his own use. For the above proposition the principal case is cited and followed in Tanner v. Com., 14 Gratt. 635; Perrin v. Com., 87 Va. 557, 13 S. E. Rep. 76. See monographic *note* on "Larceny" appended to Johnson v. Com., 24 Gratt. 555.

As to the time when the intent to appropriate goods found or received by mistake must exist, in order to constitute larceny thereof, see a discussion in 2 Va. Law Reg. 702.

Upon the question as to the presumption where stolen property is found in the possession of the accused, see Wash v. Com., 16 Gratt. 530, and *note;* Price v. Com., 21 Gratt. 846, and *note*. See also, *note* to the principal case in 70 Am. Dec. 443.

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the evidence offered proved or tended to prove. But as the instructions were given, it must be taken that they were pertinent to the facts proved or which the evidence tended to prove. And if they do not propound the law correctly, the prisoner may avail himself of the error if prejudicial to him.

To constitute larceny of the kind set out in the indictment, there must be a taking animo furandi, and against the will of the owner. At one time it was supposed that if the finder of goods converts them to his own use with a full knowledge of the owner, it is not larceny, there being no trespass committed in obtaining possession. Lord Coke, 3 Inst. 108, says, if one lose his goods and another finds them, though he convert them animo furandi to his own use, yet it is no larceny, for the first taking is lawful. So he says, if one find treasuretrove or waif, or stray and convert them ut supra, it is no larceny, both in respect of the finding, and also for that dominus rerum non apparet, ideo cujus sunt incertum est. To the same effect is 1 Hale P. C. 506.

The precise effect of these propositions of Coke and Hale was considered in the case of Regina v. Thurborn, 5 British Crown Cas. 387; and it was there determined
759 *that if lost goods are taken originally animo furandi, that is with the intent not to take a partial or temporary possession, but to usurp the entire dominion over them, but under such circumstances as to warrant the jury in finding that at the time of the appropriation the prisoner really believed the owner could neither find the chattel or be found himself, such appropriation is not larceny. But that lost goods which the taker justly believes to have been lost, may be taken and converted so as to constitute the crime of larceny, when the party finding may be presumed to know the owner of them, or there is any mark upon them, presumably known by him, by which the owner can be ascertained. This case was reviewed and approved in the subsequent case of Regina v. Preston, 3 British Crown Cas. 357. In the last case it was held that where a bank note is lost, and is found by a person who appropriates it to his own use, the jury are not to be directed to consider at what time the prisoner after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it, he knew or had the means of knowing who the owner was, and took possession of it with intent to steal it. If the original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use would amount to a larceny.

From these decisions it appears, says the annotator, 2 Waterman's Archbold 388, that a taking by finding in larceny may be classed under three heads: "1st. Where upon the finding there is no intention to appropriate the thing found to his own use, but on the contrary the finder intends to restore it to the owner if he be found, but afterwards he disposes of it to his own use either before or even after he knows who the owner is, this is not larceny, because there was no animus furandi at the
760 time of the taking. 2d. Where *the party finds goods that have been actually lost, or reasonably supposed by him to have been lost, and appropriates them with intent to take entire dominion over them, really believing then that the owner cannot be found, and he afterwards dispose of them to his own use, either before or even after he knows who the owner is, it is not larceny, because the taking, though not exactly innocent, was not punishable, and could not be made the subject of an action of trespass. 3d. Where goods lost or supposed to be lost as aforesaid, are found and appropriated with the like intent, the party at the same time knowing or reasonably believing that the owner can be found, this is larceny, whether the finder afterwards convert them to his own use or not." Under these rules it is not enough that the party has general means by the use of proper diligence of discovering the owner. He must know the owner at the time of the finding, or the goods must have some mark about them understood by him or presumably known by him, by which the owner can be ascertained.

Whether goods were actually lost, whether appropriated by the finder lucri causa, with intent to take entire dominion over them at the time, whether at the time he so acquires possession he knew the owner, or by some mark about them presumably known by him, the owner could be ascertained, are questions entirely for the jury.

In the application of these rules the judge, in the case first referred to, remarks that "questions of some nicety may arise, but it will generally be ascertained whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the chattel, the place where it is found or the nature of the marks on it."

From this it appears that the mere
761 possession of *goods which had been actually lost does not furnish any conclusive or prima facie proof of guilt: of itself it does not raise the suspicion of guilt.

The most honest man may be found in possession of a chattel proved to have been actually lost, but holding it with the intention of restoring it to the owner; and yet according to the terms of this instruction, the mere possession under such circumstances raises the presumption of guilt, unless he can explain by testimony how his possession was acquired.

A man finding a chattel actually lost, may instantly take possession thereof animo furandi, that is, with the intent to usurp the entire dominion over it, and in pursuance thereof does convert it to his own use. Such conduct in a moral aspect of the transaction may be as dishonest as to steal it, for although he may not know the owner, or there be nothing in the circumstances attending the place where it is found, or the

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marks thereon, to indicate the true owner, yet he must be conscious that there was an owner, and he should use all proper diligence to trace him out. Yet as the property was in fact lost and the owner unknown, and no marks existing to indicate who he is, such a taking animo furandi and conversion is not larceny, because there was no trespass in the taking, as the possession acquired could not be said to be against the will of the owner under the reason of the rule given by Lord Coke, quia dominus rerum non apparet ideo cujus sunt incertum est.

The instruction under consideration dispenses with all proof of the circumstances under which possession of goods which had been lost was acquired, the fact of ownership known to the finder at the time or indicated by circumstances attending the finding, or by marks on the property, and lays down the law to be that proof of loss by the owner and possession in a third person, whether the finder or not, amounts
762 to *proof of guilt unless the possession is explained. The instruction furthermore holds that those circumstances amount to guilt without reference to the question of intent, and in fact takes from the jury the consideration of the question, with what intent the possession was taken, the intent to steal laying at the foundation of the charge of larceny, and being a question entirely for the jury. The instruction furthermore assumes in the last clause that the note was stolen; thus passing upon the effect of the testimony instead of leaving it to be weighed by the jury. In all these particulars the instruction was erroneous, to the prejudice of the prisoner.

The second instruction whether strictly right or wrong, depending on the facts in evidence, was immaterial. If the prisoner supposed there was a variance between the note alleged to have been stolen and the note described in the second count, he should have moved to have excluded it as evidence under that count, or to have asked for an instruction applicable to that count. But there being one count to which the objection did not apply, and the instruction as asked for and given applying to both counts, the prisoner could not have been prejudiced by it.

I think the court erred in the first instruction, and for that error the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

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763 *Hooker v. The Commonwealth.

October Term, 1855, Richmond.

1. **Criminal Law—Arson—Dwelling House—Statute.**—A house though it was built for a dwelling-house and had been used as such, and although it was about to be used as such again, yet having been unoccupied for ten months previous, and being unoccupied when it is burned, is not a dwelling-house within the meaning of the statute. Code, ch. 192, § 2, p. 727.*

2. **Criminal Proceedings—Motion for New Trial—Presence of Accused.**†—A verdict having been found against a prisoner, he moves the court to set it aside as contrary to evidence; which motion is on another day overruled. On the day when the motion is made and also when it is overruled, the record states that the prisoner appeared by attorney; and there is nothing in the record to show that he was present. This is error.

John Hooker was indicted in the Circuit court of Patrick county for burning three houses, one of them an unoccupied dwelling-house, the property of Spencer F. Nowlin, situated in the county of Patrick. The case is stated by Judge Samuels in his opinion.

Standard, for the prisoner, and the Attorney General, for the commonwealth, submitted the case.

SAMUELS, J. The plaintiff was indicted in the Circuit court of Patrick county, for having "feloniously and maliciously set fire to and burned three houses, to wit, an unoccupied dwelling-house, kitchen and smoke-houses and some fodder, being the property of Spencer T. Nowlin."
764 *Upon the trial evidence was given tending to prove that the building described as a dwelling-house had been built for and used as a dwelling-house and for no other purpose, (except as a place of deposit for some fodder for a short time,)

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*Code, ch. 192, § 2, p. 727. "If any free person, in the daytime, maliciously burn the dwelling-house of another, or any jail or prison, or maliciously set fire to any building or other thing, by the burning of which such dwelling-house, jail or prison, shall be burnt, he shall be confined in the penitentiary not less than three nor more than ten years."

†**Criminal Proceedings—Larceny—Presence of the Accused.**—For the proposition, that, in felony cases the accused must be present throughout all the proceedings and that fact must appear from the record, the principal case is cited and followed in the following cases: State v. Conkle, 16 W. Va. 747; Lewis v. U. S., 13 Sup. Ct. Rep. 137, 146 U. S. 370; State v. Sutfin, 22 W. Va. 773; State v. Greer, 22 W. Va. 811; Shelton v. Com., 89 Va. 453, 16 S. E. Rep. 35; Coleman v. Com., 90 Va. 637, 19 S. E. Rep. 161. See, in accord, Sperry v. Com., 9 Leigh 623; Younger v. State, 2 W. Va. 579; Jackson v. Com., 19 Gratt. 656, and *note*.

The following cases cite the principal case and approve the rule there laid down, but hold that the fact that the accused was present, was shown by the record: State v. Strauder, 8 W. Va. 691; Snodgrass v. Com., 89 Va. 688, 17 S. E. Rep. 238; Bond v. Com., 83 Va. 585, 587, 3 S. E. Rep. 149; Lawrence v. Com., 30 Gratt. 851, 852, and *note*; State v. Parsons, 39 W. Va. 466, 19 S. E. Rep. 877; Boswell v. Com., 20 Gratt. 865, and *note*, holding that an order may be made in the prisoner's absence before his arraignment. The principal case is cited in State v. Conners, 20 W. Va. 6. See generally, *note* to Warren v. State (Ark.), 68 Am. Dec. 219.

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until about ten months before it was burnt; that the owner had been in the habit of renting it out, and had a short time before it was burnt rented it as a dwelling, and ordered it to be cleaned out for the tenant, who had not taken possession.

The plaintiff on the trial moved the court to instruct the jury, if they believed him guilty, that upon the facts above stated his offense did not come within the second section of chapter 192 of the Code of 1849; which instruction the court refused to give: and thereupon the plaintiff filed his bill of exceptions number one.

The jury having found the plaintiff guilty on the 21st of April 1855, the attorney for the plaintiff on the 24th of April moved the court to set aside the verdict as being contrary to evidence. On the 26th of April the court overruled the motion to set aside the verdict, and rendered judgment thereon. The entries upon the record made on the 24th and 26th days of April respectively, show that the plaintiff appeared by attorney, and there is nothing in the record to show that he was present in court in his proper person on either of those days.

The plaintiff filed his bill of exceptions number two to the opinion of the court overruling his motion to set aside the verdict; and in this exception is set forth all the facts proved at the trial. No question is made, or can be made, upon this part of the record, except that the building alleged to be a dwelling-house, was not such, within the true intent of the statute. The facts bearing on this question are the same as those set out in the first bill, and further, that the buildings burnt were the property of Nowlin; that they were
765 *one mile distant from his residence, and that they were burnt by the plaintiff in the daytime.

I am of opinion the Circuit court erred in deciding that the building described as a dwelling-house, was such within the meaning of the second section of chapter 192 of the Code of Virginia. It was one mile distant from Nowlin's residence, and no one lived or slept therein; nor had it been occupied as a dwelling for about ten months previous to its destruction. If it had been within the curtilage of Nowlin's dwelling-house, but not adjoining thereto, nor under the same roof, it would have been excepted out of the second section by the third section. It must therefore be held that if the section standing alone would embrace the case, (as it would not I conceive,) yet it falls within the exception in the third section. The facts that a building has once been used as a dwelling-house and is intended for the same use in future, do not of themselves make the building a dwelling-house within the meaning of the criminal statutes of Virginia. The safety of the inmates and their property afford a good reason for denouncing heavier penalties against crimes perpetrated against dwelling-houses, and which might endanger both, than against offenses which endanger property only. Thus, arson of a dwelling-house, and of certain other specified buildings, has been regarded as a crime of deeper dye than burning other buildings, and has accordingly been visited with punishment commensurate with the greater enormity. The statute, chapter 192 of the Code, intended to preserve this distinction, by prescribing a greater degree of punishment in case of conviction for burning a dwelling-house than for burning other houses, unless they be of the class enumerated in the first and second sections of the statute. The house alleged in this case to have been a "dwelling-house," does not answer the legal definition of such
766 building, as well settled by *many adjudged cases. See Lyon's Case, 1 Leach 185; Fuller's Case, 1 Leach 186; Haws' Case, 2 Leach 701; Silk's Case, 2 Leach 876. I am, therefore, of opinion that the Circuit court erred in refusing the instruction prayed for: and from this refusal the jury must have been led to suppose that the case came within the second section of the statute, and may have been thereby induced to find a verdict different from that which they would otherwise have found.

The record, made up as it now stands, shows that on the 24th of April when a motion was made to set aside the verdict of the jury, and again on the 26th of April, when the motion was overruled and judgment rendered, the plaintiff appeared by attorney; and there is nothing to show that he was personally present in court on either day. This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. That this is error is shown by Sperry's Case, 9 Leigh 623. It is the right of any one, when prosecuted on a capital or criminal charge, "to be confronted with the accusers and witnesses;" and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when any thing may be done in the prosecution by which he is to be affected.

The other judges concurred in the opinion of Samuels, J.

Judgment reversed.

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767 *Slaughter v. The Commonwealth.*

January Term, 1856, Richmond.

(Absent, ALLEN, P.)

1. **Private Corporations—Indictment—Failure to State Business—Cured by Verdict.**—An indictment against S for keeping an office and transacting business as agent of the Protection Insurance company of Hartford, incorporated and authorized by the state of Connecticut, without having a license therefor, against the act, &c., does not state that the said company is an insurance company. This is cured by the verdict.

2. **Statutes—Constitutionality of.**—The act, Code, ch.

*For monographic note on Corporations (Private), see end of case.

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38, § 25, p. 210, is not in violation of the constitution of Virginia or the United States.†

3. **Constitution—Privileges and Immunities—Assignment of.**—The privileges and immunities guaranteed to the citizens of the states of the Union are annexed to their *status* of citizenship; they are personal and may not be assigned or imparted by them or any of them to any other person natural or artificial.

4. **Foreign Corporations—Right of State to Exclude.**‡—The general assembly of Virginia has authority to forbid foreign corporations engaging in any pursuit within the state: and of consequence to grant permission to engage therein only upon terms.

5. **Constitution—Taxes on Licenses.**§—Taxes on licenses are not required by the constitution of Virginia to be equal and uniform.

At the October term 1853 of the Corporation court of Fredericksburg, Franklin Slaughter was presented by the grand jury for that he did, on, &c., at, &c., establish and keep an office and transact business as agent of the Protection insurance company of Hartford, incorporated and authorized by the state of Connecticut, without having a license therefor, against the act, &c.

768 *The defendant demurred to the presentment, but the demurrer was afterwards withdrawn, and issue was made up on the plea of "not guilty."

On the trial the jury found the defendant guilty, and assessed his fine at forty dollars; whereupon he applied to the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and he excepted. He also moved in arrest of judgment, but the motion was overruled, and judgment rendered on the verdict: And the defendant again excepted.

On the trial the facts stated in the presentment were proved, and it was also proved that the members of the Protection insurance company of Hartford were citizens of the state of Connecticut, and that there was no law of Virginia imposing a tax upon or requiring a license to be taken out by any citizen of Virginia, or any corporation created by the state of Virginia, who might establish an insurance office or transact the business in the state of Virginia, or by any agent of either.

Slaughter obtained a writ of error to the judgment from the judge of the Circuit court of Spotsylvania; but when the case was heard there, the judgment of the Corporation court was affirmed. And he then applied to his court for a writ of error, which was allowed.

Wellford and Patton, for the appellant.

The Attorney General, for the commonwealth.

SAMUELS, J. Franklin Slaughter was presented by the grand jury in the Corporation court of Fredericksburg, for having opened and kept (within the jurisdiction of that court) an office, and transacting business as agent, without a license therefor, of the Protection insurance company of Hartford, incorporated and authorized

769 *by the state of Connecticut. Issue was made up on the plea of not guilty, and a trial had, upon which the facts alleged in the presentment were proved, and the further fact that the members of the company are citizens of Connecticut. A verdict was found for the commonwealth assessing the fine at forty dollars. Several motions were made by the plaintiff in error for a new trial, and in arrest of judgment. These motions were severally overruled and judgment rendered on the verdict. The record was carried by writ of error to the Circuit court of Spotsylvania, by which court the judgment of the Corporation court was affirmed. The record is brought here by writ of error to the judgment of the Circuit court.

Whether the presentment should have been adjudged sufficient upon a demurrer, it is not material here to enquire, as the demurrer filed when the plaintiff in error first appeared, was afterwards withdrawn. After verdict a motion in arrest of judgment for defects in the presentment, can be sustained only in case it be so uncertain that judgment "according to the very right of the case," cannot be given thereon. Although there is no distinct averment in the presentment that the Protection insurance company is an insurance company, and we are left to infer the fact that it is such from its name, yet the offense is "charged therein with sufficient certainty for judgment to be given thereon according to the very right of the case." The defect in the presentment, if it be a defect, is cured by the verdict; and the motion in arrest of judgment for this defect could not be sustained. Code of Virginia, ch. 207, § 12, p. 770.

The question made in the Circuit court and in this court in regard to the constitutionality of the statute, Code of Virginia,

†Code, ch. 38, § 25, p. 210. "No agent or subagent of any insurance company or office, incorporated or authorized by another state, shall establish or keep any office, or transact the business of his agency within this state without a license. Any person violating this section, shall pay a fine of not less than forty nor more than one hundred dollars."

‡**Foreign Corporations—Right of State to Exclude.**—The proposition laid down in the 4th headnote of the principal case, that, the general assembly of Virginia has authority to forbid foreign corporations engaging in any pursuit within the state; and of consequence to grant permission to engage therein only upon terms, is quoted with approval in Manhattan Life Ins. Co. v. Warwick, 20 Gratt. 624, and *note*.

§**Constitution—Taxes on Licenses.**—The proposition laid down in the 5th headnote of the principal case that taxes on licenses are not required by the constitution of Virginia to be equal and uniform, is quoted with approval in Ould & Carrington v. City of Richmond, 23 Gratt. 473, and *note*; Com. v. Moore, 25 Gratt. 958, and *note*; Danville v. Shelton, 76 Va. 329; Eyre v. Jacob, 14 Gratt. 422, and *note*. See also, Gilkeson v. Frederick Justices, 13 Gratt. 577, and *note*; Western Union Tel. Co. v. City of Richmond, 26 Gratt. 1; monographic *note* on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

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ch. 38, § 25, p. 210, under which this prosecution is had, is presented by the motion for a new trial, and that in arrest of
770 judgment. It is insisted *that the judgment should be reversed, for that the plaintiff in error was merely an agent for the Protection insurance company of Hartford, incorporated or authorized by the law of the state of Connecticut; that the individual corporators of that company are citizens of that state; that as such citizens, under the constitution of the United States, article 4, § 2, clause 1, they are "entitled to all privileges and immunities of citizens in the several states;" that in a case like this they have the privileges and immunities of citizens of Virginia; that as citizens of Virginia have the privilege to make contracts in Virginia for the insurance of others, with an immunity from taxation for making such contracts, that these citizens of Connecticut have the same privilege and immunity; and that the statute above cited, imposing terms upon the agents and subagents of the company, which are not imposed upon citizens of Virginia, is a violation of that portion of the federal constitution above cited.

It is somewhat difficult to perceive how the plaintiff in error can raise this question in his case. He points out no discrimination between his privileges and immunities and those of all other citizens of Virginia engaged in his pursuit. It is not shown that he is a citizen of a state other than Virginia; the restrictions prescribed by the statute are imposed alike upon all in his condition. The defense, however, is not founded upon any alleged violation of the plaintiff's personal privileges or immunities, nor upon any violation of privileges and immunities pertaining to his immediate principal, the Protection insurance company of Hartford; but upon an alleged violation of privileges and immunities guaranteed to those citizens of Connecticut, the corporators in that company.

This defense has its basis upon an error in confounding things, which are essentially different, in holding these individual citizens, with their privileges and im-
771 munities *as such, to be identical with the company in which they are corporators. The privileges and immunities guaranteed to them are annexed to their status of citizenship. They are personal, and may not be assigned or imparted by them, or any of them, to any other person, natural or artificial. If it were otherwise, and these citizens could impart their right to others, the limitation of the guaranty to "citizens" would be without practical effect; the right might be imparted to classes, and for purposes in contravention of our policy and laws; and thus our welfare or even our safety be endangered.

It must be conceded by all, that these citizens of Connecticut can have no greater "privileges and immunities" than those which an equal number of our own citizens might enjoy. It must be further conceded by every one in Virginia, that fifty or a hundred (whatever number) citizens of Virginia could not without a charter associate themselves together, and usurp the franchise of a corporation; adopt a corporate name or seal; nor establish a perpetual succession, nor exempt their members from personal liability for contracts of the association; nor to any extent affect or repeal the laws regulating the succession to property, real or personal. In fine, it must be conceded, that our citizens, in any number, of their own motion, and in virtue of their mere citizenship, could do no corporate act whatever. Regarding citizens of Connecticut and of Virginia respectively as having equal privileges and immunities in this respect, we must hold that mere citizenship in Connecticut confers no corporate franchise in Virginia.

It is said however, in effect, that the charter in Connecticut confers the corporate existence, and also the faculty of trading as a corporation; and that the federal constitution guarantees to the corporators the right to trade in Virginia as our own
772 citizens may *trade. The reply is obvious, that we do not recognize the authority of Connecticut to confer on her own citizens privileges or immunities in Virginia, which we have not given to our own citizens within the state. Our own citizens, without a charter from our own authorities, can do no corporate act within the state. Those of Connecticut can be in no better position. The general assembly of Virginia alone has authority to say how far the general rules of property and the general law of liability for contracts shall be varied in favor of corporations. They have heretofore, by general laws and by private acts of incorporation, exercised that power, and will, without doubt, continue to exercise it with reference to the welfare of our own people exclusively. They have not (if they could) conferred on another state unlimited discretion to charter companies to transact business in Virginia. It is a grave exercise of sovereign power to create artificial persons in our midst not amenable to our laws; to vary the general laws by conferring corporate existence, capacity and power. The authorities of Connecticut could not confer such faculties and functions on citizens of Virginia, to be exercised in Virginia; by parity of reason, if no more, they cannot confer them on citizens of Connecticut, to be exercised here. The plaintiff's theory rests upon the assumption that because private individuals may engage in particular pursuits, that therefore artificial persons called corporations, created and existing elsewhere, may engage in the same pursuits; that the right to exercise their natural faculties in lawful pursuits, is identical with the right to engage in the same pursuits with the aid of a new organization with other and different faculties from those pertaining to the same individuals.

If we carry out the pretensions of the plaintiff to their legitimate results,
773 we must hold that the authority *of

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another state may create a corporation within that state, but to use its corporate power within this state in any pursuit permitted to our own citizens: and that the only mode by which we can expel the intruder will be to forbid our own citizens to engage in that pursuit.

It seems to me that the chain of reasoning, by which corporate powers beyond the limits of the state conferring them are to be deduced from private individual rights of citizens, is utterly defective. I have no doubt of the power of the general assembly of Virginia to forbid foreign corporations from engaging in any pursuit within the state; and, of consequence, to grant permission to engage therein only upon terms; and that the statute, Code of Virginia, ch. 38, § 25, p. 210, is clearly within the scope of their legitimate powers.

The question as to the nature and extent of the privileges and immunities secured to citizens of the several states by the federal constitution, has from time to time been the subject of consideration in the federal and state courts. In several of the cases the claim to privilege and immunity was asserted under circumstances very like those of our case; but in no one of them was the claim allowed. In the cases of The Commonwealth v. Milton, and City of Lexington v. Same, 12 B. Monr. R. 212, the Court of appeals of Kentucky decided that a statute of that state imposing a tax upon insurance companies chartered in other states but doing business in Kentucky, was valid, although insurance companies chartered in Kentucky were not subjected to the same tax. In these cases the defendant relied upon the federal constitution, article 4, § 2, as does the plaintiff in our case; yet upon full consideration, it was held that the legislature have authority to enact the statute.

In Tatem v. Wright et al., 3 Za-
774 briskie's R. 429, the *Supreme court of New Jersey affirmed the validity of a statute imposing a tax upon the agents of foreign insurance companies from other states doing business in New Jersey. They overruled the claim of privilege and immunity founded on the section of the federal constitution above cited; and they decided that a corporation aggregate was not a citizen, or entitled to the privileges of a citizen, except perhaps for the purpose of giving jurisdiction to the federal courts.

In Corfield v. Coryell, 4 Wash. C. C. R. 371, the subject was under consideration; and the opinion of the court, pronounced by Judge Washington, contains an enumeration of the privileges and immunities secured by the federal constitution, but the franchise of corporation is not embraced therein. In Virginia they may be regarded as set forth in our bill of rights and constitution.

In the Bank of Augusta v. Earle, 13 Peters' R. 519, the question was argued, and the right of the bank, a corporation chartered in Georgia, to make a contract in the line of its business, in Alabama, was affirmed. It was so held, because the comity of the state of Alabama permitted the contract to be made within her borders. If there had been a statute in that state forbidding the bank to do business within that state, or allowing it to do so only upon terms, the Supreme court would have given full effect to such statute.

It is not necessary in the case before us to express any opinion on the conflict between the decision of this court in Bank of Marietta v. Pindall, 2 Rand. 465, and that of the Supreme court in the Bank of Augusta v. Earle. The principle of either case seems to require the affirmance of the judgment.

The plaintiff's counsel, in the argument here, alleged that the statute is in violation of the constitution of Virginia; that as the constitution, article 4, clause 22,
775 *prescribes that "taxation shall be equal and uniform throughout the commonwealth, and all property, other than slaves, shall be taxed in proportion to its value, which shall be ascertained in such manner as may be prescribed by law;" and as clause 25 of the 4th article authorizes the general assembly to levy a tax on "incomes, salaries and licenses," that such tax must also be "equal and uniform."

The provisions of the 22d and 23d clauses were inserted with the intention of preventing onerous taxes upon slaves. As that species of property was chiefly held in the eastern portion of the commonwealth, and as the power of laying taxes would in a short time pass into the hands of the western portion, it was foreseen that the western portion, if the tax laying power should not be restricted, might discriminate in the levy of taxes to the prejudice of the owners of slaves. These clauses were therefore inserted in the constitution as a compromise, a guaranty for such equality of taxation as therein prescribed. A tax on the value of all property, other than slaves; as to slaves a tax equal to and not exceeding the tax assessed on three hundred dollars worth of land was imposed on every one over the age of twelve years. The provisions of the clauses, taken in connection with the history of the times, leave no doubt that they were inserted as an adjustment of the supposed antagonism of eastern and western interests. The language, however, is broad enough to embrace all subjects of assessable value except slaves, and such is the construction put upon it by the general assembly. It is proposed, however, in the argument here, to extend the equality and uniformity prescribed by clause 22 to the subjects of taxation enumerated in clause 25. If it be conceded for the purposes of this case, that the rule of uniformity and equality must apply to both classes of subjects, yet it can only be so ap-
776 plied as far as practicable; *property of assessable value may readily be brought under the rule; so of incomes and salaries; but the very large class of licenses, whence is derived a large revenue, cannot be assessed; licenses are necessarily ob-

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tained before engaging in the licensed pursuit; it would be idle to speculate in advance as to the value of the privilege. To fix arbitrarily a specific tax for all licenses would be grossly unequal and far from uniform; to tax the merchant who may have fifty thousand dollars profitably invested in his business, and an inn keeper with a tenth part of that capital paying poorly in his business, the same specific sum, would be against the true meaning of the constitution. The requisitions of the constitution may be carried out by a uniform tax on licenses to persons following the same pursuit, under the same conditions and circumstances; a difference therein will justify a discrimination in the tax. The case before us is an apt instance of business pursued under a difference of circumstances, to justify such discrimination. Our domestic insurance companies are taxed upon their capital, or upon their dividends; a license tax cannot therefore be exacted of them. Constitution of Virginia, art. 4, clause 25. The Protection insurance company of Hartford is not and cannot be taxed upon its capital or dividends, they being beyond the reach of our laws. Our insurance companies are exempt from license tax because, and only because they pay a large tax in a different mode. The Protection insurance company of Hartford, insisting on equality and uniformity, claims an exemption from the license tax, although it does not pay that other tax in that other form, or any other tax whatever. Holding then that the general assembly of Virginia had authority to enact the statute, Code of Virginia, ch. 38, § 25, p. 210, I am of opinion that the defense founded upon its alleged unconstitutionality, is without merit.

777 *As I have said in regard to the other branch of the defense, I may say in regard to this, that it is difficult to perceive how the plaintiff can make it in his case; there is no discrimination against him; he and all others in his business are subjected to precisely the same tax; he must be understood as maintaining the rights claimed for his principal.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

CORPORATIONS (PRIVATE).

I. Definitions and Distinctions.

II. Creation of Corporations.

III. Incidents of Incorporation.
- A. Generally.
- B. The Charter.
- C. The By-Laws.
- D. Power of Courts and Legislature over Private Corporations.
- E. The Term "Person" as applied to Corporations.
- F. Powers of Corporations.
- G. Eminent Domain.
- H. Liability of Corporations.

IV. Stock and Stockholders.
- A. The Contract of Subscription.
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- D. Dividends.
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V. Officers and Agents of Private Corporations.
- A. Generally.
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VI. Consolidation and Succession.
- A. Consolidation.
- B. Succession.

VII. Dissolution of Corporations.
- A. Causes.
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- C. Suits to Wind up Affairs of a Corporation.
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VIII. Pleading and Practice.
- A. Suits Must Be Brought in Corporate Name.
- B. Locality of Suits against a Corporation.
- C. Service of Process.
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- E. Sheriff's Return.
- F. Suits by and against Corporations.

IX. Foreign Corporations.
- A. No Legal Existence Outside of State Creating Them.
- B. Suits by and against.
- C. Taxation.
- D. Effect of War.

Cross References.

Banks and Banking, appended to Bank v. Marshall, 25 Gratt. 378.

Building and Loan Associations, appended to White v. Mech. Build. Fund Ass'n, 22 Gratt. 233.

Insurance, Fire and Marine, appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 612.

Insurance, Life and Accident, appended to McLean v. Piedmont, etc., Life Ins. Co., 29 Gratt. 361.

I. DEFINITIONS AND DISTINCTIONS.

A Corporation.—A corporation is "a body composed of one or more individuals, and possessed of a franchise, by virtue of which it subsists as a body politic, under a special designation, and by the policy of the law is vested with the capacity of perpetual succession, and of acting in several particulars however numerous the association, *as a single individual.*" 1 Minor's Inst. (3rd Ed.) 529.

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. Among the most important are immortality, and, if the expression may be allowed, individuality. By these means a perpetual succession of individuals is capable of acting for the promotion of the particular object like one immortal being." MARSHALL, C. J., in Dartmouth College v. Woodward, 4 Wheat. 636, cited in Railroad Co. v. Transportation Co., 25 W. Va. 324.

A corporation is an inanimate artificial being having no power to act except through living agents. Frazier v. Va. Mil. Inst., 81 Va. 59.

A Franchise.—A franchise is a special right or

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privilege conferred on individuals by grant, actual or presumed, from the government and which otherwise they could not exercise. The property acquired is not the franchise, but the franchise consists in the incorporeal right. Roper v. McWhorter, 77 Va. 214; Tuckahoe Canal Co. v. Tuckahoe R. Co., 11 Leigh 76.

Public and Private Corporations Distinguished.—Corporations are generally divided into two classes, based on the character of their business. Corresponding to the private person is the private corporation, created for private purposes or for the pecuniary gain of its members; and of course they do not cease to be private corporations, simply because the legislature supposed, as it always does, that their creation would indirectly promote the public interest.

On the other hand public corporations correspond to public officers in the division of natural persons. They are created generally for governmental purposes; or they may be created for business purposes and will still be public corporations, if the whole interest in the corporation belongs to the state. Railroad Co. v. Transportation Co., 25 W. Va. 324.

Quasi-Public Corporations.—There is also a third class of corporations corresponding to *quasi* public officers, called *quasi* public corporations, viz. owners of ferries, common carriers, innkeepers, etc., who are chartered to conduct a business in which the public has an interest; and hence are subject to the control of the legislature as to their maximum charges, etc. Railroad Co. v. Transportation Co., 25 W. Va. 324.

II. CREATION OF CORPORATIONS.

Status before Incorporation—Conveyance to a Future Corporation.—After the corporators had signed an agreement to become a corporation, but before the charter had been obtained, a deed conveying land to such corporation by name was signed and acknowledged by the grantor, and delivered to a third party, with directions to retain it until the corporation obtained its charter and organized, and then to deliver it to the corporation; and, after the charter had been received, and the corporation organized under it, such third person delivered the deed to, and it was accepted by, the corporation. *Held*, the said deed operated as a valid conveyance of said land to the corporation from the date of the delivery of said deed to it. Spring Garden Bank v. Hulings Lumber Co., 32 W. Va. 357, 9 S. E. Rep. 243.

Contracts Made in Behalf of a Future Corporation.—While a corporation cannot ratify contracts made in its name or behalf before it has acquired life, it may exercise its power to make contracts when it comes into existence by accepting or adopting such contracts. Richardson v. Graham, 45 W. Va. 134, 30 S. E. Rep. 92.

No Particular Form of Words Necessary.—No particular form of words is necessary to the creation of a corporation, but it may result from implication and intendment. It is the grant of certain powers and privileges and the imposition of the necessary restrictions, which constitute the main elements of a corporation and as it is always a question of intention, the formal words, "erect, establish, incorporate," etc., are not deemed essential; so an act of assembly authorizing a foreign corporation to extend their road into West Virginia makes such foreign corporation a West Virginia corporation. Goshorn v. Board, 1 W. Va. 307.

A Pipe Line Company an Internal Improvement Company—Might Formerly Be Created by Special Act in West Virginia.—A pipe line company, whose object is the transportation of petroleum and other oils, is an internal improvement company and might have been created by a special act of the legislature under Art. XI, § 5, Constitution of West Virginia, and the power of eminent domain might have been conferred upon it. W. Va. Transp. Co. v. Volcanic O. & C. Co., 5 W. Va. 382.

Now no corporation can be created by special act in West Virginia but only by general law. Art. XI, sec. 1, Constitution of 1872.

Present Statute Relating to Court Charters.—For the provisions of the present statute for obtaining a charter by a corporation, see Code Va. (1887) sec. 1145; Code W. Va. (1891) ch. 54.

Same Effect as When Conferred by the Legislature.—Franchises and corporate rights granted indirectly by the state through instrumentalities provided by general laws for such purposes, are the same in effect, as if the power conferring such franchises and rights had been exercised directly by the state itself. Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396.

No Fee Required Now in Virginia.—There is now no law in Virginia requiring a fee to be paid on every charter before it becomes operative. Combined Saw & Planer Co. v. Flournoy, 88 Va. 1029, 14 S. E. Rep. 976.

When Legal Existence of Corporation Chartered by the Courts Begins.—When a charter has been granted by a circuit court, pursuant to section 1145 of the Code, and lodged with the secretary of the commonwealth for recordation (the tax thereon having been paid when a tax is required), the corporation so chartered has a legal existence, and may sue and be sued as a corporation. In the absence of any provision in the order granting the charter requiring the minimum capital to be subscribed, the stockholders are not liable as partners although the minimum capital has not been subscribed. The subscription of the minimum capital is not a condition precedent to the existence of the corporation. Coalter v. Bargamin, 6 Va. Law Reg. 757.

Necessity for Filing Certificate of Incorporation.—Where the statute law of a state requires the filing of the original certificate of incorporation, such filing is a condition precedent to the creation of the corporation and until this has been done, it has no existence, and that fact may be taken advantage of collaterally whenever the fact of incorporation is called in question. Childs v. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362.

Presumption That Incorporation Was Regular.—Where the law requires that notice shall be given of a meeting to organize a corporation, if it appears by the books of the corporation that such a meeting was held with the requisite number of stockholders present, it will be presumed that the proper notice was given. Grays v. Turnpike Co., 4 Rand. 578.

Where the law requires the presence at the first meeting of a corporation, of "the number of persons entitled to a majority of all the votes which could be given on all the shares" and the books showed merely the presence "of a majority of shareholders" it will be presumed that the meaning was the same. Grays v. Turnpike Co., 4 Rand. 578.

De Facto Corporations.—Where the defendant is sued by its corporate name and issues its policies signed by the president and treasurer, that fact

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alone will justify the inference that defendant is a *de facto* corporation. Bon Aqua Imp. Co. v. Insurance Co., 34 W. Va. 764, 12 S. E. Rep. 771.

Liability.—The principle to be deduced from our statute and the authorities, is, that a private business corporation, acting, and carrying on its corporate business in its corporate name, after its legal existence has ended by the expiration of its charter, must be held to be a corporation *de facto*; and that as such, so long as it in fact so carries on its business, and contracts or incurs liabilities with, or to third persons dealing with it as a *de facto* corporation, it may sue and be sued at law, either in actions *ex contracto* or *ex delicto*, and it cannot defeat such action by alleging that its charter had expired before the cause of action arose. Its directors and stockholders by failing to wind up its business when the charter expires, as it is their duty to do under our statute, cannot relieve the corporation from liability for acts done in its name, and during its actual existence as a *de facto* corporation. In order to relieve it from liability the corporation must have ceased to exist both in law and in fact. And consequently, when it is sued as a corporation, a plea averring simply that it has ceased to exist in law, or as a legal corporation, will be insufficient, but it must aver also that it had ceased to exist in fact at the time the alleged cause of action arose. Miller v. Newburg, etc., Coal Co., 31 W. Va. 886, 8 S. E. Rep. 600.

III. INCIDENTS OF INCORPORATION.

A. GENERALLY.

Corporation a Distinct Entity.—It is well settled that from the very nature of a private business corporation, the stockholders are not the private and joint owners of its property, etc.; the corporation is the real though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it. It must purchase, hold, grant, sell and convey the corporate property, do business, sue and be sued, plead and be impleaded for corporate purposes by its corporate name. Park v. Petroleum Co., 25 W. Va. 108; Barksdale v. Finney, 14 Gratt. 338.

Its Property Taxable in Name of Corporation.—Property belonging to a corporation is vested in the shareholders in their corporate capacity and not as individuals, and is consequently taxable in the name of the company. B. & O. R. Co. v. Supervisors, 3 W. Va. 319.

B. THE CHARTER.

All Persons Dealing with Corporation, Bound with Notice.—Persons dealing with a corporation are bound with notice of whatever is contained in the law of its organization and they must be presumed to be informed as to the restrictions or conditions annexed to the grant of power, by the law under which the corporation is authorized to act. Silliman v. R. Co., 27 Gratt. 119; Bocock v. Alleghany C. & I. Co., 82 Va. 913, 1 S. E. Rep. 325; Haden v. F. & M. Fire Ass'n Co., 80 Va. 683; Smith v. Cornelius, 41 W. Va. 59, 23 S. E. Rep. 599; Bockover v. Life Ass'n, 77 Va. 85; Whitehurst v. Whitehurst, 83 Va. 155, 1 S. E. Rep. 801; Building Ass'n v. Snyder, 98 Va. 710, 37 S. E. Rep. 298; Campbell v. Building Ass'n, 98 Va. 729, 37 S. E. Rep. 350, 6 Va. Law Reg. 632.

In Case of Court Charters, from the Time of Filing.—After the charter of a corporation has been lodged for record in the office of the secretary of the commonwealth anyone dealing with such corporation is bound with notice of its provisions. Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. Rep. 900.

Acquiescence in Change of Charter.—And if a stockholder pays any installment on his stock or participates in a stockholders' meeting, he is estopped to deny knowledge of the terms and provisions of the charter, however much it may vary from his contract of subscription. Real Estate Co. v. Claiborne, 97 Va. 734, 34 S. E. Rep. 900.

The General Law Forms Part of the Charter.—A general law does not need to be copied into the charter, but forms an essential part of it and all parties are bound by its terms whether copied into the charter or found only in the statute book. Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. Rep. 891.

Also Provisions Made in Pursuance of Authority of the Legislature.—Where the act of incorporation is a bare grant of existence to the corporation, to be effectuated by the provisions imposed on it by the governing bodies of the cities and counties named therein respectively, such provisions will constitute an organic part of the charter of such corporation. Richmond, etc., Ry. Co. v. Brown, 97 Va. 26, 32 S. E. Rep. 775.

Construction of Charter.

Construed Strictly against the Corporation.—It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them, as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant; any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. Roper v. McWhorter, 77 Va. 214.

"The grant of privileges and exemptions to a corporation is strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken." CHIEF JUSTICE TANEY in Ohio Life Ins. Co. v. Debolt, 16 Howard 416, cited with approval in B. & O. R. Co. v. Supervisors, 3 W. Va. 319.

Effect of Acceptance of New Charter.—When a new charter is granted to and accepted by a corporation the former charter is not thereby wholly superseded, but only in those respects in which it is inconsistent with the new charter. B. & O. R. Co. v. Supervisors, 3 W. Va. 319.

C. THE BY-LAWS.

Stockholders Bound with Notice.—A stockholder is bound, at his peril, to take notice of the by-laws of the corporation, of which he is a member. Real Estate Co. v. Claiborne, 97 Va. 739, 34 S. E. Rep. 900; Campbell v. Ass'n, 98 Va. 729, 37 S. E. Rep. 350, 6 Va. Law Reg. 632.

Absence When They Were Adopted Immaterial.—Where the charter of a corporation allows a majority to alter and amend the rules and regulations as they may judge necessary, all members of the corporation will be bound by such subsequent change, confirmed by Act of Assembly, though not present at the meeting adopting it. Currie v. Mut. Ass'n Soc., 4 H. & M. 315.

General Power to Make By-Laws.—The power to make reasonable by-laws, consistent with its charter inheres in every corporation. One who becomes a

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member, subjects himself not only to regulations then existing, but to those afterwards enacted within the scope of such power. The corporation cannot by a subsequent by-law destroy the contract of membership or change the essential character of an antecedent agreement between a member and the corporation; but a by-law more or less affecting the remedy of shareholders may be passed and existing members will be bound by it, so far, at least, as they consented to the exercise of such a power when they became members. Building Ass'n v. Snyder, 98 Va. 710, 37 S. E. Rep. 298.

Limitations.—A corporation has not the power, by laws of its own enactment, to disturb or devest rights which it has created, or to impair the obligation of its contracts, or to change its responsibility to its members, or to draw them into new and distinct relations; and all by-laws attempting to do this are inoperative and void. Savage v. People's Building, etc., Ass'n, 45 W. Va. 275, 31 S. E. Rep. 991.

Must Not Be Contrary to Existing Laws.—A by-law in contravention of the laws of Congress is void. Feckheimer v. Bank, 79 Va. 80.

D. POWER OF COURTS AND LEGISLATURE OVER PRIVATE CORPORATIONS.—Neither the courts nor the legislature can control the conduct or actions of a private corporation when acting within the scope of the powers conferred upon it by its charters, any more than they can control the conduct of a private person in his business. To this rule there are some exceptions arising from the character of the business, for which see "Quasi-Public Corporations," *infra*. Railroad Co. v. Transportation Co., 25 W. Va. 324.

Where the charter of a water company provides that the water rates shall be uniform throughout the town for the same class of service, but allows a charge of $9 per hydrant, and also allows a maximum charge of 5 cents per hundred gallons thereby impliedly authorizing a charge by measurement, the plaintiff cannot enjoin the water company from charging by measurement as long as the company keeps within its charter and does not discriminate between consumers in the same circumstances. Exchange, etc., Co. v. Roanoke Gas & Water Co., 90 Va. 83, 17 S. E. Rep. 789.

May Compel Payment of Employees in Lawful Money.—The act of March 7, 1891, prohibiting corporations, etc., from paying their employees in other than lawful money, also the act of March 9, 1891, touching the weighing of coal, are not in violation of the Constitution of the United States or of West Virginia. Coal Co. v. State, 36 W. Va. 802, 15 S. E. Rep. 1000.

Charter a Contract.—The charter of a strictly private corporation is almost universally admitted to be a contract and the legislature cannot, without the corporation's consent, alter its charter in a material respect, since it would be impairing the obligation of the contract, and consequently unconstitutional. Railroad Co. v. Transportation Co., 25 W. Va. 324.

A Ferry Franchise Private Property.—A ferry franchise is private property within the meaning of the constitution, which declares that private property shall not be *taken* or *damaged* for public use without just compensation. Mason v. Harper's Ferry Bridge Co., 17 W. Va. 396.

Grant of a Charter Not Exclusive.—The grant of a charter to one corporation is not held to be exclusive and to prevent the chartering of rival companies, but whenever exclusive rights are intended express provisions must be introduced. Monopoly is not a matter of inference; it must rest its pretensions upon express grant. It is a restriction upon common right and legislative power, hence cannot be implied. Tuckahoe Canal Co. v. Tuckahoe R. Co., 11 Leigh 43, 36 Am. Dec. 374; Roper v. McWhorter, 77 Va. 214.

Reserved Power of Modification or Repeal.

May Repeal but Cannot Modify without Consent of Corporation.—"The power of the legislature to 'repeal, alter or modify the charter of any bank at its pleasure,' must be held to be limited to this extent. It may certainly repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a contract, and therefore, in order to complete the creation of such corporations, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be accepted. It is clear that the government cannot enforce the acceptance of a charter upon a private corporation without its consent. These well-settled principles are everywhere recognized as applicable to the original charters of incorporation; and upon principle and authority they apply with equal force to any amendment or modification of the charter as well as to the original charter. Though the legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification, than it could have forced upon them the acceptance of the original charter without their consent. Under the reservation they can repeal or destroy the charter, without any consent on the part of the corporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter. The power reserved by the legislature gives the right certainly to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of the other contracting party. These principles grow out of the nature of charters or acts of incorporation, which are regarded in the nature of contracts. The amendment or modification must be made by the parties to the contract, the legislature on the one hand, and the corporation on the other, the former expressing its intention, by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance.

"The reservation of the right to alter, amend or repeal the act by which the corporation is created, may be prudent and salutary; but it seems to be a necessary implication, that if the legislature should undertake to make what in their opinion is a legitimate alteration or amendment, the corporation has the power to reject or accept it, whatever may be the consequences. One consequence undoubtedly is, that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body. But such amendment or modification

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cannot be forced upon the corporation without its consent." CHRISTIAN, J., in Yeaton v. Bank of Old Dominion, 21 Gratt. 593; Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. Rep. 877.

The act of March 1st, 1867, entitled "An act to authorize the James River & Kanawha Company to borrow money;" though, when accepted by the company, it created a contract between the company and the state, did not create a contract between the company and the holders of the state bonds therein mentioned; and though the company executed a mortgage on its property to secure the money authorized to be borrowed by said act, yet, if the company has not borrowed the money or made use of the bonds intended to be secured by the mortgage, it cannot be held to have accepted the terms of the act or become liable under its proviso. Stuart v. James River, etc., Co., 24 Gratt. 294.

Not Necessary to an Immaterial Change.—A limited power to borrow money conferred on a building association by a new charter, is not such a radical departure from the original design and business of the company as would necessitate the assent of each member of the company in order that he may be bound by it. Bosang v. B. & L. Ass'n, 96 Va. 119, 30 S. E. Rep. 440.

A Branch Bank Cannot Accept Modification for Mother Bank.—A branch bank, having no separate charter has no power to accept a modification of the charter of the mother bank. Yeaton v. Bank of Old Dominion, 21 Gratt. 593.

Cannot Disturb Existing Contracts.—Under the reserved right "to repeal, alter or modify" the legislature may alter the charters of banks or take them away altogether, but it cannot disturb contracts lawfully made under such charters, or disturb rights already legally vested under the old charters. ANDERSON, J., dissenting. Bank of Old Dominion v. McVeigh, 20 Gratt. 457.

May Be Exercised Either by General or Special Law.—Under a power of modification or repeal reserved in the charter, the charter may be modified by a general law as well as by special act, so as to make shareholders personally liable, and those who become, or continue shareholders, must be understood as consenting to it. Anderson v. Com., 18 Gratt. 295; Robinson v. Gardiner, 18 Gratt. 509; Va. Devel. Co. v. Crozer Iron Co., 90 Va. 126, 17 S. E. Rep. 806.

Distinction in Case of Quasi-Public Corporation.—But a quasi-public corporation having accepted a franchise in which the public has an interest, is subject to the control of the legislature as to its charges, etc., in the exercise of the police power, and a provision in their charter fixing a maximum charge, is not a contract, but amounts to nothing more than a license which may at any time be changed by the sovereign power from the state. Railroad Co. v. Transportation Co., 25 W. Va. 824.

May Take Away Exclusive Privileges.—The right to establish ferries and toll bridges is in the legislature and that body can at any time, by a repeal of the general law, take away all the exclusive privileges of proprietors theretofore existing; but it has not done so in West Virginia. Mason v. Bridge Co., 17 W. Va. 396.

When Mandamus Will Lie to a Corporation to Compel a Transfer of Stock.—Where a by-law requires that the transfer of shares be made on the books of the bank and the right to a transfer is established, if the bank refuses to open its books and allow the transfer, a court of equity will compel the bank to transfer not only the shares but the accrued dividends, since it is a case for specific performance and damages would be inadequate. Feckheimer v. Bank, 79 Va. 80.

To Compel Performance of Its Corporate Duties. Mandamus will lie to a corporation to compel it to perform the duties imposed upon it by its charter, viz. issuing a transfer when required to do so by its charter. Richmond Ry., etc., Co. v. Brown, 97 Va. 26, 32 S. E. Rep. 775.

Sunday Laws Applicable to Corporations Engaged in Interstate Commerce.—In Norfolk & West. R. Co. v. Com., 88 Va. 95, 13 S. E. Rep. 340, the statute, Code Va. § 3801, prohibiting the running of trains on Sunday, with certain specified exceptions, was held void as in conflict with the United States constitution, as an improper regulation of interstate commerce, whether intended to be so or not, in a matter of national concern, and that it made no difference that Congress had not acted in the matter; and it could not be justified as an exercise of the police power. LONG, J., dissenting. But in Norfolk & West. R. Co. v. Com., 93 Va. 761, 24 S. E. Rep. 837, this same statute was upheld as constitutional, as being a valid exercise of the police power, and, though in this case the train consisted only of empty coal cars, hence was held not to be engaged in interstate commerce, yet the court expressly disapproved of the decision in Norfolk & West. R. Co. v. Com., *supra*, saying, "A state may, in order to secure and protect the lives and health of its citizens, or to preserve good order and the public morals, legislate for such purposes, in good faith and without discrimination against interstate or foreign commerce, without violating the commerce clause of the United States constitution although such legislation may sometimes touch in its exercise the line separating the respective domains of national and state authority, and to some extent affect foreign and interstate commerce." State v. Railroad, 24 W. Va. 783.

E. THE TERM "PERSON" AS APPLIED TO CORPORATIONS.—"The term 'person' used in law, is unquestionably sufficiently comprehensive to embrace corporations; and it must be held to embrace them, unless there is something in the law showing the legislative intent to restrict its application." CABELL, J., in Stribbling v. Bank of the Valley, 5 Rand. 132; Crafford v. Supervisors, 87 Va. 110, 12 S. E. Rep. 147; State v. B. & O. R. Co., 15 W. Va. 362.

"Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute." ALLEN, J., in B. & O. R. Co. v. Gallahue, 12 Gratt. 655; W. U. Tel. Co. v. Richmond, 26 Gratt. 1; Quesenberry v. Ass'n, 44 W. Va. 512, 30 S. E. Rep. 73; Bank v. Distilling Co., 41 W. Va. 530, 23 S. E. Rep. 793. See Code Va. 1887, § 5, subsec. 13; Code W. Va., ch. 13, sec. 17, clause 9.

Especially is this true of statutes imposing a tax in which the word "persons" embraces corporations unless excluded by *express* terms or *necessary* implication. Miller v. Com., 27 Gratt. 110.

"For civil purposes, corporations are in law deemed persons. The only doubt has been whether that word would be so construed as to embrace them within the purview of penal statutes, and in the case of U. S. v. Amedy, 11 Wheat. 393, the court decided that under the act of Congress making it felony to destroy a vessel with the intent to prejudice any person or persons that had underwritten such vessel corporations were comprehended." ALLEN, J., in U. S. Bank v. Merchant's Bank, 1 Rob. 573. But see Miller v. Com., 27 Gratt. 110.

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Corporations are in law for civil purposes deemed persons; they have power to plead, be impleaded, grant or receive by their corporate names and to do all other acts within the purview of their corporate power, which natural persons can do. B. & O. R. Co. v. Gallahue, 12 Gratt. 655.

A corporation is a "person" so as to come within the purview of the act, 1 R. C. 1819, p. 474, directing the method of proceeding against absent debtors in courts of equity so that a suit may be maintained against a *foreign* corporation where it has estate within the commonwealth. Bank of U. S. v. Merchants' Bank, 1 Rob. 573. STANARD and BROOKS, JJ., dissenting. B. & O. R. Co. v. Gallahue, 12 Gratt. 655.

Liable as Garnishee.—A corporation is liable as garnishee under the attachment laws, being included in the word "person" used in the statute. B. & O. R. Co. v. Gallahue, 12 Gratt. 655.

Subject to the Usury Laws.—Corporations generally are within the usury laws; being included under the designation of "person." The fact that a bank is allowed to take a fraction of a per cent. more than the general law allows does not amount to a general repeal of the usury law as to that bank, but is only a protection against the usury law up to the specified limit. Stribbling v. Bank, 5 Rand. 132; Crabtree v. Ass'n, 95 Va. 670, 29 S. E. Rep. 741, 4 Va. Law Reg. 12, and *note*.

Effect of Rule of Ejusdem Generis.—But, in Lynchburg v. R. Co., 80 Va. 237, it was held that a section of the charter of the city of Lynchburg which granted authority to impose a license tax upon persons engaged in certain enumerated callings and "upon any other person or employment, which it may deem proper whether such person or employment be herein specially enumerated or not" does not empower the city to impose such a tax upon a railroad corporation, "which is neither a person nor employment in the ordinary acceptation of these words." HINTON, J. The decision was based on the rule of *ejusdem generis*.

F. POWERS OF CORPORATIONS.

Corporation Must Exercise its Powers Collectively, Not Individually.—Where authority is conferred on a corporation aggregate by statute to make contracts, neither a majority of the members, nor all of them acting separately have the power to bind the corporation; one of the principal objects being the concurrent counsel and deliberation of the members acting together; and of course, if they cannot *make* a binding contract acting separately, they cannot, individually, ratify what has been done, so as to bind the corporation. A corporation can only act as a body or by its authorized agents. Penn. Lightning Rod Co. v. Board of Education, 20 W. Va. 360.

Implied Powers.—"Corporations aggregate are artificial beings created for specific and limited objects, public or private, in order to conduct and continue in succession the interests pertaining to those objects, by the exercise collectively of appropriate, legitimate means, such as natural persons may employ individually. The difference between the powers of corporations and individuals is to be found mainly in the limited objects of the former, and the necessity of their acting in a concrete character. It is essential to corporations, as well as individuals, that they should have the capacity to sue and be sued, to make contracts, to acquire and alienate property. Without these powers the purposes of their institution could not be accomplished. But they have not, like individuals, an unlimited discretion in the application of these powers. They may not exercise them for purposes foreign to their creation. A bank of discount and deposit cannot engage in manufacturing or agricultural pursuits; an insurance or mining company cannot discount bills or notes, or circulate their paper as money; a road or navigation company cannot speculate in lands or stocks. But all such corporations have the right to secure and collect debts due to them, and consequently to obtain deeds of trust or mortgages therefor upon property real or personal, or to commute them by taking in payment assignments of *choses in action*, or conveyances of lands or goods. The authority to use such means is to be determined by the lawfulness of the end which they are employed to accomplish.

"It is true that the capacity of corporations at common law to purchase and hold lands and chattels is laid down broadly in the books, though I am not aware of any case in which the question was made whether this power was unlimited. However this may be, I think it clear that our statutory corporations cannot take and hold real estate for purposes wholly foreign to their creation." Rivanna Nav. Co. v. Dawsons, 3 Gratt. 20; The Banks v. Poitiaux, 3 Rand. 136; Wroten v. Armat, 31 Gratt. 228.

Whilst no powers will be implied except those only which are incident to the very existence of the corporation or so necessary to the enjoyment of some special grant that without the implied power such right would fail, yet it is an established principle that corporations may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

Implied Powers May Be Curtailed by the Provisions of the Charter.—It is, moreover, unquestionable that the general incidental power of a corporation, whether derived from the common or the statute law, may be curtailed by the provisions of its legislative charter, either expressly or by necessary implication. Thus the charter may in terms prohibit the corporation from purchasing lands or goods for any purpose whatever, or for any but a particular specified purpose; or the prohibition may be implied from an insertion, by way of enactment, of the general incidental power to purchase, with a proviso limiting it to a given purpose. But a general prohibition would not be inferred from a mere partial enactment of the incidental common-law power; as, for example, from a clause authorizing a bank, insurance or manufacturing company to purchase land for the erection of its necessary buildings. Such a clause, whether with or without limitation as to quantity or value, would not exclude the incidental power to take mortgages or other securities on real or personal estate, for debts due the corporation, or assignments or conveyances of chattels or lands in commutation therefor.

The incidental capacity of a corporate body to acquire property for its chartered objects, is for the most part salutary, and the entire prohibition of it would often be productive of great inconvenience. Nothing is easier, whenever sound policy may require the denial of this otherwise inherent power, than a plain manifestation of such legislative intent in the charter of incorporation; and it ought not to be lightly inferred, but made manifest by express terms or necessary implication. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19; Wroten v. Armat, 31 Gratt. 228.

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Powers of Corporations Depend upon the True Construction of Their Charters.—Whatever the implied powers of corporations aggregate may be at common law and the modes by which those powers are to be carried into operation, corporations, either private or public, created by statute, must depend, both for their powers and the mode of exercising them upon the true construction of the statute creating them; they are precisely what the statute has made them, they derive all their powers from the statute, and are capable of exercising their powers only in the manner prescribed or authorized by it. Penn. Lightning Rod Co. v. Board of Education, 20 W. Va. 360; B. & O. R. Co. v. Supervisors, 3 W. Va. 319; Smith v. Cornelius, 41 W. Va. 59, 23 S. E. Rep. 599.

Subject to the Police Power of the State.—A corporation, where it is not otherwise provided in its charter expressly or by clear implication, in the use of its property, the exercise of its powers and the transaction of its business, stands upon the same footing as natural persons and is subject to the same control under the police powers of the state or a municipal corporation. Under this police power a city ordinance forbidding a railroad to propel cars through certain crowded streets of a city by steam, was upheld as not impairing the obligation of the contract of incorporation. Richmond, Fred'g & Pot. R. Co. v. City of Richmond, 26 Gratt. 83.

Power of Corporation to Contract—Necessity for Seal. Old Rule—New Rule.—In ancient times corporations aggregate could do nothing except by deed under their corporate seal. But this rule cannot now be supported as a general proposition. A corporation, like a natural person can grant or convey land only by deed but it is now firmly established that a corporation may be bound by promises express or implied, resulting from the acts of its authorized agents, although such authority be conferred only by virtue of a corporate vote unaccompanied by the corporate seal. Penn. Lightning Rod Co. v. Board of Education, 20 W. Va. 360.

A corporation may make a contract without the use of a seal in all cases where this may be done by an individual. Grubbs v. Insurance Co., 94 Va. 589, 27 S. E. Rep. 464; Kelly v. Board, 75 Va. 263; Banks v. Poitiaux, 3 Rand. 136, 15 Am. Dec. 706; Legrand v. Hampden-Sidney College, 5 Munf. 324.

Realty Passes Only by Deed.—When the charter of a corporation declares its stock to be personal estate, but that its real estate should only be conveyed as other real estate, such real estate will not pass except by deed duly executed. Barksdale v. Finney, 14 Gratt. 338.

Seal Must Be Affixed by Authority of Corporation, and Be Intended for a Seal.—The mere presence of what purports to be the seal of a corporation impressed upon a contract that would be a valid and binding contract, though not under seal, will have no effect on its apparent character without proof that the seal is the seal of the corporation and was affixed by its authority and that it was the intention of the parties that it should be a sealed instrument. Grubbs v. Insurance Co., 94 Va. 589, 27 S. E. Rep. 464, 3 Va. Law Reg. 279, and *note*.

Private Seal of President Not Sufficient.—To constitute a valid deed of a corporation, the corporate seal must be affixed, the private seal of the president is not sufficient; but such an instrument purporting to be a deed of trust of the corporation though invalid as the "deed" of the corporation, is valid as a mortgage of the personal property of the corporation, which it purports to convey. Rauch v. Oil Co., 8 W. Va. 36.

Sufficient Authority to Execute Deed.—When a corporation, at a meeting of stockholders, authorizes the officers of the corporation to execute a deed under the direction of the executive committee, that is sufficient authority to the president to execute the deed under the direction of said committee. Merchants' Bank v. Goddin, 76 Va. 503.

Presumption That Seal Was Affixed by Proper Authority.—The rule is well settled that if a contract purports to be sealed with the seal of the corporation and it is proved to be signed and executed by the proper agents, the presumption is that the seal was regularly affixed by the proper authority; and a contract under seal, executed by an agent within the scope of his appointed power, will be held valid and binding upon the corporation until evidence to the contrary has been introduced, and the presumption of authority to affix to the instrument the seal of the corporation will not be overcome by the mere fact that no vote of the directors authorizing it is shown, since it is often the case that large powers are executed by corporate officers with the tacit approval of the corporation, and if the stockholder has notice of the contract and acquiesces by failing to make any inquiry as to its validity, he is estopped to question its validity afterwards. Fidelity Ins. T. & S. D. Co. v. Shenandoah Val. R. Co., 32 W. Va. 344, 9 S. E. Rep. 180.

The President a Proper Person to Execute the Deed.—A deed of a corporation, executed by the president under the seal of the corporation, is a valid deed. Merchants' Bank v. Goddin, 76 Va. 503.

Where the deed of a corporation was signed by the corporation, by its president, with the corporate seal affixed and the certificate of the notary stated that "Thos. L. Rosser, president, whose name is signed to the writing hereto annexed," acknowledged the same before him in his county, this was held a sufficient execution of the deed by the corporation. Banner v. Rosser, 96 Va. 238, 31 S. E. Rep. 67.

Seal Must in Any Case Be Acknowledged.—The seal of a corporation, even though an actual seal, must be acknowledged in the body of the instrument. Salt Co. v. Norfolk, etc., Co., 95 Va. 461, 28 S. E. Rep. 567, 3 Va. Law Reg. 722, and *note*.

Sufficient Acknowledgment of Seal.—It is a sufficient acknowledgment of a corporate seal in the body of an instrument, if the instrument is there acknowledged to be a bond, inferentially an instrument under *seal*. Dinwiddie Co. v. Stuart, 28 Gratt. 526.

Act Validating Deeds of a Corporation Must Not Interfere with Vested Rights.—The Act approved March 1, 1894 (Acts 1893-4, p. 580) validating deeds in favor of a corporation, which were acknowledged before a notary, who was an officer or stockholder of the corporation at the time, is unconstitutional in so far as it impairs the lien of judgments recovered and docketed prior to the approval of such act. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. Rep. 481.

Defective Certificate of Acknowledgment of a Deed.—A certificate of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer or agent executing it was sworn, and deposed to the facts contained in the certificate, as required by sec. 5, ch. 73, Code, is fatally defective, and does not entitle such deed to be recorded. Abney v. Ohio Lumber & Mining Co., 45 W. Va. 446, 32 S. E. Rep. 256.

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Defence of Usury Not Available to Corporation.—The Act of March 22, 1873, Code Va. 1887, sec. 2825, in prohibiting the defence of usury to corporations is not in violation of the federal constitution or that of Virginia and is retroactive in its operation, even though suit has been brought on such a contract before its passage. Danville v. Pace, 25 Gratt. 1.

Relation of Corporation to Stockholder Not a Fiduciary One.—An individual stockholder is not, by reason of being a stockholder, a part owner of the property of the corporation, or entitled to act for it as its agent; but he stands as a stranger towards it and may sue it and be sued by it and deal with it at arm's length. Kanawha Coal Co. v. Ballard & Welch Coal Co., 43 W. Va. 721, 29 S. E. Rep. 514.

May Contract with Its Members.—An incorporated company is, in a legal point of view, wholly distinct from the persons composing it and may make any contract with one of its members or stockholders that it might make with a stranger. Biggs v. Elliston Dev. Co., 93 Va. 404, 25 S. E. Rep. 113.

May Secure Debts to Shareholder.—A corporation may contract debts to its individual corporators and is as much bound to pay or secure such debts as debts due to strangers, and the fact that a deed is given to secure such debts does not render it fraudulent unless some fraudulent intent is shown. Burr v. McDonald, 3 Gratt. 215; Hope v. Salt Co., 25 W. Va. 789.

Ultra Vires Contracts.

When Corporation May Set up Defence of "Ultra Vires."—When want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of authority depends nor merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 505.

Where there is nothing *on the face of the paper* indicating that a corporation has exceeded its corporate powers in the execution of a mortgage, it will not be allowed to plead "*ultra vires*" in a suit to enforce it. The stockholders only can object, not the corporation itself. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501.

Who May Contest Ultra Vires Acts.—The corporation can contest an *ultra vires* act of its directory, also the attorney general may restrain a corporate excess which tends to the public injury.

But the president and directors, as such, have no authority to sue in behalf of the corporation. Smith v. Cornelius, 41 W. Va. 59, 23 S. E. Rep. 599.

Rights of a Minority of Shareholders.—In order to give standing in a court of equity to a small minority of shareholders, contesting, as *ultra vires*, an act of the directors, it must appear that they have exhausted all the means within their reach to obtain redress of their grievance within the corporation itself and that they were stockholders at the time of the transaction complained of or that the shares have devolved on them since, by operation of law. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501.

Contracts Fairly within the Objects of Incorporation Not "Ultra Vires."—A contract by a railway company to deliver a certain number of bales of cotton in a certain place at a specified time is not *ultra vires* a railroad corporation, being incident to and for the benefit of their business as common carriers, and not forbidden by their charter. The court, citing 1 Wood Ry. Law, pp. 179, 480, said: "There is no question but that, under the head of its implied powers, a corporation, especially a railroad corporation, may, in order to increase its business, enter into many contracts and undertakings which are not strictly within its express powers, if they are not expressly prohibited and are essential to promote the business of the corporations, or add materially to the convenience of its prosecution." R. Co. v. Compress Co., 83 Va. 272, 2 S. E. Rep. 139.

Where the charter of a corporation authorizes a bond issue, an application of the proceeds to pay off the floating debts of the corporation is not *ultra vires*. Addison v. Lewis, 75 Va. 701.

Jurisdiction of Equity to Annul Such Contracts.—Equity has jurisdiction to declare null and void an order of the board of directors of a corporation that is *ultra vires* and obstructs its rights to property, though that order be void. Ravenswood, etc., R. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. Rep. 285.

Corporation a Necessary Party.—In a suit to annul an act of a corporation as *ultra vires*, the corporation is a necessary party. Smith v. Cornelius, 41 W. Va. 59, 23 S. E. Rep. 599.

Power of Corporations to Acquire Land.

Charters Merely Directory.—"It seems to me, that the charters limiting the amount of land that a corporation may acquire are merely directory. They impose no penalty in terms. They do not declare the purchase by or conveyance to the banks to be void, nor vest the title in the commonwealth or any other than the banks in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might, for that cause, be dissolved by a proceeding at the suit of the commonwealth; and even in that case, it seems the better opinion that the property, if not previously conveyed away would revert, upon the dissolution of the corporation, to the grantor and not to the commonwealth. But any conveyance made by the corporation, before its dissolution would be effectual to pass its title. The banks therefore have a title which they can convey to the appellee and which would, in his hands, be indefeasible. It would seem extremely inconvenient if a contractor with one of these banks could for the purpose of avoiding his contract, institute the inquiry whether the bank had violated its charter." GREEN, J., in The Banks v. Poitiaux, 3 Rand. 136; Fayette Land Co. v. L. & N. R. Co., 93 Va. 274, 24 S. E. Rep. 1016; Litchfield v. Preston, 98 Va. 530, 37 S. E. Rep. 6, 6 Va. Law Reg. 397, and *note*; Wroten v. Armat, 31 Gratt. 228.

It seems that where the corporation is trying to enforce a sale by it of lands already acquired contrary to its charter, specific performance will be enforced, but not where the corporation is trying to enforce a sale to itself in violation of its charter. Banks v. Poitiaux, 3 Rand. 136, and dictum in Fayette

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Land Co. v. Louisville, etc., R. Co., 93 Va. 274, 24 S. E. Rep. 1016.

Such Charters Construed Liberally.—Under an act of assembly, authorizing a bank to hold as much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more, the bank may purchase more ground than is necessary for the erection of a banking house, build fire-proof houses on the vacant land, for the greater security of the banking house, and sell them to third persons. Banks v. Poitiaux, 3 Rand. 136. See also, Davis v. Lee Camp (Va.), 18 S. E. Rep. 839.

Statute of Mortmain Not in Force in Virginia.—The statute of mortmain has never been adopted into the law of Virginia, and there is no proceeding authorized by the common or statute law of Virginia under which lands acquired by a corporation in violation of its charter can be forfeited to the state. Fayette Land Co. v. Louisville & Nashville R. Co., 93 Va. 274, 24 S. E. Rep. 1016; Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19.

Incapacity to Take Not Inferred from Inhibition to Hold.—An incapacity to take will not be inferred from an inhibition to hold, though the policy of the latter be to prevent the accumulation by the corporation of a specified description of property, if the purpose of the conveyance be a sale of the property by the corporation, and the application of the proceeds to the objects contemplated by the charter. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19; Banks v. Poitiaux, 3 Rand. 136.

Prohibition to Take Land as Security Does Not Avoid the Security.—A prohibition on a bank to take a deed of trust or mortgage to secure loans will not render the security void, for such a provision is made for the benefit of the government and not of the borrower and the government alone can take advantage of it or not at its pleasure. Wroten v. Armat, 31 Gratt. 228.

Power to Alienate Its Franchise, Must Be Authorized by Its Charter, Private Corporations.—A private corporation, unless authorized by charter to do so, cannot lease or dispose of its franchise or its property needful in the performance of its obligations to the state, without legislative consent. Dictum in Smith v. Cornelius, 41 W. Va. 59, 23 S. E. Rep. 599.

Such authority is now given by statute in Virginia, in case of a foreclosure and sale under a deed of trust or mortgage, or under a decree of court, of all the works and property of an internal improvement company. Code Va. 1887, §§ 1233-4, 1236, Acts 1891-2, p. 623; 1 Va. Law Reg. 546.

Quasi-Public Corporations.—In Roper v. McWhorter, 77 Va. 214, a ferry was held to be a quasi-public franchise, in the proper exercise of which the public was interested, hence could not be transferred without express legislative authority.

A quasi-public corporation has the power to mortgage its property for the furtherances of the objects of its creation, when authorized by the legislature. Enders v. Board of Public Works, 1 Gratt. 364.

Cannot Thus Exempt Itself from Liability.—A railroad corporation cannot, without distinct legislative authority, by lease or any other contract, turn over to another company its road and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road. Ricketts v. R. Co., 33 W. Va. 433, 10 S. E. Rep. 801, 25 Am. St. Rep. 901; Fisher v. R. Co., 39 W. Va. 366, 19 S. E. Rep. 578; Naglee v. R. Co., 83 Va. 707, 3 S. E. Rep. 369, 5 Am. St. Rep. 308.

Power to Subscribe to Stock in Another Corporation May Take Such Stock as Security.—The taking of stocks and bonds of another corporation merely as collateral security for advances made to such corporation does not come within the prohibition of the Code of W. Va., prohibiting one corporation from subscribing to or purchasing the stocks, bonds or other securities of another corporation except in payment of a *bona fide* debt. County Court v. R. Co., 35 Fed. Rep. 161.

May Be Authorized by Law.—A law authorizing a bank to subscribe to the stock of a joint stock company is valid. Goddin v. Crump, 8 Leigh 120.

May Accept Devise or Bequest of Its Own Stock.—A corporation has the power to accept a devise or bequest of its own stock whether such is declared by its charter to be realty or personalty. Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19.

Power to Accept Bequests.—Corporations have the legal capacity to take charitable bequests, when, and to the extent, authorized by their charters. Wilson v. Perry, 29 W. Va. 169, 1 S. E. Rep. 302; University v. Tucker, 31 W. Va. 621, 8 S. E. Rep. 410; Roy v. Rowzie, 25 Gratt. 599.

Parol Evidence Admissible to Show Identity of Corporation.—Roy v. Rowzie, 25 Gratt. 599; Wilson v. Perry, 29 W. Va. 169, 1 S. E. Rep 302.

Corporation May Act as Trustee.—The old rule that a corporation could not be a trustee has been long rejected and now the well-established doctrine is that corporations of every description may take and hold estates as trustees for purposes not foreign to the objects of their creation and existence and they may be compelled by the courts to carry the trusts into execution. Prot. Epis. Ed. Soc. v. Churchman's Reps., 80 Va. 718.

Power to Form a Partnership with a Natural Person.—The authorities are conflicting as to whether a corporation can form a partnership with an individual; but it is believed that the weight of authority is against such power. A dictum in Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. Rep. 249.

Where a corporation and an individual have assumed to enter into a partnership, and jointly transacted business together, they may recover, by reason of their joint interest, upon obligations made to them in their partnership name, irrespective of their partnership rights and duties as between themselves, or the power of such corporation to execute the powers incident to a partnership. Wilson v. Carter Oil Co., 46 W. Va. 469, 33 S. E. Rep. 249.

Power to Borrow Money.—A private manufacturing company may borrow money to carry on its operations. Burr v. McDonald, 3 Gratt. 215; Pyles v. Riverside Furniture Co., 30 W. Va. 123, 2 S. E. Rep. 909.

Certification of Mortgage Bonds by Trustee.—Where certain first mortgage bonds have been deposited as security for general mortgage bonds, it is not necessary for them to be certified by the trustee, and if it were, it is such a power *coupled with a trust* that a court of equity will compel its execution. Atwood v. R. Co., 85 Va. 966, 9 S. E. Rep. 748.

Power to Make an Assignment for the Benefit of Creditors.—A corporation has the power to make a deed of assignment to trustees for the benefit of creditors. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866; Planters' Bank v. Whittle, 78 Va. 737; Burr v. McDonald, 3 Gratt. 215; Lamb v. Cecil, 25 W. Va. 288.

A bank has the power to make an assignment of its assets for the benefit of its creditors independ-

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ently of the Act of Feb. 1866. Farmers' Bank v. Willis, 7 W. Va. 31.

Manner of Making Assignment.—A corporation may execute a deed of assignment by any agent duly authorized and a deed prepared according to the directions of the corporation and approved by the company in general meeting is valid. Burr v. McDonald, 3 Gratt. 215.

Passes Unpaid Subscriptions—Construction.—A deed of assignment to trustees for the benefit of creditors, of all the property of a corporation, passes all unpaid subscriptions to the trustee, with the right to collect the same, when a call has been duly made, by suit in his own name, as well under the statute, Code 1873, ch. 141, sec. 17, as in the exercise of the original powers of a court of equity. Such a deed is to be construed by the law of the domicil of the corporation. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

Effect of Sale under Deed of Trust.—In Wash. Alex. & Georg. R. Co. v. Alex. & Wash. R. Co., 19 Gratt. 624, DORMAN, J., was of opinion that ch. 61, §§ 28, 29, Code Va. 1860, providing that a sale under a deed of trust or mortgage of a corporation's property, passed subsequently acquired property as well, that the corporation was *ipso facto* dissolved and the purchaser became a corporation, did not apply to the sale by a trustee of a mere equity, conveying no legal title. See Code Va. 1887, §§ 1233, 1234, 1236; Acts 1891-2, p. 623.

Power to Create Preferences.

In Virginia.—A deed by a private manufacturing corporation incorporated in 1833, in trust to pay its debts, which gives preferences in favor of some of its stockholders who had been sureties for the corporation, was valid, the Act of Feb. 13, 1837, Sess. Acts, ch. 84, § 17, prohibiting such preferences by mining and manufacturing corporations not applying. Burr v. McDonald, 3 Gratt. 215.

Prior to the act of 1837 there was no law prohibiting preferences by *any* insolvent private corporation. Pyles v. Riverside Furn. Co., 30 W. Va. 123, 2 S. E. Rep. 909. See also, Planters' Bank v. Whittle, 78 Va. 737. For present statute, see Code Va. 1887, § 1149.

In West Virginia.—The law in West Virginia was the same as in Virginia until 1863, when the provisions of the Act of 1837 were omitted from a general reenactment of the law governing corporations, so that trust deeds preferring creditors executed in 1882, 1883 and 1884 were valid, since there was nothing, at that time, in the policy of the West Virginia statutes, against such preferences. Pyles v. Riverside Furn. Co., 30 W. Va. 123, 2 S. E. Rep. 909. But in Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. Rep. 621, the court said that the policy of the West Virginia statutes was changed adversely to such preferences by ch. 74, sec. 2, Code W. Va.

Now Enure Ratably to the Benefit of All Existing Creditors.—A deed of trust executed by a corporation, if not executed to secure a debt contracted, or money borrowed at the time of the creation of the lien, will enure ratably to all the creditors existing at the time of the creation of the lien. Code Va. 1873, ch. 57, § 63; Code Va. 1887, § 1149; Clinch River Veneer Co. v. Kurth, 90 Va. 737, 19 S. E. Rep. 878; Haskin Wood-Vulcanizing Co. v. Cleveland Ship Building Co., 94 Va. 439, 26 S. E. Rep. 878, 3 Va. Law Reg. 108, and *note*; Hardy v. Mfg. Co., 80 Va. 404.

A Confession of Judgment is a Voluntary Preference within the Statute.—A *confession* of judgment by a corporation chartered by a court, for an antecedent debt, is such an illegal voluntary preference as comes within the purview of sec. 1149, Code Va. 1887; hence will enure ratably to the benefit of all creditors whose debts existed at the time. RIELY, J., saying *obiter* that such a corporation might suffer a judgment, where it had no defense. Tate v. Building Ass'n, 97 Va. 74, 33 S. E. Rep. 382.

Statute Applies to the Creation of a Lien, Not to the Payment of Indebtedness.—An assignment of bonds of a corporation at their face value in discharge of the company's indebtedness and not as *security* for the indebtedness of the company is not the creation of a lien so as to come within the language of the statute providing that "Any lien or incumbrance created by any company on its works or property for the purpose of giving a preference to one or more creditors of the company over any other creditor or creditors, except to secure a debt contracted or money borrowed at the time of the creation of the lien or encumbrance shall enure ratably to the benefit of all the creditors of the company." Code Va. 1873, ch. 57, § 63; Code Va. 1887, § 1149; Planters' Bank v. Whittle, 78 Va. 737.

Priority of Lien to Those Furnishing Supplies, etc.—Sections 2485, 2486, providing that employees and persons furnishing supplies to railroads, mining and manufacturing companies shall have liens superior to mortgages, deeds of trust, etc., executed since March 21, 1877, is not in conflict with the 14th amendment to the United States Constitution, as being special and class legislation, and pig iron furnished to a rolling mill is included among such "supplies." The supply liens are given precedence over all mortgages, etc., executed since March 21, 1887, not merely over those executed between that date and May 1, 1888. Va. Devel. Co. v. Crozer Iron Co., 90 Va. 126, 17 S. E. Rep. 806.

The Capital Stock a Trust Fund for the Benefit of Creditors.—The capital stock of a corporation is a trust fund for the benefit of creditors; for the same reason, the entire assets are also, and the directors are the trustees for the creditors of the corporation. Lamb v. Laughlin, 25 W. Va. 800; Lamb v. Pannell, 28 W. Va. 603; Sweeney v. Refining Co., 30 W. Va. 443, 4 S. E. Rep. 431; Newcomb v. Brooks, 16 W. Va. 63; Hardy v. Manufacturing Co., 80 Va. 404.

Especially, the Unpaid Subscriptions.—"Corporate property and assets, especially the unpaid subscriptions, constitute a trust fund, specially set apart for the payment of corporate debts, upon the faith of which those debts were contracted, and it will be pursued and subjected to the satisfaction of the corporate liabilities. When, as in this case, a joint stock company makes an assignment for the benefit of its creditors, all the property and assets of the company, embraced in the deed, pass thereby to the trustees for the purposes of the trust, as provided by the instrument; and the effect of the assignment is to divest the company of the right to collect and apply such assets, and to vest that authority in the trustees. Though the company does not, and cannot, assign its right of franchise to make the calls necessary to enable the trustees to pay off the debts, and it remains its duty to make such call, yet if it neglects or stubbornly refuses to discharge that duty, and a court of equity is called on to administer the trust, and it appears that the trustees named in the deed have proved inefficient, or are not, for reasons satisfactory to the court, the proper persons to execute the trust, such court will remove them and appoint another or others in their place, and confer upon the trustee or trustees substituted, all the powers and authority necessary to the prompt and faithful execution of

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the trust; which authority is not only conferred upon the court by our statute, but is necessarily incident to the exercise of its ordinary powers touching the administration of trusts. In short, the application of these principles exemplifies the fact that corporations, as well as natural persons, must pay their debts." Lewis v. Glenn, 84 Va. 981, 6 S. E. Rep. 866.

G. EMINENT DOMAIN.—See monographic *note* on "Eminent Domain."

May Be Delegated to Private Corporations.—The right of eminent domain appertains to every independent government, and may be delegated to private corporations, to be exercised by them in the execution of works, in which the public is interested. B. & O. R. Co. v. P. W. & K. R. Co., 17 W. Va. 841; W. Va. Trans. Co. v. Vol. O. & C. Co., 5 W. Va. 382.

Must Condemn the Fee Simple.—Corporations except a turnpike company condemning land under Code Va. 1873, ch. 56, sec. 11, Code Va. 1887, § 1079, must take and pay for the fee simple and not merely an easement, and such provision is not unconstitutional. Roanoke v. Berkowitz, 80 Va. 616.

Corporation Must Pay Money into Court, Where the Title is Disputed.—A corporation can only acquire a clear title to land condemned for its purposes by paying the damages into court, so that parties in interest may be convened before the court. Robinson v. Crenshaw, 84 Va. 348, 5 S. E. Rep. 222.

Telegraph and Telephone Poles an Additional Servitude.—Placing of poles on a public highway constitutes an additional servitude, and the act Feb. 10, 1880, Code Va. 1887, §§ 1287-1290 authorizing telegraph and telephone companies to erect their poles along the public roads, etc., does not authorize them to do so without compensating the owners of the fee, since the public have only the easement of right of way and such taking without compensation would violate the constitutional prohibition against taking private property without compensation. W. U. Tel. Co. v. Williams, 86 Va. 696, 11 S. E. Rep. 106.

Property of a Corporation Equally Subject to the Right of Eminent Domain.—The property of a corporation is as much subject to the right of eminent domain as that of a natural person, whether consisting of the land itself or a mere right of way and if the charter of a railroad company authorizes it to cross the right of way of a canal company, it may do so provided they do not obstruct the traffic of the canal, on payment of a just compensation, condemning the land as the property of the canal company if they own it; but if they have only a right of way, condemning it as the property of the original owner subject to the right of way of the canal company. Tuckahoe Canal Co. v. Tuckahoe R. Co., 11 Leigh 43.

There is nothing so sacred in the title of a railroad company to property, that it cannot be taken under the exercise of the right of eminent domain. Property belonging to a railroad company and not in actual use *necessary to the proper exercise of the franchise thereof* may be taken for the purposes of another railroad under the general railroad law of the state. An express legislative enactment is generally required in order to take such property in use by a railroad company, except where the proposed appropriation would not destroy or greatly injure the franchise of the company, or render it difficult to prosecute the object thereof. B. & O. R. R. Co. v. P. W. & Ky. R. R. Co., 17 W. Va. 812, 852.

H. LIABILITY OF CORPORATIONS.

Civilly.

Corporations Liable Civilly for the Torts of Their Agents, Committed within the Scope of Their Employment.—It was at first doubted whether a corporation was in any case liable in a civil suit for the torts of its agents, especially whether an action of trespass would lie against a corporation. But modern authorities all agree, that corporations are liable for torts committed by their agents in the discharge of the business of their employment and within the proper range of such employment and that too whether the tort be one, the responsibility for which is to be enforced by an action on the case or by trespass. State v. B. & O. R. Co., 15 W. Va. 362; Norfolk v. West. R. Co. v. Neely, 91 Va. 539, 22 S. E. Rep. 367.

Lease or Mortgage Works No Exemption.—A corporation cannot exempt itself from liability by leasing its property and the use of its franchises to another, without the authority of the legislature. Ricketts v. Railroad, 33 W. Va. 433, 10 S. E. Rep. 801, 25 Am. St. Rep. 901.

Nor does a voluntary conveyance by deed of trust of its property and franchises, without the authority of the legislature, work such an exemption. Naglee v. Railroad Co., 83 Va. 707, 3 S. E. Rep. 369.

Even When Torts Are Wilful and Malicious.—Although there has long been doubt on the question, and there is still conflict, the better opinion now is that a corporation is liable not only for the unintentional torts of its agents when done within the scope of their employment, but also for their wilful or malicious torts under the same circumstances. State v. B. & O. R. Co., 15 W. Va. 362.

Liability for Punitive Damages.—In West Virginia, a corporation is not liable to punitive damages even for the wanton and malicious acts of its agents, in the absence of evidence tending to show that his conduct was either authorized or approved by the corporation or that the agent was incompetent or of known bad character. Ricketts v. Ches., etc., R. Co., 33 W. Va. 433, 10 S. E. Rep. 801, 25 Am. St. Rep. 901. See also, dictum in Norfolk, etc., R. Co. v. Lipscomb, 90 Va. 137, 17 S. E. Rep. 809. This question has never arisen directly in Virginia, but in Norfolk & West. R. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 737, the corporation was held liable for punitive damages, but on the ground that the corporation subsequently ratified the act of its agent.

Unintentional Tort of Agent.—But where the unlawful act of the agent is not wilful or malicious but the result of a mistake, punitive damages cannot be exacted from the corporation. Norfolk & West. R. Co. v. Lipscomb, 90 Va. 137, 17 S. E. 809.

When Not Liable for Non-Feasance.—A corporation chartered for the improvement of a river and authorized to charge tolls thereon, if it has not charged tolls, is not liable for damages resulting from failure to improve the river. James River & Kanawha Co. v. Early, 13 Gratt. 541.

Criminally.

In Virginia Cannot Be Indicted by Its Corporate Name.—A corporation such as the President, Directors and Company of Swift Run Gap Turnpike Co. cannot be impleaded *criminaliter* by its artificial name for committing a nuisance in obstructing a common public highway by digging it up and placing stone in it. Com. v. President, etc., of S. R. G. Turnpike Co., 2 Va. Cas. 362.

In West Virginia Corporation Liable Criminally for the Acts of Misfeasance as Well as Non-Feasance.—

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Although formerly a matter of doubt, it may now be regarded as settled that a corporation may be indicted for a failure to perform certain public duties which the law or its charter has imposed upon them. A distinction was formerly made between acts of non-feasance, or failure to perform such duties, and acts of misfeasance by the agents of a corporation, in the former the corporation was held liable, in the latter, some courts held it not to be so; but this distinction is no longer recognized by the weight of authority. GREEN, P., in State v. B. & O. R. Co., 15 W. Va. 362.

Where Evil Intention Constitutes an Element of the Offence.—"In view of the fact that since these decisions have been rendered, the courts have shown a tendency to extend the liability of corporations in civil actions for the misfeasance of their agents, and as it seems now well settled that they may be held liable in suits for libel, and perhaps malicious prosecution, and for assaults and batteries committed by their agents in the performance of their duties, and in view of the further fact that they may in such suits, it is said, be subjected to exemplary or punitive damages, I hesitate to accede to the statement that they cannot be held liable to an indictment for any offences which derive their criminality from evil intention. The very basis of an action of libel, or for a malicious prosecution, is the evil intent, the malice of the party against whom such a suit is brought; and I cannot now well see how it is possible to hold that a corporation may be sued for a libel, and punitive damages recovered, and at the same time hold that such corporation could not be indicted for such libel. The suits of libel and malicious prosecution are in their nature very like to criminal proceedings; and if they lie against a corporation, it would seem to follow, that there are cases for which indictments may lie against a corporation where the evil intention constitutes an element in the offence. And if a corporation is, as has been said, liable civilly for an assault and battery committed through its servants, it is perhaps going too far to say that a corporation can in no case be liable criminally for any offence against the person under any circumstances." GREEN, P., in State v. B. & O. R. Co., 15 W. Va. 362.

May Be Indicted for a Nuisance.—If a railroad company, under authority from a county court giving it license to build its road upon, along, or across public highways upon the express condition that it shall restore such highways to their former state, or to such state, as not unnecessarily to have impaired their usefulness, takes possession of a part of a public highway and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under section 45, ch. 43, of the Code, notwithstanding it has such authority from the county court. State v. Monongahela R. R. Co., 37 W. Va. 108, 16 S. E. Rep. 519.

Liable for Contempt.—A corporation is liable to a fine for a contempt, by motion. B. & O. R. Co. v. Wheeling, 13 Gratt. 40.

May Be Indicted for "Sabbath Breaking."—A corporation may be indicted for "Sabbath breaking" under Code W. Va., ch. 149, §§ 16 and 17: State v. B. & O. R. Co., 15 W. Va. 362.

Proof Necessary in Indictment.—"But while in a civil suit for a tort, even when done wilfully, perhaps no other proof may be necessary in any case than that the act was done by its agents, yet to hold such proof sufficient to sustain an indictment against a corporation for the misfeasance of its agents in every case would be to disregard the maxim, that the accused is always presumed to be innocent: and clear proof of guilt on the part of the accused must be produced, before a conviction can properly be had. The act of misfeasance may, in a particular case, be of such a character, that though done by an authorized agent within the scope of his general employment and for the benefit of the corporation, yet it may give rise to but a suspicion that it has been directed or approved by the corporation. And if the act be of such character, independent proof must in such case be produced of the approval of the corporation, before it can be found guilty in a criminal proceeding. In such case it would clearly not be necessary to prove that the corporation by a distinct act, such as a vote of its directors, either directed the act to be done or subsequently approved of its being done. For if this was required, it would amount to an absolute exemption of a corporation from all liability criminally for the wrongs of its agents: for criminal acts are never so formally directed or approved. Still in such a case the approval of the corporation must be satisfactorily proven, but such approval may be shown satisfactorily otherwise than by proving such direct act of approval. The criminal act being in such a case done by an authorized agent acting within the scope of his authority, the mere doing of the act, even though done wilfully, sufficiently shows, we incline to think, the assent and approval of the corporation, to make them liable in a civil suit; and it gives rise to a suspicion in a criminal proceeding against the corporation, which, if corroborated by evidence that similar acts have been done by the agents of the corporation repeatedly, would be sufficient proof of their approval to justify a conviction. It is but a reasonable inference that acts which are habitually done by the authorized agents of a corporation are done with their approval; and this is indeed almost the only manner in which the approval by the corporation of the acts of its agents can ever be proven. The tacit appropriation by a corporation of the benefits of the acts of its agents, repeatedly occurring, is full and satisfactory proof of the assent of the corporation to the doing of such acts." GREEN, P., in State v. B. & O. R. Co., 15 W. Va. 362.

Liability of a Quasi-Public Corporation.—A corporation is liable to be sued in assumpsit under the authority of its charter for work done and materials furnished even though the governor and other officers are members, as mere trustees for the state, having no personal interest in it, and the object of the corporation is to effect a public improvement at the public expense. The court distinguished this case from that of Sayre v. Turnpike Co., 10 Leigh 454, holding that case only authority for the proposition that a quasi-public corporation like the above is not liable for a remote and consequential injury. Dunnington v. Pres., etc., Turnpike Road, 6 Gratt. 160.

IV. STOCK AND STOCKHOLDERS.

See monographic *note* on "Stock and Stockholders" appended to Osborne v. Osborne, 24 Gratt. 392.

A. THE CONTRACT OF SUBSCRIPTION.

When Binding.—The contract of subscription becomes mutual and binding when the subscription is made and accepted, but no right of action accrues

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until a valid call has been made. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

Character of Subscription a Question for the Jury.—Whether the contract of defendant was a contract to take stock in an existing corporation or merely an agreement to subscribe to a corporation to be subsequently formed, is a question for the jury. Exposition v. Ocheltree, 44 W. Va. 626, 30 S. E. Rep. 78.

Ratification of Subscription Contract.—A stockholder who votes in a corporate meeting and pays an assessment on his stock, is estopped to deny the existence of the corporation when sued on his subscription; and though the capital stock be reduced after his subscription, by voting he acknowledges himself a shareholder and is presumed to consent to such change, being bound with notice of it as a shareholder. Greenbrier Ind. Exp. v. Squires, 40 W. Va. 307, 21 S. E. Rep. 1015.

Proof of Subscription.

Name on Book of Corporation.—Where the name of an individual appears upon the stock book of a corporation as a stockholder, the presumption is that he is the owner of the stock appearing in his name; and such book is proper evidence to go to the jury to show that he was a subscriber to the capital stock of such corporation. South Branch Ry. Co. v. Long, 43 W. Va. 131, 27 S. E. Rep. 297. See also, Exposition v. Ocheltree, 44 W. Va. 626, 30 S. E. Rep. 78; Grays v. Turnpike Co., 4 Rand. 578.

A Certificate Not Necessary.—The certificate is merely evidence, but not the only evidence of ownership of stock. He is a stockholder, who has subscribed and paid for shares of stock in a corporation. Crumlish v. Shen. Val. R. Co., 40 W. Va. 627, 22 S. E. Rep. 90.

Must Be in Subscriber's Handwriting.—The fact that defendants' names appear on the books of the company, if not in their handwriting, is no proof of a written contract to take stock and the statute of limitation to the suit on a verbal contract is a good defence, after the lapse of three years. Savings Bank v. Land Co., 96 Va. 352, 31 S. E. Rep. 511.

Failure to Make Required Cash Payment No Defence.—A subscriber to stock in a corporation cannot escape his liability to pay his subscription on the ground that he did not make the required cash payment at the time he subscribed. P. W. & K. R. Co. v. Applegate, 21 W. Va. 172.

Subscription Contract Not Avoided to Injury of Creditors by Fact That a Lottery Constituted the Inducement.—In a suit by the receiver of a court to collect an assessment on unpaid subscriptions to an insolvent corporation, for the benefit of creditors, who credited the corporation on the faith of such subscriptions, without knowledge of their vice, such subscriptions being lawful on their face, shareholders will not be allowed to set up the defence that the inducement to said subscriptions was the distribution by *lot* of lots of unequal value. Cardwell v. Kelley, 95 Va. 570, 28 S. E. Rep. 953.

Subscriptions Need Not Necessarily Be in Cash.—Subscriptions to stock in a corporation need not, in the absence of statutory provisions requiring it, be paid in cash, but any property which the corporation is authorized to purchase, or which is necessary for the purpose of its legitimate business may be received in payment. Richardson v. Graham, 45 W. Va. 134, 30 S. E. Rep. 92.

Act Transferring Suits to Enforce Stock Subscriptions from Courts of Equity to Courts of Law, Constitutional.—The Act of Dec. 22, 1897, giving courts of law jurisdiction of all suits for the recovery of unpaid stock subscriptions, is not unconstitutional as taking away a vested right to a remedy in equity, and it cannot be claimed that equity still has jurisdiction of such suits on the ground that the remedy at law is inadequate. Shickell v. Improvement Co. (Va.), 37 S. E. Rep. 813.

Evidence of Insolvency in Making Assessments.—A return of "no effects" on an execution against shareholders in a suit to collect an assessment, is *prima facie* evidence of their insolvency, and a further assessment may be laid on such as have paid the first, without inquiring as to what real estate or other property is owned by the delinquent stockholder, since that would unduly delay creditors in obtaining their debts. Martin v. Salem Land Co., 97 Va. 349, 33 S. E. Rep. 600.

Sale of Stock May Be Delayed until Default in Payment of All the Installments.—Internal improvement companies, which have the right to sell the stock of shareholders for delinquencies in the payment of installments called for by them, are not obliged to sell at the first failure to pay an installment, but may wait until delinquencies have occurred on them all, and may sell the stock, and hold the stockholder liable for the amount of any loss that may result to the company, with interest on the installments from the time they severally fell due. Brockenbrough v. James River, etc., Co., 1 Pat. & H. 94.

Statutory Remedy Merely Cumulative.—The remedy given by statute to make sale and transfer of the shares of a defaulting stockholder is simply cumulative and does not deprive the corporation of its right of action or relieve the stockholder from his obligation of payment. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866; Grays v. Turnpike Co., 4 Rand. 578.

Distinction between Guaranteed and Preferred Stock.—Where a contract calls for the payment of eight per cent. *preferred* stock by a corporation at its par value, it is error to decree the payment of that amount of *guaranteed* stock in lieu thereof since the corporation was not required to *guarantee* the payment of the eight per cent. Dickinson v. Ches., etc., R. Co., 7 W. Va. 390.

Liability of Vendor of Stock.—Where buyer and seller of stock in a joint stock company have both regarded and treated the stock as paid up and non-assessable, the seller is liable to the buyer for future assessments lawfully made on the stock, although the contract of sale stipulates that he is to be relieved from all liability as endorser or otherwise, for the debts of the company. Such assessment is not a debt or liability for the company, but a debt or liability of the stockholder to the company. Stuart v. Peyton, 97 Va. 796, 34 S. E. Rep. 696.

Measure of Damages for Failure to Deliver Stock.—Where defendant sold plaintiffs certain shares of stock at a certain price, but the company denied that defendant owned any shares, if the plaintiff sues without unreasonable delay, he is entitled to recover the highest price of the stock in market at any time after demand and refusal. Gray v. Kemp, 88 Va. 201, 16 S. E. Rep. 225.

B. LIABILITY OF STOCKHOLDERS.

No Liability on Stockholder at Common Law beyond His Subscription.—It is a well-settled rule of the common law, that in the absence of any constitutional provision or statute law to the contrary there is no liability upon the stockholders of a corporation to pay its debts or liabilities beyond his subscription. Nimick v. Iron Works, 25 W. Va. 184.

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Nature of Common-Law Liability.—"The liability of the stockholder, to the extent of his liability under the charter, is not simply as such, but it is a personal liability as surety for the company. It is virtually and in effect a liability upon a contract, and the mutual agreement of the parties; not indeed, in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties." LACY, J., in Hardy v. M'f'g Co., 80 Va. 404.

Payment by a Stockholder Extinguishes a Debt of the Corporation.—Where a stockholder satisfies a lien on property of the corporation and takes an assignment of the lien to himself, such lien is extinguished and the stockholder cannot revive it by an assignment to a third party. Hardy v. Norfolk M'f'g Co., 80 Va. 404.

Statutes Imposing Further Liability to Be Strictly Construed.—All such constitutional or statutory provisions which impose a personal liability upon the stockholders for the payment of the corporate debts are to be strictly construed. Nimick v. Iron Co., 25 W. Va. 184.

Enforced by Bill in Equity—Proper Parties.—Such liability must be enforced by a bill in equity to which the corporation, the stockholders and creditors are necessary parties, since the liability of the stockholders is not primary, but secondary, and conditional on the insufficiency of the corporate assets and cannot be determined without ascertaining who are the solvent stockholders, the amount of stock held by each, the amount of all debts due by the corporation to its several creditors, and the amount of the available corporate assets. Nimick v. Iron Co., 25 W. Va. 184. See Crumlish v. Railroad, 28 W. Va. 623.

Enforced in Courts of State Imposing It—Changed by Statute in West Virginia.—Such liability must be enforced in the courts of the state imposing it and through the remedy provided by the laws of that state, WOODS, J., saying: "Dwelling in the place of its creation, all contracts made with the corporation must, by legal intendment, be made subject to the laws of its creation, and all persons contracting with it must be presumed to contract with reference to the remedies provided them by the state creating the corporation, and if these remedies are not as convenient and efficient as they might possibly have been made, they can have no rightful claim by law or comity to supplement such inefficient remedies by invoking the aid of the courts of a foreign state. They have contracted with reference to the advantages afforded them by the laws of the state under which the corporation was created, and no injustice is done them when they are obliged to be content with the remedies which the laws of the same state afford for the protection of their property and the enforcement of the rights thereby granted to them." Nimick v. Iron Works, 25 W. Va. 184.

The doctrine of this case has been superseded by §§ 58, 59, ch. 53, Code W. Va. which gives the circuit courts jurisdiction of such suit. Swing v. Furniture Co., 45 W. Va. 283, 31 S. E. Rep. 925; Swing v. Veneer & Panel Co., 45 W. Va. 288, 31 S. E. Rep. 926.

C. RIGHT OF STOCKHOLDERS TO SUE OR DEFEND ON BEHALF OF CORPORATION.

When Corporation Is a Going Concern.—Stockholders cannot sue in behalf of a corporation in a court of law; but in a court of equity the rule is different. There, though redress should be obtained if possible through its regularly appointed agents, if it is shown that the directors or managing officers have refused to act and redress has been vainly sought within the corporation, a bill by the stockholders themselves will be entertained. Crumlish v. R. Co., 28 W. Va. 623; Moore v. Schoppert, 22 W. Va. 290.

In order to entitle a stockholder to institute and maintain a suit in equity to redress a corporate injury committed *infra vires*, against a solvent corporation in the full exercise of its franchises, and carrying on its corporate business, it must appear not only that the directors are either disabled by their misconduct to sue, or that they have wrongfully refused to do so upon a proper demand; but where the matter will admit of the necessary delay, and it is practicable to call upon the stockholders to act, this must also be done. Until it is shown that every reasonable effort to obtain redress through the regularly constituted agents and controlling power of the corporation has proved unavailing, a stockholder cannot sue in his own name alone, nor on behalf of himself and other stockholders. Nor do sections 57 and 58, ch. 53, Code W. Va. have any application to such a suit. Rathbone v. Parkersburg Gas Co., 31 W. Va. 798, 8 S. E. Rep. 570.

What Allegations Are Insufficient.—Where the bill does not allege that the corporation is either insolvent or has abandoned its corporate business, or that any of its officers have done any act *ultra vires*, but merely that the president and manager of the company's business has abused his trust and that a majority of the directors and stockholders are under his influence and refuse to remove him, alleging that the said directors and stockholders are near kinsmen of said president; that some of them reside at a distance and permit him to select their proxies, that they refused to permit a committee appointed to investigate the books of the company to employ an expert to assist them, that, at a meeting for the election of a board of directors, some of them withdrew and broke up the meeting and that they afterwards gave notice for a meeting to elect five directors, ignoring the fact that three directors had been elected at the former meeting; such facts, taken singly or all together do not of themselves necessarily establish that the directors and stockholders have acted either fraudulently or in wilful disregard of their duties or that they have manifestly abused the discretionary power vested in them or that a majority of them have by their misconduct disabled themselves to act or that they have been legally called upon to act and refused to do so, so as to entitle stockholders to file a bill in their own name. Rathbone v. Gas Co., 31 W. Va. 798, 8 S. E. Rep. 570.

Right of Stockholders to Defend a Suit against Corporation.—A corporation must defend a suit brought against it, in its corporate name, and a stockholder will not be permitted to defend, and his answer will be stricken out. But if the officers and agents of the corporation refuse to defend the suit, in its name the court may in equity allow such defence to be made by the stockholders. Park v. Oil Co., 26 W. Va. 486.

A stockholder of a corporation cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interest of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting, from unfounded and illegal claims against the company,

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his own interest and the interest of such other stockholders as choose to join him in the defence. Kanawha Coal Co. v. Ballard & Welch Coal Co., 43 W. Va. 721, 29 S. E. Rep. 514.

When Corporation Has Ceased Business.—When, however, it is shown that the corporation has ceased to exist either in law or in fact or that it has abandoned its corporate business and neglected to maintain its corporate existence by the election of officers, nothing more can be required of the stockholder or creditor in order to entitle him to sue for the protection of his rights in such corporation, than that he should show the condition of such corporation and its management. Crumlish v. Railroad Co., 28 W. Va. 623; Finney v. Bennett, 27 Gratt. 365; Code W. Va. ch. 53, § 58.

When Corporation Not Even a Necessary Party.—And when such a suit is brought by the stockholders of a *foreign* corporation to compel a domestic corporation to account for certain assets of the said foreign corporation in its possession, the domestic courts have jurisdiction and the foreign corporation is not even a necessary party. The court distinguished this case from that of Nimick v. Iron Works, 25 W. Va. 184, where the object was to enforce a statutory liability imposed by the state of Ohio, on stockholders of an Ohio corporation resident in West Virginia. The court held that such liability being conditional on failure of assets could not be enforced by the West Virginia courts, since they had not jurisdiction over the Ohio corporation, to determine the amount of its assets. But in the principal case the liability of the domestic corporation is absolute and unconditional. Crumlish v. Railroad Co., 28 W. Va. 623.

Multifariousness of Bill.—A bill filed by a stockholder of a dissolved corporation in his own behalf and that of other stockholders against a domestic corporation, primarily to compel it to hand over assets of the dissolved corporation in its hands and, secondarily, to ask that the creditors of the dissolved corporation may be convened and the assets distributed among its creditors and shareholders, is not open to the objection of multifariousness. Crumlish v. Railroad Co., 28 W. Va. 623.

Barred by Laches.—While a minority of the stockholders of a corporation may maintain a bill in equity, in behalf of themselves and other stockholders, for fraud, conspiracy, or *ultra vires* acts, against a corporation, its officers, or others who participated therein, when the minority stockholders have been injured by said act, they must act promptly, and not wait an unreasonable time. If they postpone their complaint for an unreasonable time, they forfeit their right to equitable relief. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501.

Where a stockholder has notice or the means at hand of becoming acquainted with the contracts made by the corporation in which he is a stockholder, a court of equity will not allow him to remain quiet an unreasonable length of time, with a view of ascertaining whether the contract will result in profit to him, and then repudiate the contract if it has resulted in loss. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501.

Acquiescence by Failure to Attend Meetings.—And if the minority of stockholders fail to attend meetings, they will be held to acquiesce in whatever is done by the majority, and are barred of relief in equity. Boyce v. Montauk Gas Coal Co., 37 W. Va. 73, 16 S. E. Rep. 501.

Parties to the Suit.—Where, in a suit in equity by a shareholder to protect his equitable interest in the affairs of a corporation, all the parties in interest, stockholders, directors and president are before the court, it is unnecessary to make the corporation a formal party. Kyle v. Wagner, 45 W. Va. 349, 32 S. E. Rep. 213.

D. DIVIDENDS.—The board of directors may from time to time declare dividends of so much of the net profits as they may deem it prudent to divide. If any stockholder be indebted to the corporation, his dividend, or so much thereof as may be necessary, may be applied to the payment of the debt; if the same be then due and payable. Code W. Va. 1891, ch. 53, § 39; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646.

Stock Dividends.—A stock dividend is not in the ordinary sense of the word, a dividend, the latter being the distribution of profits to stockholders as income from their investment. A stock dividend is merely an increase in the number of shares, the increased number representing exactly the same property that was represented by the smaller number of shares. Hence where two parties agree to exchange shares in two corporations, retaining the dividends declared for a certain month, and one corporation declares a stock dividend, such dividend goes with the stock and cannot be retained as a true dividend. Kaufman v. Woolen Mills, 93 Va. 673, 25 S. E. Rep. 1003, 2 Va. Law Reg. 669, and *note*.

E. CORPORATE MEETINGS.—Where by the charter a general meeting of the company is to be held at least once annually, other meetings may be held as often as the interests of the corporation require it. Burr v. McDonald, 3 Gratt. 215.

All Members Must Have Reasonable Notice of Meetings.—No function existing in a number of persons, such as the stockholders of a corporation, can be rightfully exercised in the absence of any of the members composing such body, unless they have had reasonable notice and an opportunity to be present, otherwise all proceedings had at such a meeting are invalid. Reilly v. Oglebay, 25 W. Va. 36.

V. OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

See monographic *note* on "Officers and Agents of Private Corporations" appended to Richmond Enquirer Co. v. Robinson, 24 Gratt. 548; also, *note* on "Agencies" appended to Silliman v. Fred., etc., R. Co., 27 Gratt. 119.

A. GENERALLY.

Contracts between Corporation and its Officers Not Void but Voidable.—Contracts between a corporation and its officers are not void *per se*, but merely voidable at the option of the corporation or its receiver within a reasonable time. Such reasonable time as applied to executory contracts would be before they become executed. A partly executed contract can be avoided before its final execution, but the executing party must be placed *in statu quo*, in the absence of fraud or *mala fides*. Griffith v. Lumber Co., 46 W. Va. 56, 33 S. E. Rep. 125.

Ratification of Agent's Contract.—Whether a contract by an agent of a corporation be beyond his authority or not, the corporation may ratify, and such ratification, once made, is final. Newport News, etc., Devel. Co. v. Newport News St. Ry. Co., 97 Va. 19, 32 S. E. Rep. 789.

Negligence of Officer Imputed to Corporation.—The negligence of an officer of a corporation in allowing

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a judgment to be rendered against the corporation as garnishee, when the debt had been previously assigned to another party and notice thereof had been given to another officer, will preclude the corporation from relief in equity against the judgment. Richmond Enquirer v. Robinson, 24 Gratt. 548.

Misconduct of Officers.—It may be stated as a general rule that there is no wrong or fraud, which the directors or officers and agents of a corporation may commit that cannot be redressed by appropriate and adequate remedies. From the fiduciary relation which the director of a corporation holds to the corporation itself and to its shareholders and creditors, and from the fact that they are held to strict good faith in the management of the corporate concerns, it follows that they are liable either to the corporation, or, in a proper case, to the shareholders or creditors, for a fraudulent breach of trust or misappropriation of corporate funds, whereby a loss or injury results to the corporate assets. Rathbone v. Gas Co., 31 W. Va. 798, 8 S. E. Rep. 570.

The Promoters.

Occupy a Fiduciary Relation.—The promoters of a corporation stand in a fiduciary relation to the corporation, and cannot make a profit out of their transactions in behalf of the corporation, unless with the full knowledge and consent of the corporation. Central Land Co. v. Obenchain, 92 Va. 130, 23 S. E. Rep. 876.

Promoters Entitled to a Fair and Open Profit.—Where a promoter of a corporation holds an option on land and in soliciting subscriptions, proposes in writing, which is shown to each subscriber, a certain price at which he will sell it to the corporation, and after the corporation was organized, it agreed to purchase on those terms, such promoter is entitled to any profit arising from such sale. Richardson v. Graham, 45 W. Va. 134, 30 S. E. Rep. 92.

B. PARTICULAR OFFICERS.

The Directors.

The Representatives of the Corporation.—The directors of a corporation are, as to all purposes of dealing with others, the corporation itself and when convened as a board they are the primary possessors of all the powers possessed by the corporation. What they do as the representatives of the corporation, the corporation itself is deemed to do. Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. Rep. 620.

Until the appointment of a receiver and the awarding of the injunction the management of the affairs of the company remains in the hands of the directors. Planters' Bank v. Whittle, 78 Va. 737.

Must Act as a Body.—The directors of a corporation cannot separately and individually give consent to, or make a contract to bind the corporation. They can act only as a board, their power being not joint and several, but joint. Limer v. Traders' Co., 44 W. Va. 175, 28 S. E. Rep. 730; Smith v. Cornelius, 41 W. Va. 59, 23 S. E. Rep. 599.

Power of Directors to Make an Assignment.—Directors have no authority to make an assignment of the entire assets of a corporation without the assent of the stockholders, such assignment amounting to dissolution, and the statutory mode of dissolution, ch. 53, sections 56 and 57, Code W. Va. being exclusive. Kyle v. Wagner, 45 W. Va. 349, 32 S. E. Rep. 213.

Power to Bind the Corporation.—Money borrowed by the directors and expended in the prosecution of the enterprise constitutes a valid debt; in spite of a resolution of the stockholders in regular meeting that "No further *assessment* should be made except by authority of the shareholders." Shickell v. Improvement Co. (Va.), 37 S. E. Rep. 813.

Power to Fix Capital Stock under Maximum Amount.—Under section 23, ch. 53, Code W. Va. the increase of the capital stock of a corporation is entirely in the control of the board of directors and the only limitation upon their power in this respect is that the maximum capital be not exceeded. Exposition v. Ocheltree, 44 W. Va. 626, 30 S. E. Rep. 78.

When Contract between Directors and Corporation Upheld.—Though the directors or other agents of a corporation occupy a fiduciary relation, whether called trustees or not, still if the transaction amounts merely to a loan of money to the corporation on its own terms, and they obtain no unfair advantage, such transaction will be upheld, especially where the corporation ratifies the transaction by receiving the benefit of it. In any case, if the corporation or creditors claiming through it, wish to avoid such transaction they must restore the consideration received. Atwood v. Railroad Co., 85 Va. 966, 9 S. E. Rep. 748.

When Stockholders Occupy Position of Directors.—The general rule is that directors of a corporation cannot purchase the corporate property, but stockholders of a corporation, managed by a board of directors may; but where there is no such board, and the stockholders perform their duties, they occupy the same position as directors and are subject to the same incapacity to purchase the corporate property and any such purchase is voidable at the pleasure of any shareholder, though the price be fair and adequate. Reilly v. Oglebay, 25 W. Va. 36.

The President.

Power to Bind the Corporation.—The president of a railroad company has authority to make contracts for the necessary labor for the company, by virtue of his office, in all cases where the authority of the president is not restricted by special legislation or by regulations of the company known to the other contracting party. Railroad Co. v. Snead, 19 Gratt. 354.

When Parol Evidence Admissible to Show Who is Bound.—Where a due bill is signed by the president of a railroad, simply with his own name, parol evidence is admissible to ascertain whether it is an acknowledgment of his individual debt or that of the railroad company. Railroad Co. v. Snead, 19 Gratt. 354.

Mere Addition of "President" Not Sufficient.—The mere addition of the word "president" to the signature of the president of a corporation on negotiable paper does not bind the corporation. Scott v. Baker, 3 W. Va. 285; Rand v. Hale, 3 W. Va. 495.

Ratification by Corporation.—Whether the president of a land company is authorized or not to make a contract for the purchase of land, if the company ratify the contract by adopting the purchase and capitalizing it and offering it for sale, the company will be bound. W. Salem Land Co. v. Mont. Land Co., 89 Va. 192, 15 S. E. Rep. 524.

When President or Director a Trustee.—A president or director of a corporation stands as a trustee for it as to its property committed to his hands for the purposes of the corporation. Ravenswood, etc., R. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. Rep. 285.

The Treasurer.

Has Power to Draw Checks, but Not to Endorse Negotiable Paper.—The authority to draw checks may be said to be inherent in the office of treasurer unless

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taken away or restrained, but the power to bind the company by endorsing negotiable notes is not, the law requires clear proof of the authority of an agent to endorse negotiable paper. As to what is not sufficient, see Davis v. Investment Co., 89 Va. 290, 15 S. E. Rep. 547.

Admissions of Officers.—In an action for libel against a corporation, the admission of the general manager of the corporation made weeks after the publication of the supposed libel, constitutes no part of the *res gestæ* and cannot be given in evidence against the corporation. Reusch v. Cold Storage Co., 1 Va. Law Reg. 286.

Compensation of Officers.—Although not necessary to the decision of the case, BRANNON, J., said in Crumlish v. Cent. Imp. Co., 38 W. Va. 390, 18 S. E. Rep. 456, "The law raises no implied promise to pay compensation to the directors, president or vice president of a private corporation in the absence of a provision in the by-laws or an order of the directors. And if the treasurer, secretary or other executive officer be a stockholder or director, no such promise is raised by law in his favor; but if not, then the law does raise such a promise and presumes that compensation was intended from the fact of such appointment." Ravenswood, etc., R. Co. v. Woodyard, 46 W. Va. 558, 53 S. E. Rep. 285.

An order of the board of directors of a corporation allowing compensation to the president, passed when he was present and perhaps voted is *prima facie*, fraudulent and void. Code W. Va., ch. 53, § 52; Ravenswood, etc., R. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. Rep. 285; Sweeney v. Refining Co., 30 W. Va. 443, 4 S. E. Rep. 431.

The *board of directors* of a corporation cannot allow compensation to the president or any director for his services without previous authority granted by the stockholders. Code W. Va., ch. 53, § 52. And such an order of the board would be *ultra vires* and may be repudiated by the corporation. Ravenswood, etc., R. Co. v. Woodyard, 46 W. Va. 558, 33 S. E. Rep. 285.

Conflict of Laws.—Under the law of Pennsylvania, the president of a private corporation created by that state cannot recover from the corporation upon a *quantum meruit* for official services there rendered, in the absence of any by-law or resolution of the directors allowing compensation. Nor can one who is treasurer and secretary of the corporation, and a stockholder and director, recover on a *quantum meruit* for his official services without such by-law or resolution. The law of that state raises no promise on the part of the corporation in such cases, and the question whether, in such cases, there is an implied promise, depends on the law of that state. Crumlish v. Central Imp. Co., 38 W. Va. 390, 18 S. E. Rep. 456.

Subsequent Ratification of Allowance.—Though section 1119, Code Va., providing "There shall be no compensation for services rendered by the president or any director unless it be allowed by the stockholders," is mandatory, subsequent ratification by the stockholders of payments of salary to the president of a corporation by authority of the board of directors, is equivalent to previous authorization, but one or the other is indispensable. BUCHANAN, J., dissenting. Shickell v. Imp. Co. (Va.), 37 S. E. Rep. 813.

VI. CONSOLIDATION AND SUCCESSION.

A. CONSOLIDATION OF CORPORATIONS.—"A consolidation not only renders the property and works of the old company, which pass to the company with which it is consolidated, subject to the liabilities of the old company, but also makes the new, or surviving company responsible for them. Where two railroad companies unite, or become consolidated under the authority of law, the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities, of those out of which it is created. The corporation which is created by such consolidation, or the surviving corporation, where another or others are merged into it or consolidated with it, is ordinarily deemed the same as each of the corporations which formed it for the purpose of answering for the liabilities of the old corporation, and may be sued under its new name, or under the name of the surviving company, for their debts as if no change had been made in the name, or in the organization of the original corporations. There has been some question whether the consolidated company could be sued in an action at law for the liabilities of the companies composing it, or whether the proceeding must be in equity. But the better view seems to be that when a consolidation has been authorized and made, it confers all the rights, property, and franchises of the old company upon the new or consolidated company, and subjects it to all the liabilities of the old companies; and an action at law may be brought against the new or consolidated company for the debts or torts of the old companies. The question is not whether the consolidation compels a creditor to accept the defendant corporation as a new debtor against his will, or a person who has been injured to resort to a stranger for satisfaction, but whether it empowers the creditor or the person injured to resort, if he desires to do so, in the first instance, to the corporation which by the terms of the consolidation is made liable to him. The privity, some cases say, necessary to support this action, is created by the statute authorizing the consolidation and the purchase and conveyance made under it. Other authorities place the right to bring such action on the ground that the effect of the consolidation is, as to the liabilities of the old company, not to dissolve the corporation which is the immediate debtor, but to continue its existence in the consolidated corporation." BUCHANAN, J., in Langhorne v. Richmond R. Co., 91 Va. 369, 22 S. E. Rep. 159.

Either Liable but Not Both Jointly.—Where one corporation has been consolidated with another, a party injured by the original company has his option to sue either the original company which committed the injury or the new company with which such company has been consolidated, but he cannot sue both in the same action at law. Langhorne v. Richmond R. Co., 91 Va. 369, 22 S. E. Rep. 159.

Necessary Allegations.—The plaintiff in such case must allege generally the authority of the old companies to consolidate, the act of consolidation and under what name.

He must also state a good cause of action against the original corporation and the new one with which it has been consolidated. Langhorne v. R. Co., 91 Va. 369, 22 S. E. Rep. 159.

B. SUCCESSION OF CORPORATIONS.

Liability of Successor Corporation for Contracts of Former Corporation.—Where a railroad company buys the property of another insolvent railroad, it succeeds to its property, rights and easements and becomes responsible for its liabilities under

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any agreement entered into by the former company for the acquisition of land, especially where it has estopped itself by vouching such agreement to defeat an action of ejectment. Steenrod v. Railroad, 27 W. Va. 1.

Change of Name—Liability to Suit.—Where one corporation is a mere continuation of a former corporation with additional franchises, under a new name, it is liable to be sued on contracts made with the old corporation, and whether such is the case is a mixed question of law and fact to be submitted to the jury. Wilson v. C. & O. R. Co., 21 Gratt. 654.

ANDERSON, J., said *obiter* in the above case that when a corporation changes its name after the making of a contract it must be sued by its new name.

When Former Corporation Not a Necessary Party.—And in such a case where the former corporation is wholly insolvent and has "passed out of existence," it need not be made a party to a suit for specific performance of such an agreement against the successor corporation. Steenrod v. Railroad, 27 W. Va. 1.

Liable to the Extent of Property Received.—Where by authority of the legislature a corporation has accepted a transfer of the entire stock of another corporation and has taken possession and held the property of the old corporation after the expiration of the time limit of its charter, it places itself in the position of a successor to the latter corporation, liable, to the extent of the property received, to the debts, and entitled to all the rights of the latter. Barksdale v. Finney, 14 Gratt. 338.

And Only to That Extent.—When a new corporation, with different stockholders, is formed it cannot be sued by the creditors or held liable for the debts of the old corporation, except upon some special ground, such as having received assets of the old corporation without giving value therefor. Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646.

Liability Must Be Enforced in Equity.—Where one corporation by legislative authority takes charge of the property and franchise of another, the first corporation cannot be garnisheed by a creditor of the second corporation; his remedy is in equity. Swann v. Summers, 19 W. Va. 115.

Assumption of Obligation Must Be Alleged, When Liability Is Based on Contract.—In a suit brought against a corporation which has assumed the obligations of a defunct corporation, failure to *allege* that the new corporation has assumed said obligations when the proof shows the obligation sued on to be that of the defunct corporation, is a variance, and plaintiff's evidence will be struck out. Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. Rep. 891.

Effect of Acquisition of Entire Capital Stock.

Does Not Give Legal Title to the Property of Corporation.—A conveyance of all the capital stock of a corporation to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Park v. Petroleum Co., 25 W. Va. 108.

Corporation Succeeding a Partnership.—Where a debt is due a partnership and the partners are afterwards incorporated, the debt becomes a debt of the corporation and they may sue for it in the corporate name in a court of equity. Griffin v. Macaulay, 7 Gratt. 476.

VII. DISSOLUTION OF CORPORATIONS.

A. CAUSES.

Forfeiture of Charter.

Franchise Continues Till Forfeiture Claimed by State.—The charter of a corporation does not expire by reason of acts of omission or commission on the part of the corporation, even where they constitute a sufficient ground for declaring a forfeiture; but the franchise continues in full force until a forfeiture is claimed by the state granting it, and this can be done only in a proper legal proceeding by which the cause of forfeiture is ascertained and dissolution adjudged. Moore v. Schoppert, 22 W. Va. 283.

Quo Warranto the Proper Remedy.—An information in the nature of a *quo warranto* is the proper remedy by which to try and decide whether the charter of a corporation ought to be nullified and vacated, or to prevent the company from receiving tolls. The fact that the commonwealth is a stockholder is no bar to such a proceeding. The superior court of law for the county in which the president and directors reside has jurisdiction in such a proceeding, no matter where the acts of forfeiture complained of were committed. Com. v. Pres. & Directors of James River Co., 2 Va. Cas. 190.

Causes of Forfeiture Cannot Be Taken Advantage of Collaterally.—Although a corporation by failure to perform its duties has made itself liable to forfeiture of its franchises, such grounds of forfeiture cannot be taken advantage of by injunction or otherwise in a court of equity to resist the payment of tolls, etc., or for any other purpose, except where a public nuisance results and in the case of charitable trusts; the only remedy is in a court of law by the writ of *quo warranto* instituted by the state, the court saying, "The act of incorporation is not a contract between the corporate body on the one hand and individuals whose rights and interests may be affected by the exercise of its powers, on the other, but it is a compact between the corporation and the government from which they derive their powers. Individuals cannot therefore take it upon themselves, in the assertion of their private rights, to insist on breaches of the contract of the corporation, as a ground for resisting or denying the exercise of a corporate power." Pixley v. Roanoke Nav. Co., 75 Va. 320.

A cause of forfeiture cannot be taken advantage of, or enforced against a private corporation, collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose, against the corporation, so that it may have an opportunity to answer; and the state can alone institute such a proceeding, since it may waive a broken condition of a compact with it as well as an individual. Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. Rep. 227; Childs v. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362; B. & O. R. Co. v. Supervisors, 3 W. Va. 319.

Non-Payment of License Tax.—And this is as true of the non-payment of a license tax to the state, as it is of any other cause of forfeiture, the law, in this respect, not having been altered by Code W. Va. 1891, ch. 32, § 88. Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. Rep. 227.

Failure to Appoint Officers, etc.—Forfeiture of the charter for failure to appoint officers or other acts of non-user, cannot be enquired into collaterally, unless there is evidence that the charter has been ascertained to be forfeited by the sentence of the proper court in a proper proceeding for the purpose. Crump v. U. S. Mining Co., 7 Gratt. 352; B. & O. R. Co. v. Supervisors, 3 W. Va. 319.

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Express Provisions for Forfeiture in Charter, No Inquisition Necessary.—Where the charter of a railroad authorizes the company to issue bonds and secure them by a mortgage, but also provides that if the road is not completed to a certain point by a certain day, it shall forfeit to the state its corporate franchises and rights together with the roadbed and all other property, the two clauses are to be taken together and on the failure to complete the road in the specified time its property is forfeited to the state free from the incumbrance of the mortgage, it appearing that the holders of the bonds were the officers of the road and that none of the proceeds had been expended on the road, and consequently they were neither purchasers for value or without notice. Such forfeiture, the state having elected to enter for the forfeiture, is absolute and no inquisition or judicial proceedings of any kind are required to consummate it. Silliman v. R. Co., 27 Gratt. 119.

Expiration of Charter Period of Existence Ipso Facto Dissolves the Corporation.—If the charter or governing statute of the corporation, fixes a definite period of time at which its corporate life shall expire, when that period is reached, the corporation is *ipso facto* dissolved without any direct action to that end either on the part of the state or of its members; and it has no further power to adopt by-laws. Knights of Pythias v. Weller, 93 Va. 605, 25 S. E. Rep. 891.

A Mere Discontinuance of Business Does Not Effect a Dissolution.—A mere cessation or discontinuance by a corporation, of its corporate business, will not operate as a dissolution. Law v. Rich (W. Va.), 35 S. E. Rep. 858.

Insolvency Does Not, Per Se, Work Dissolution.—Insolvency, *per se*, does not work a dissolution of a corporation, nor invalidate an assignment of its effects for the benefit of creditors. Shen. Valley R. Co. v. Griffith, 76 Va. 913; Weigand v. Supply Co., 44 W. Va. 133, 28 S. E. Rep. 803.

Resolution by Majority of Stockholders Works a Dissolution.—A resolution by the stockholders of a joint stock company to discontinue its business under § 56, ch. 53, Code W. Va. 1891, operates as a voluntary surrender of the corporate franchise and a dissolution of the corporation. Law v. Rich (W. Va.), 35 S. E. Rep. 858.

Statutory Methods in West Virginia.—Not less than one-third in interest of the stockholders of a corporation have a right under § 57, ch. 53, Code W. Va. 1891, to file their bill in equity, and on showing sufficient cause the court will dissolve the corporation. Weigand v. Supply Co., 44 W. Va. 133, 28 S. E. Rep. 803.

In such a suit the corporation is a necessary party. Hurst v. Coe, 30 W. Va. 158, 3 S. E. Rep. 564.

More Than One-Third of the Stockholders May Join in the Bill but in Any Case Sufficient Cause Must Be Shown.—But in such suit the court cannot make a decree of dissolution unless cause be shown, even though a majority in interest are plaintiffs and they had an *absolute* right to dissolve the corporation by their majority vote at a general meeting of the corporation. Code W. Va., ch. 53, § 56. But the mere fact that a majority in interest are plaintiffs and had another remedy does not deprive the circuit court of its jurisdiction, on sufficient cause being shown, from decreeing a dissolution. Hurst v. Coe, 30 W. Va. 158, 3 S. E. Rep. 564.

B. EFFECT OF DISSOLUTION ON PROPERTY AND SUITS OF THE CORPORATION.

All Suits Abate.—At common law, upon the death or dissolution of a corporation, its real estate reverted to the grantors and donors and the personal property escheated to the king, while the debts due to and from it were thereby extinguished and all actions pending for or against it at the time, abated. Board v. Livesay, 6 W. Va. 44; Miller v. Coal Co., 31 W. Va. 836, 8 S. E. Rep. 600. Rider v. Nelson & Albemarle Union Factory, 7 Leigh 154; May v. State Bank of N. C., 2 Rob. 56.

Exception Where Corporation Had Assigned its Rights before Dissolution.—Where the charter of a corporation expired pending an appeal but the corporation had made an assignment of its rights in the subject in controversy, the court, if satisfied of the fact of the assignment, may permit the case to proceed without notice of the dissolution of the corporation. Bank of Alexandria v. Patton, 1 Rob. 499; May v. State Bank of N. C., 2 Rob. 56.

A Judgment Raises a Conclusive Presumption of a Continued Existence of Corporation at Time of Judgment.—But if an original judgment be rendered in favor of a corporation, as it could not be regularly rendered unless the existence of the corporation continued, the necessary intendment is that the continued existence of the corporation was either proved or admitted and if execution be sued out the defendant is estopped to deny the existence of the corporation at the time of the judgment, and proof of the extinction of the corporation before the judgment is inadmissible. No such estoppel exists, when, by an assignment before extinction, proof of the expiration of the charter is excluded, and no such intendment arises. May v. State Bank of N. C., 2 Rob. 56.

In Case of Dissolution after Judgment and before Execution No Execution Can Issue.—And if, after judgment in favor of a corporation, the corporation becomes extinct by the expiration of the term of its existence, no execution can be sued out or if sued out is liable to be quashed. Dictum in May v. State Bank of N. C., 2 Rob. 56.

Modern Rule as to Dissolution, May Still Sue and Be Sued in Respect of its Corporate Assets.—But this rule, so far as modern business and commercial corporations are concerned, has become practically obsolete. Its unjust operation upon the rights of creditors and stockholders has been generally prevented by statute and in equity the assets of such a corporation, which represent not the donation of the prince or its pious founder, but the contributions of its stockholders, are held, independently of statute, to constitute a trust fund, into whosesoever hands they may come, for the benefit of creditors and stockholders. Very soon after Rider v. Factory, 7 Leigh 154, was decided, and according to a suggestion of the court in that case the act of 1836 7 was passed by the general assembly of Virginia. Code Va. 1887, § 1163, which act was incorporated into the Code W. Va. ch. 53, § 59, providing in substance that when a corporation shall expire or be dissolved, its assets shall, under the direction of the board of directors then in office or such receiver as may be appointed, be subject to the payment of the liabilities, and the surplus, if any, be distributed among the stockholders. And suits may be brought or defended and all other lawful acts done in the corporate name in like manner as before dissolution Miller v. Coal Co., 31 W. Va. 836, 8 S. E. Rep. 600. Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. Rep. 227; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646, and such suits do not have to be

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carried on under the direction of such director or receiver. Hall v. Bank of Va., 14 W. Va. 584.

Assets, after Dissolution, a Trust Fund for Creditors.—After a corporation has ceased to exist or has abandoned its business, its assets become a trust fund for the payment of creditors and stockholders, creditors first and the residue if any, to the stockholders, who are simply deferred creditors. Crumlish v. R. Co., 28 W. Va. 623.

Functions of Directors Suspended.—When the stockholders have taken the necessary steps to effect the dissolution of the company, and are trying to liquidate its indebtedness with the least loss to themselves, the functions of the directors are, in effect, suspended; they cannot purchase for the company the stock of one of its shareholders, with the company's property, thereby diminishing its assets, both the directors and the said shareholders being aware of the facts. The directors can make no disposition of the corporate property which will not enure to the equal benefit of all the shareholders. Augsburg Land, etc., Co. v. Pepper, 95 Va. 92, 27 S. E. Rep. 807.

Effect of Dissolution on Contracts of Corporation.

Executory Contracts Avoided.—Where an insolvent corporation is forced into liquidation and dissolution, all its executory contracts perish with it, for this is an implied condition of their execution. Such, however, is not the law where a solvent corporation is voluntarily dissolved. By its own act it cannot relieve itself from its contracts, but its assets will be held liable for breaches thereof. Griffith v. Lumber Co., 46 W. Va. 56, 33 S. E. Rep. 125.

C. SUITS TO WIND UP THE AFFAIRS OF A CORPORATION.

Jurisdiction of Equity.—Equity has no inherent jurisdiction to dissolve a corporation; its powers in that respect are wholly derived from statute. Law v. Rich (W. Va.), 35 S. E. Rep. 858.

Equity Has Exclusive Jurisdiction.

A Creditor Cannot Obtain a Preference by Levying an Attachment.—There can be no suit against a defunct domestic corporation, except one in equity as provided in sections 57 and 59, ch. 53, Code W. Va. to wind up its affairs for the benefit of creditors and stockholders. No creditor can, by levying an attachment, obtain priority over other creditors. Stiles v. Oil & Coal Co. (W. Va.), 35 S. E. Rep. 986.

Proper Parties.

Rule in Virginia.

Stockholders Not Proper Parties.—Under Code Va. 1887, § 1103, the corporation, though dissolved or expired, is the proper party defendant in a creditor's suit against the corporation, and the stockholders are not proper parties. The fact that there has been an assignment of the corporate assets to trustees only alters the case so far as to make the trustees necessary parties. Hamilton v. Glenn, 85 Va. 901, 9 S. E. Rep. 129.

The stockholders individually are neither necessary nor proper parties to suit to wind up the affairs of a corporation, but they are bound by the decree, and where they never appealed from the decree they cannot question its validity in a collateral proceeding. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

Where no relief is sought against the *shareholders*, they are sufficiently represented by the corporation. Bristol Iron & Steel Co. v. Thomas, 93 Va. 396, 25 S. E. Rep. 110. But where relief is sought against the shareholders themselves, they should be made parties. Martin v. S. Salem Land Co., 94 Va. 28, 26 S. E. Rep. 591; Cason v. Seldner, 77 Va. 293.

Rule in West Virginia.

Stockholders Necessary and Proper Parties.—In a suit in equity under section 59, ch. 53, Code W. Va., by a creditor to assert a debt against a defunct domestic corporation and to wind up its affairs, the stockholders are necessary parties and the decree must both ascertain the debts against the corporation and the shares of the stockholders in the surplus. Stiles v. Oil & Coal Co. (W. Va.), 35 S. E. Rep. 986. See also, Styles v. Laurel Fork Oil, etc., Co., 45 W. Va. 374, 32 S. E. Rep. 227.

A Return of "No Effects" on an Execution Justifies a Resort to Equity.—Where a creditor of a corporation has obtained judgment against it, upon which execution has been issued and returned no property found, he has the right to sue in equity for the benefit of himself and all other creditors who will join in the suit to subject the assets of the corporation, including the unpaid subscriptions of its stockholders, as far as may be necessary, to the payment of its debts. It is in the nature of a creditor's bill, and by it the equitable assets of the corporation can be reached. Martin v. South Salem Land Co., 2 Va. Law Reg. 743, 94 Va. 28, 26 S. E. Rep. 591.

Simple Contract Creditor Has a Right to Bring Such Suit.—A simple contract creditor, who has not reduced his claim to judgment, and has no lien, can yet sue a corporation in equity and have its assets administered and applied to the payment of its debts. Nunnally v. Strauss, 94 Va. 255, 26 S. E. Rep. 880, BUCHANAN, J., and KEITH, P., dissenting; Finney v. Bennett, 27 Gratt. 365.

Res Judicata in Such Suits.—In a suit involving, among other things, a debt between two corporations, a decree is rendered for a certain sum in favor of the one against the other, ascertaining the amount of the liability on the basis of the amount of paid-up stock of the creditor company. That decree is *res judicata* and estoppel between the companies as to the amount of recovery, and also as between the creditor company and its stockholders, and also between such stockholders as regards the amount of the recovery, but not as to the amount of paid-up stock in settling the rights of stockholders in the distribution of the fund arising from the debt so recovered, Crumlish v. Shenandoah Val. R. Co., 40 W. Va. 627, 22 S. E. Rep. 91.

Statutes, When Constitutional.—A statute, whose whole object is to provide a convenient and judicious mode for winding up an insolvent corporation and distributing its assets equitably amongst those entitled thereto, violates no contract and impairs no right of the corporators and should be upheld in Virginia as it certainly would be by the state enacting it. Bockover v. Life Ass'n, 77 Va. 85.

Creditors' Bills.—The road and franchises of a railroad company are liable, on a creditor's bill, to the payment of judgments recovered against the company, and where the amount of the judgment is small and the rental value of the road large, the road and franchises should be leased for as short a period as is practicable, but the creditors have a right to have them leased, even though the proceeds be far in excess of the judgment, if the lease cannot be made for a shorter period. It is proper to make another railroad in possession of the road in suit, a party to the suit, to ascertain its interest in said road and on failure of that company to respond or show what its interest is, a decree for leasing the road is proper. Winchester, etc., R. Co. v. Colfelt, 27 Gratt. 777.

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Powers of Creditors and Majority of Stockholders over Assets of Insolvent Corporation.—Where a corporation has but one asset, namely, a decree for a certain sum against a railroad company, and a decree for the sale of its road, etc., to satisfy the same, after first satisfying prior liens and charges to a large amount, the creditors and the owners of a greater part of the stock may, if they see fit, give to outside parties, out of the amount decreed to them, a *bonus*, for a guaranty that at the commissioner's sale, the railroad, etc., shall be made to bring at least enough to pay their claim, as well as the prior liens and charges. And, if such *bonus* is made to appear to have been that, without which neither creditors nor stockholders would have received anything, then the court will charge the fund thus brought into the cause with the payment of such *bonus*, and, after the payment of the creditors, distribute the surplus, if any, among the stockholders according to their respective interests. Crumlish v. Shen. Val. R. Co., 40 W. Va. 627, 22 S. E. Rep. 91.

Rights of Creditors.—The makers of notes, delivered to a corporation on conditions which have not been complied with, cannot be held liable to creditors of the corporation whose debts were not contracted on the faith of such notes, and who did not know of their existence until after their debts were contracted. Catt v. Olivier, 6 Va. Law Reg. 465.

D. RECEIVERS.

When Appointed.—Where a corporation is insolvent and is largely indebted, which indebtedness is secured by a lien, which its creditors have a right to resort to; if it appears that the property of the corporation is being dissipated, it is proper for a court on the application of such creditors to appoint a receiver to take charge of the property of the corporation. The court, quoting the Am. & Eng. Enc. Law, said, "In order to obtain the appointment of a receiver the plaintiff must show—First, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of the claim; and secondly, that the possession of the property by the defendant was obtained by fraud, or that the property itself or the income arising from it is in danger of loss, from the neglect, waste, misconduct, or insolvency of the defendant." Kanawha Coal Co. v. Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. Rep. 514; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646.

Duty of Receiver as to Executory Contracts of Corporation.—A receiver is not bound to carry out an executory contract of a corporation, but he may disregard it. The power to adopt or reject it is restricted to the receiver; it is not reciprocal. But if he adopts it under order of court and afterwards abandons it under a further order, the other party is entitled to compensation for what he has actually done in fulfillment of the contract, subject to deduction for what he, on his part, has received. Griffith v. Lumber Co., 46 W. Va. 56, 33 S. E. Rep. 125.

VII. PLEADING AND PRACTICE.

A. SUITS MUST BE BROUGHT AND DEFENDED IN CORPORATE NAME.—A corporation must sue and be sued in its corporate name. Krell Piano Co. v. Kent, 39 W. Va. 294, 19 S. E. Rep. 409; Culpeper Agri., etc., Soc. v. Digges, 6 Rand. 164; Porter v. Nekervis, 4 Rand. 359; Stewart v. Thornton, 75 Va. 215; Hart v. Balt., etc., R. Co., 6 W. Va. 336; Hechmer v. Gilligan, 28 W. Va. 752; Mason v. Bank, 12 Leigh 84; Legrand v. Hampton-Sidney College, 5 Munf. 324. And the same rule prevails in courts of equity. Stewart v. Thornton, 75 Va. 215.

Misnomer of Corporation.—Though misnomer of a corporation is only matter of abatement, where it is plaintiff, yet where it is defendant, it is matter in bar. Bank of Va. v. Craig, 6 Leigh 399.

But where suit is brought against a branch bank instead of the mother bank, which, alone, is incorporated, this is not a mere misnomer, which must be pleaded in abatement; but is a bar to any recovery and though a verdict be founded upon the general issue pleaded, the error is not cured by the statute of jeofails. Mason v. Farmers' Bank, 12 Leigh 84.

Modern Rule.

Identification of Corporation Sufficient.—The name of a corporation is not the only means of identity. If some words be added, omitted, or changed in the spelling, in the true name of the corporation, this is not a fatal variance, if there be enough to distinguish it from other corporations, and to show that the corporation suing or being sued was the one intended. First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530, 23 S. E. Rep. 792.

Leave to Amend Will Be Given.—A corporation may be known by several names as well as a natural person and a recovery may be had against it in its true name provided its identity be averred in pleading and apparent in proof. Where there is a variance as to the name, opportunity to amend will be allowed so as to put in issue the identity of the two corporations. Langhorne v. Rd. City R. Co., 91 Va. 364, 22 S. E. Rep. 357.

Not Pleadable in Abatement.—The misnomer of a corporation cannot be taken advantage of by plea in abatement; but where formerly pleadable in abatement, the declaration and summons may, on the motion of either party, on affidavit of the right name, be amended by inserting the same therein. Code W. Va., ch. 125, § 14; First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530, 23 S. E. Rep. 792.

Abbreviated Name Used in Charter May Be Used, at Least No Objection Can Be Made in the Appellate Court for the First Time.—Where a corporation is formally called in the charter, the "President, Directors & Co. of the Farmers' Bank of Va.," but elsewhere in the charter and generally, merely the "Farmers' Bank of Va.," and it is sued in the latter name and no objection is made in the lower court, it cannot be successfully objected to in the court of appeals. Farmers' Bank v. Willis, 7 W. Va. 31.

Change of Name, Pendente Lite, Immaterial.—A mere change of name, *pendente lite*, of a defendant corporation, without any change of membership or composition, will not defeat an action against the corporation. Welfley v. Shen. I., L., M. & M. Co., 83 Va. 768, 3 S. E. Rep. 376.

Misnomer of Corporation in Contracts.—"But contracts may be made by or with them, by a mistaken name if the mistake be only in *syllabis et verbis* and not in *sensu et re ipsa*." So a bond executed to the "President and Managers of the Culpeper Agricultural and Manufacturing Society" may be sued on by the "Culpeper Agricultural and Manufacturing Society," that being the legal style of the corporation. Culpeper Agricultural, etc., Society v. Digges, 6 Rand. 165.

Contracts under an Assumed Name.—Where a corporation does business under an assumed name for its own convenience and a party contracts with it under that assumed name, having constructive

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notice of its true name, such contract can be enforced by either party. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. Rep. 299.

B. LOCALITY OF SUITS AGAINST A CORPORATION.—A corporation holding land in different counties, if so empowered by its charter, may be sued in any county wherein such land may be, though its principal office is located or its chief officer resides elsewhere. The cause of action growing out of its contracts, acts, negligences or omissions, may arise in a different county or corporation and suit may be brought where the cause of action arose without reference to the residence of the defendant corporation. B. & O. R. Co. v. Gallahue, 12 Gratt. 655.

Principal Office of Chesapeake and Ohio Railroad Company in West Virginia.—Since the charter of the C. & O. R. Co. provides that, if the company deems it inexpedient to establish its principal office in the state of West Virginia, its place of business at or nearest Charleston, shall for all purposes be deemed to be the principal office in said state; actions against said railroad company should be brought in the circuit court of Kanawha county. The fact that said company is doing business in other counties of said state will not confer jurisdiction on the courts of such counties, when the cause of action arose outside of the state; unless the president or other chief officer reside in such county. Code, ch. 123, § 1; Ballard v. C. & O. R. Co., 42 W. Va. 1, 24 S. E. Rep. 602.

What Amounts to a New Cause of Action so as to Confer Jurisdiction.—An action against a corporation on a contract for commissions on sales of stock, made at home office, should be brought in the jurisdiction of the home office, and the fact that plaintiff received a telegram from the corporation in a different jurisdiction, telling him that he would have to divide commissions on further stock with another agent who had an option on it, is a mere modification of the former contract and confers no jurisdiction on the courts of that place on the ground that a new cause of action arose there. Ferguson v. Grottoes Co., 92 Va. 316, 23 S. E. Rep. 761.

To Whom Process Must Be Directed.—If the foundation of the jurisdiction is that the cause of action or some part thereof arose in Lynchburg, the process can only be directed to an officer of that city. Dictum in Guarantee Co. v. Nat. Bank, 95 Va. 480, 28 S. E. Rep. 909; Code Va., § 3220.

C. SERVICE OF PROCESS.

On Whom.—Under Act 1883-4, p. 701, Code Va. 1887, § 3225, service of process on any corporation, other than a bank of circulation or a town, where the president is a nonresident, may be on any agent of the corporation, in the county or corporation in which he resides or in which the principal office of the company is located, whatever may be the employment of the agent. Norf. & West. R. Co. v. Cottrell, 83 Va. 512, 3 S. E. Rep. 123.

Service on Depot or Station Agent of Railroad Company Good.—In an action against a railroad company the summons may be served upon a depot or station agent in the actual employment of the company residing in the county or township wherein the action is brought and the return of an officer showing that such process has thus been served is sufficient. Code W. Va., ch. 52, § 20; Douglass v. Kan. & Mich. R. Co., 44 W. Va. 267, 28 S. E. Rep. 705.

Where.—Service of process on the president or other officer must be in the county or corporation in the state in which he *resides*. The clause providing for personal service of process on a nonresident, as a substitute for an order publication, Code Va. 187, ch. 166, § 15, Code 1887, § 3232, refers only to natural persons who are nonresident defendants and has no application to nonresident defendant corporations. A judgment based on such service is void for want of jurisdiction. Dillard v. Cent. Va. Iron Co., 82 Va. 734, 1 S. E. Rep. 121; Frazier v. Railroad Co., 40 Va. 224, 21 S. E. Rep. 723; Taylor v. Ohio, etc., R. Co., 35 W. Va. 328, 13 S. E. Rep. 1009.

When.—When it appears that process to commence a suit has been served on an agent of the company, less than ten days before the return day, Code Va., § 3227, the proper mode to take advantage of it is by motion to quash the sheriff's return and not by motion to dismiss the suit. Norfolk, etc., R. Co. v. Carter, 91 Va. 587, 22 S. E. Rep. 517.

Service on Attorney Adversely Interested Voidable.—Service of process upon the president and attorney of a corporation who is also the attorney in adverse interest is not void but voidable on motion in time. ENGLISH, J., dissenting and holding such service absolutely void. Blowpipe Co. v. Spencer, 46 W. Va. 590, 33 S. E. Rep. 342.

Service on the Quondam Officer of a Defunct Corporation Good.—Service of process on the *quondam* president of a defunct corporation is good; the method by publication provided by Code Va. 1887, § 1103, is merely cumulative and does not exclude the methods applicable to an existing corporation. Richmond, etc., R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 S. E. Rep. 573.

Service of Process on Officer Who Has Been Notified of His Election is Good.—One who has been notified of his appointment as director, must be presumed to have accepted it unless he expressly declines it; service of process on such a person, therefore, is valid, especially where he makes no disclaimer. The fact that he does not notify the corporation is immaterial. Danville, etc., R. Co. v. Brown, 90 Va. 340, 18 S. E. Rep. 278.

Disclaimer by Officers Immaterial.—Where process is duly served on officers of a corporation, such service is valid, though they disclaim the right to answer officially. Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

A Judgment without Service of Process Void—Remedy.—A judgment pronounced by a justice, without service of process upon, or notice to the defendant, is void. But as such judgment may be set aside, even when rendered upon the verdict of a jury, by the circuit court upon a writ of *certiorari*, the defendant in the judgment cannot obtain relief against it in a court of equity. Kanawha & O. Ry. Co. v. Ryan, 31 W. Va. 364, 6 S. E. Rep. 924.

Presumption That Process Was Duly Served.—Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that "process was duly served" or "order of publication was duly executed as to the defendants," it will be presumed that it was so served or executed. But when the record shows the process or order of publication, and shows clearly that process was not served or order of publication executed as to any particular defendant, such declaration in the decree will not raise such presumption as to such defendant. Styles v. Laurel Fork Oil & Coal Co., 45 W. Va. 374, 32 S. E. Rep. 227.

Acceptance of Process Must Show Character in Which Process Was Received.—An acceptance of process

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reading "Service accepted. Alf. Paul," is bad, as not showing the character in which he received service, *i. e.*, as attorney appointed to accept service. Adkins v. Ins. Co., 45 W. Va. 384, 32 S. E. Rep. 194.

D. ORDER OF PUBLICATION.

Must Follow the Statute.—An order of publication in a suit against a corporation, along with other defendants, must follow the statute and state, on affidavit, that such defendant is a corporation and that no person can be found in the county, upon whom process can be legally served and require it to appear within one month and do what is necessary to protect its interests. Styles v. Oil & Coal Co., 45 W. Va. 374, 32 S. E. Rep. 227.

Local Attorney of Corporation a Proper Person to Make It.—The affidavit of a corporation in an order of publication against "parties unknown" must, of necessity, be by an agent, and it is proper for the local attorney of the corporation to make it, who resides in the place where the cause of action arose and on that account is more likely to be conversant with the facts than some officer of the corporation residing elsewhere. Fayette Land Co. v. Louisville, etc., R. Co., 93 Va. 274, 24 S. E. Rep. 1016. On summoning corporations by publication, see article, 2 Va. Law Reg. 545.

E. SHERIFF'S RETURN.

Must Show Service on Attorney Appointed to Receive It.—A return of service of a summons in an action against a foreign corporation upon an attorney, must show that he is the attorney appointed by the corporation to accept such service, otherwise it is defective and judgment on it is void, but the return may be amended. The return must state all the facts necessary to make it good, so that the court may judge of the sufficiency of the service, and where it departs from the statute, everything is inferred against it that such departure warrants. Adkins v. Ins. Co., 45 W. Va. 384, 32 S. E. Rep. 194.

Return of Service on "Lawful Attorney" Prima Facie Good.—Where the return of the sheriff, shows that the writ was served on the "lawful attorney" of a nonresident insurance corporation, this is "*prima facie*" service on the attorney required to be appointed by such foreign insurance company by Code W. Va., ch. 34, § 15. Wagon Co. v. Peterson, 27 W. Va. 314.

Must Show Service on Such Attorney in the County Where He Resides.—The return of service of process on the attorney appointed by a corporation for accepting service of process or on any officer or agent authorized by law to accept it, by Code W. Va., § 7, ch. 124, must show that such service was had in the county in which such attorney, etc., resides, sec. 38, ch. 50.

Otherwise judgment rendered on such invalid service is void for want of jurisdiction, where there is no appearance. Frazier v. R. Co., 40 W. Va. 224, 21 S. E. Rep. 723.

This applies as well to process issuing from a justice's court as to that from any other court. Kanawha, etc., R. Co. v. Ryan, 31 W. Va. 364, 6 S. E. Rep. 924; Taylor v. Ohio River R. Co., 35 W. Va. 328, 13 S. E. Rep. 1009. But a court of equity will not enjoin such a judgment since there is adequate remedy at law by writ of *certiorari*. Kanawha, etc., R. Co. v. Ryan, 31 W. Va. 364, 6 S. E. Rep. 924.

Must Show Service Ten Days before Return Day.—Where the sheriff's return fails to state that process was served at least ten days before the return day of such process, where that is necessary, a judgment by default, founded on such process, is wholly void, it may be attacked in a collateral suit by third persons, it neither binds nor bars anything and all acts performed under it and all claims flowing out of it are void. Staunton Perpetual B. & L. Co. v. Haden, 92 Va. 201, 23 S. E. Rep. 285.

Amendment of Return.—Return of service of a summons from a justice's court, defective in failing to show that service on a corporation's agent was made in the county of his residence, may be amended, either before the justice or in the circuit court upon appeal. Hopkins v. B. & O. R. Co., 42 W. Va. 535, 26 S. E. Rep. 187; Assurance Co. v. Everhart, 88 Va. 952, 14 S. E. Rep. 836.

Lapse of Time No Bar to Amendment.—The return of a sheriff to a summons may be amended thirteen years after judgment by default has been rendered in the action, so as to show that the county in which service was had on the defendant corporation, by giving one of the directors a copy of the summons, was the county in which he resided, and the judgment will be validated by such amendment. It is immaterial that subsequent mortgagees of the corporation may be injured by the amendment, it not being shown that they were aware of the irregularity in the judgment, which was duly docketed, when they took their mortgages, and if they were, they would nevertheless acquire their liens subject to the judgment plaintiff's right to have the record perfected. Shenandoah Val. R. Co. v. Ashby, 86 Va. 232, 9 S. E. Rep. 1003.

F. SUITS BY AND AGAINST CORPORATIONS.

Prejudice against Corporations Not a Proper Question to Put to a Juror.—In an action against a corporation, a juror cannot be asked on his *voir dire* whether he is prejudiced against corporations. Atlantic, etc., R. Co. v. Reiger, 95 Va. 418, 28 S. E. Rep. 590.

No Averment of Incorporation Necessary, Only Proof of It at the Trial, by Old Rule.—A corporation need not set forth in its declaration how they are a corporation, but must prove it at the trial; and this rule applies to *motions* as well as to *suits* by a corporation. Grays v. Turnpike Co., 4 Rand. 578; Anderson v. Kanawha Coal Co., 12 W. Va. 526; Rees v. Conococheague Bank, 5 Rand. 326; Taylor v. Bank of Alexandria, 5 Leigh 471; Jackson v. Bank of Marietta, 9 Leigh 240; Quarrier v. Insurance Co., 10 W. Va. 507; Lithgow v. Com., 2 Va. Cas. 297. And the same rule holds where a corporation *is sued*, nor do the provisions of sections 1 and 18, ch. 61, Code W. Va. 1868, "that an action for excessive charges cannot be maintained against anyone but an *incorporated* railroad company affect the case. Hart v. B. & O. R. Co., 6 W. Va. 336.

Same Rule in Criminal Proceedings against Corporations.—In criminal prosecutions against corporations, the fact of the incorporation of defendant does not have to be proven unless such fact is put in issue as provided in section 41, ch. 125, Code. State v. Thacker Coal & Coke Co. (W. Va.), 38 S. E. Rep. 529. See also, Lithgow v. Com., 2 Va. Cas. 297.

Now Not Even Necessary to Prove It at the Trial unless Denied under Oath.—In a suit against a corporation it is not necessary to aver in the declaration, that it is a corporation, nor is it necessary to prove at the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying the fact. The court will take notice of the fact *ex officio*. Code Va. 1887, sec. 3280; B. & O. R. Co. v. Sherman, 30 Gratt. 602; Gillett v. American Stove, etc., Co., 29 Gratt. 565; Douglass v. K. & M. R. Co., 44 W. Va. 267, 28 S. E. Rep. 705. And the plea of "*nul*

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tiel corporation" unaccompanied by an affidavit denying the corporate existence of the plaintiff, does not put the plaintiff to the proof of its corporate existence. Crews v. Farmers' Bank, 31 Gratt. 348.

Never Necessary under a Plea of Conditions Performed.—But while under a special plea that the plaintiff was not a corporation or under the general issue, as *non est factum*, *not guilty*, and *non assumpsit*, it was necessary to prove plaintiff's existence as a corporation, under a plea of conditions performed, it never was necessary, since by such a plea, the defendant admits the obligee of the bond had an existence as a corporation. Central Land Co. v. Calhoun, 16 W. Va. 361.

Affidavit Must Deny Corporate Existence at Time of Contract Sued on.—The affidavit denying the fact of incorporation, which is necessary to put such fact in issue, Code Va. 1887, § 3280, must deny the corporate existence at the time of the contract sued on; it is not sufficient merely to deny it at the time of the institution of the suit. Richmond, etc., R. Co. v. New York, etc., R. Co., 95 Va. 386, 28 S. E. Rep. 573.

Evidence of Incorporation.

Books of Corporation the Best Evidence.—The books of a corporation are the best evidence of due incorporation and ought to be admitted and all fair presumptions will be made in favor of the regularity of incorporation. Grays v. Turnpike Co., 4 Rand. 578.

Records and Parol Evidence.—The organization of a corporation may be proved by its records and parol proof, without the production of its list of subscribers. Crump v. U. S. Mining Co., 7 Gratt. 352.

Its Deed under Seal Evidence of Incorporation.—A deed of the corporation, signed with its name by the secretary and under the seal of the corporation, duly acknowledged and admitted to record and reciting that "it is a corporation framed under the laws of the state of New York" is *prima facie* evidence of incorporation. Anderson v. Kanawha Coal Co., 12 W. Va. 526.

Certificate of Incorporation.—Where the certificate of incorporation discloses no error on its face and is in accordance with the provisions of Code W. Va., ch. 54, sections 6, 7, 8, 9, 10, ch. 53, § 62, it is sufficient evidence of the existence of the corporation, and, having conducted business as a corporation, the validity of its incorporation cannot be attacked by proving *aliunde* the certificate that certain prerequisites of the law had not been in good faith complied with. Lafin & Rand Powder Co. v. Sinsheimer, 24 Am. Rep. 522.

Certified Copy of Certificate of Incorporation.—A certified copy of the certificate of incorporation, duly authenticated is sufficient evidence of the fact of incorporation Manufacturing Co. v. Bennett, 28 W. Va. 16.

Not Inferred from Merely Doing Business as a Corporation.—The fact of incorporation cannot be inferred from the mere doing business as if incorporated. Jackson v. Bank of Marietta, 9 Leigh 240.

Ex Parte Affidavit Not Sufficient.—Where the only proof of incorporation is the *ex parte* affidavit of a witness, which is excepted to by opposing counsel, such proof is insufficient and the bill should be dismissed. Bowyer v. Giles, etc., Turnpike Co., 9 Gratt. 109.

Estoppel to Deny Incorporation.—A party who has contracted with a corporation, as such, cannot afterwards raise the objection, that, at the time he entered into such contract, the corporation was not legally incorporated, if such corporation could constitutionally exist. Manufacturing Co. v. Bennett, 28 W. Va. 16; Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. Rep. 299; Bon Aqua Imp. Co. v. Insurance Co., 34 W. Va. 764, 12 S. E. Rep. 771.

Where one party has admitted the due incorporation of the other in the facts agreed in the case, he will not be allowed in that case to question the existence of such fact. Nat. Building & Loan Ass'n v. Ashworth, 91 Va. 706, 22 S. E. Rep. 521.

When Court Will Notice Incorporation Ex Officio. Banks.—Where the charter of a corporation in a public act, *e. g.*, the charter of a bank, it is not necessary for the corporation in bringing an action to prove its incorporation. Northwestern Bank v. Machir, 18 W. Va. 271; Hays v. Northwestern Bank, 9 Gratt. 127; Stribbling v. Bank, 5 Rand. 132.

Extension of Such Charters.—And the court will take judicial cognizance, not only of the original charter of a bank; but likewise of acceptance by the bank of an extension of its charter. Farmers' Bank v. Willis, 7 W. Va. 31.

Railroads.—The acts of the Legislature conferring corporate powers on the B. & O. R. Co. are public acts and will be noticed by the court *ex officio*. Hart v. B. & O. R. Co., 6 W. Va. 336; State v. B. & O. R. Co., 15 W. Va. 362.

Charters of Private Corporations Created under General Law and Printed with Public Acts.—Though the court expressly declined to decide the question, as not necessary to the decision in that case, Bon Aqua Imp. Co. v. Insurance Co., 34 W. Va. 764, 12 S. E. Rep. 771, they plainly indicated that, if the case arose, they would hold that the courts would take judicial notice of private corporations created under general law, whose certificates were printed with the public acts of the Legislature, in accordance with sec. 19, ch. 54, Code W. Va. 1891.

But an Act Creating a Rolling Mill, Private.—An act of the Legislature chartering a rolling mill is a private act, hence the provision of sec. 4203 of the Code, excluding from the operation of the Code any act passed between the 15th of March, 1887, and the 1st of May, 1888, does not apply, this provision referring merely to public acts. Va. Devel. Co. v. Crozer Iron Co., 90 Va. 126, 17 S. E. Rep. 806.

Inability of Corporation to Make an Affidavit.—In a suit against a corporation, a replication to a plea of the statute of limitations by the corporation, to the effect that the plaintiff could not truly make the affidavit prescribed by sec. 27, ch. 106, Code W. Va. 1868 is bad, since a plaintiff is excused from making such an affidavit in a suit against a corporation, the corporation on its part being unable to make an affidavit. Stuart v. Greenbrier Co., 16 W. Va. 95. The same is true where a corporation is plaintiff. Bank v. Handley, 14 W. Va. 823.

Answer of Corporation Must Be under Common Seal, Effect.—A corporation cannot be sworn and therefore must put in its answer under its common seal only. If the plaintiff wishes to have a sworn answer, he must make some of the officers or members of the corporation parties. The answer of a corporation not being verified by affidavit, is no evidence for the defendant, though responsive to the bill; but it puts the allegation to which it responds in issue and imposes on the plaintiff the burden of proving it. This is its effect on a motion to dissolve an injunction, as well as on the hearing of the cause. B. & O. R. Co. v. Wheeling, 13 Gratt. 40; B. & O. R. Co. v. Gallahue, 12 Gratt. 655; Jeter v. Railroad Co., 35 W. Va. 433, 14 S. E. Rep. 146.

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Bill of Discovery against Corporation Alone, Must Be Dismissed.—Since corporations cannot answer under oath, but only under their corporate seal, a bill of discovery against a corporation alone must be dismissed. The proper method is to make such officers or shareholders as are personally cognizant of the facts wanted, parties defendant along with the corporation. Roanoke St. R. Co. v. Hicks, 96 Va. 516, 32 S. E. Rep. 295; Jeter v. Railroad Co., 35 W. Va. 433, 14 S. E. Rep. 146.

Pleading of Corporation Should Be Verified by Affidavit of Someone Conversant with the Facts.—A pleading of a corporation should be verified by the affidavit of the president or some other officer conversant with the facts, the affidavit of the attorney at law of the corporation is not sufficient, BRANNON, P., saying: "What would he know of the indebtedness, unless he should show that he was personally cognizant of the facts? Doubtless there are instances, in which an attorney may make affidavit for a corporation; but this is an instance where the affidavit calls for personal knowledge of the facts, the account between the parties, if any instance does." In such affidavit the affiant must state the facts, as of his own knowledge, and not as hearsay. Quesenberry v. B. & L. Ass'n, 44 W. Va. 512, 30 S. E. Rep. 73.

In Pleas to the Jurisdiction, Corporations Must Appear by Its President, Not in Person or by Attorney.—A corporation cannot, in pleas to the jurisdiction, appear either in *person* or by *attorney*, but must appear by its *president*. Quarrier v. Insurance Co., 10 W. Va. 507.

Form of Plea.—A plea to the jurisdiction by a corporation should conclude "whether the court can or will take further cognizance of the action aforesaid" not "that the plaintiff's aforesaid action may abate and be dismissed." The affidavit also should be *positive* and not "as affiant verily believes."

Further, the necessary facts should be alleged to have existed when the action was brought, not merely when the plea was filed. The language of the plea in these respects should have been "That the cause of action, if any such cause there was, did not, nor did any part thereof, arise in said county of Kanawha, and the principal office of the said corporation was not, and the president, who is its chief officer, did not, reside in that county at the time said action was brought, but its office and his residence were at the time and ever since have been, and now are in the county of Ohio, and in the last named county, there arose the cause of action and every part thereof, if any such cause there was." Quarrier v. Insurance Co., 10 W. Va. 507; Guarantee Co. v. Nat. Bank, 95 Va. 480, 28 S. E. Rep. 909.

One Party to a Contract Not Disqualified to Testify because Other Party is a Corporation.—A corporation must of necessity contract through its agents, and is incapable of testifying except through the mouth of its agents. Its incapacity to testify does not, however, operate to exclude the testimony of a party with whom it has made a contract or had a transaction, which is the subject of a suit between them, because it is not incapacitated to testify by reason of death, insanity, infamy, or other legal cause, the causes specified by the statute, whose existence shall disqualify the other party as a witness in his own favor, unless he be first called to testify in favor of the party who is incapable of testifying by reason of some one of the causes so specified. Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. Rep. 594; Kelly v. Board, 75 Va. 263.

Death of Other Party Does Not Disqualify Agent of the Corporation.—The agent of a corporation is not disqualified to testify by the death of the other party to a transaction, the original parties to which were the corporation and the said party. Unless the agent is one of the "original parties" to the *contract*, he is not incompetent; the test of competency being not the *fact* to which such party is called to testify, but the *contract* or other transaction, which is the subject of investigation. Mutual Life Ins. Co. v. Oliver, 95 Va. 445, 28 S. E. Rep. 594; First Nat. Bank v. Terry, 99 Va. —, 6 Va. Law Reg. 770.

IX. FOREIGN CORPORATIONS.

A. NO LEGAL EXISTENCE OUTSIDE OF STATE CREATING THEM.—A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the state or sovereignty by which it is created. Rece v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. Rep. 214.

Not "Citizens" within the Language of the Federal Constitution.

Power of Legislature to Exclude Them.—The clause of the federal constitution, art. 4, § 2, declaring that the *citizens* of each state are entitled to all the privileges and immunities of citizens of the several states, does not apply to corporations. SAMUELS, J., in Slaughter v. Com., 13 Gratt. 767, said: "I have no doubt of the power of the general assembly of Virginia to forbid foreign corporations from engaging in any pursuit within the state; and, of consequence, to grant permission to engage therein only upon terms; and that a statute imposing a fine for doing business without a license. Code Va. 1849, ch. 38, § 25, is clearly within the scope of their legitimate powers."

If Admitted, it May Exercise All Its Charter Powers Unless in Contravention of the Laws or Policy of the State.—When a state permits a foreigner to come into its territory for the purpose of carrying on its business it must be presumed to have consented that that company should exercise all of the powers conferred by its charter and the general laws appertaining thereto, unless prohibited from doing so by the direct enactments of the state or by some rule of public policy to be deduced from the general course of legislation. Bockover v. Life Ass'n, 77 Va. 85.

Statutory Provisions for Admission.

Foreign Corporations, to Sustain an Action, Need Not Allege Compliance with Such Statute.

Defendant Must Plead and Prove Such Non-Compliance.—It is not necessary for a foreign corporation, in order to sustain its action, to set forth in its complaint that it has complied with the laws of the state which entitled it to do business therein, but this defense, if available, is a matter to be pleaded and proved by the defendant. Nickels v. Build. & Loan Ass'n, 93 Va. 380, 25 S. E. Rep. 8.

And He Must State in What Respect the Plaintiff Has Failed.—If the fact relied on by the appellee is that the appellant corporation has not complied with the requirements of the law, requiring a foreign corporation to have an office in the state, Code Va. 1887, § 1104, it is essential that the appellee allege in his bill in what *particular* the appellant has failed. Nat. Build. & Loan Ass'n v. Ashworth, 91 Va. 706, 22 S. E. Rep. 521; 1 Va. Law Reg. 519.

Effect of Compliance.

Still Nonresidents within the Meaning of the Attachment Laws.—Whilst a corporation may by its

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agents transact business anywhere, unless prohibited by its charter or by local laws, it can have no residence or citizenship, except where it is located by the authority of its charter. Hence a foreign corporation by complying with the requirements of the Va. statute, Code 1873, ch. 36, § 19, Code 1887, ch. 53, for doing business in the state of Virginia by making a deposit and appointing a resident agent, etc., is *not a resident* of Virginia within the meaning of the foreign attachment laws and the property of such corporation is liable to attachment as a *nonresident*. Cowardin v. Ins. Co., 32 Gratt. 445.

The appointment by a foreign corporation of an attorney in West Virginia to accept service of process. Code W. Va., ch. 54, sec. 24, does not make it a domestic corporation; it is still liable to attachment as a foreign corporation. Quesenberry v. Ass'n, 44 W. Va. 512, 30 S. E. Rep. 73; Savage v. Ass'n, 45 W. Va. 275, 31 S. E. Rep. 991.

A statute merely enabling a foreign corporation to hold property or do business in this state and have the same powers, rights and privileges and be subject to the same regulations, restrictions and liabilities, as domestic corporations, Code W. Va., ch. 54, § 30, does not make it a domestic corporation, and it may be proceeded against by attachment as a foreign corporation. Savage v. Ass'n, 45 W. Va. 275, 31 S. E. Rep. 991; Quesenberry v. Ass'n, 44 W. Va. 512, 30 S. E. Rep. 73.

But Cannot Be Required to Give Security for Costs.—A foreign corporation which has complied with the requirements of sec. 24, ch. 54, Code W. Va., as to appointing a resident agent is not to be considered a nonresident, so as to be required to give security for costs as plaintiff. Marmet Co. v. Archibald, 37 W. Va. 778, 17 S. E. Rep. 299.

Are Residents for the Purpose Being Sued.—But by compliance with the terms of such statute a foreign corporation is to be considered, *for the purpose of being sued*, as domiciled in Virginia and is entitled to rely on the statute of limitations just as if it had been chartered by the legislature of Virginia. Insurance Co. v. Duerson, 28 Gratt. 630; Cowardin v. Insurance Co., 32 Gratt. 445, approved in Hall v. Bank of Va., 14 W. Va. 584; Abell v. Insurance Co., 18 W. Va. 400. But where afterwards such corporation ceases to do business in the state and neglects to appoint an agent and otherwise fulfill the requirements of the statute, this is a withdrawal from the state and an obstruction of the plaintiff and such period is not to be counted in the running of the statute of limitations, in accordance with sec. 18, ch. 104, Code of W. Va. Abell v. Insurance Co., 18 W. Va. 400.

Corporations Existing When Constitution of West Virginia Adopted in 1860.—Under the 8th section of art. 11 of the constitution of West Virginia providing that the common law and laws of Virginia at the time of the constitution, not repugnant thereto, shall be and continue the law of West Virginia until altered or repealed by the Legislature, the charter of a bank incorporated in Virginia, having branches in West Virginia is continued in full force, unless repugnant to the constitution, as a domestic corporation of West Virginia and cannot be proceeded against as a foreign corporation by attachment or otherwise. Nor is the case of Parker v. Donnally, 4 W. Va. 648, even impliedly in conflict with this doctrine. Farmers' Bank v. Gettinger, 4 W. Va. 305.

But during the war all power of a Virginia corporation to do business in West Virginia was suspended and it was proper to proceed against it by attachment as a foreign corporation. Hall v. Bank of Va., 14 W. Va. 584.

Effect on Contracts of Non-Compliance.—A contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business in another state will not on that account be held absolutely void, unless the statute expressly so declares; and, if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of all others. Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. Rep. 37; Building Ass'n v. Snyder, 98 Va. 710, 37 S. E. Rep. 298; 1 Va. Law Reg. 524, and *note*.

B. SUITS BY AND AGAINST.

Power of a Foreign Corporation to Sue in Virginia Courts.—A foreign corporation may sue in our courts upon a contract with them, valid according to the laws of the country in which the contract was made, unless contrary to the policy of the laws of Virginia. Rees v. Conococheague Bank, 5 Rand. 326; Bank of Marietta v. Pindall, 2 Rand. 465; Taylor v. Bank of Alexandria, 5 Leigh 471; Freeman's Bank v. Ruckman, 16 Gratt. 126.

But no foreign bank can sue on a *primary* contract made in Virginia by discounting notes or otherwise. Bank of Marietta v. Pindall, 2 Rand. 465.

Power of Receiver, etc., of Foreign Corporation to Sue in Virginia Courts.—The law is now settled by an irresistible preponderance of authority that a receiver, trustee, or assignee of a foreign corporation, with general powers over the property of such corporation, has the right, by virtue of the comity existing between the various states of this Union, to sue for any debt, claim, or property owing to or belonging to such corporation. Swing v. Bentley & Gerwig Furniture Co., 45 W. Va. 283, 31 S. E. Rep. 925.

Power of Local Courts over Foreign Corporations. Will Not Interfere with Their Internal Management.—It seems to be well settled that the domestic courts will not interfere with the management of the internal affairs of a foreign corporation. The reasons for such a rule are apparent. Courts other than those of the state creating it, and in which it has its *habitat*, have no visitorial powers over such corporation, nor any authority to remove its officers, or to punish them for misconduct committed in the state which created it, or to enforce a forfeiture of its charter. Neither have they the power to compel obedience to their orders, or to enforce their decrees. Taylor v. Mutual, etc., Life Ass'n, 97 Va. 67, 33 S. E. Rep. 385.

A Virginia court will not enjoin a foreign corporation from forfeiting the policy of insurance of a citizen of Virginia nor require it to exhibit its books, papers, etc., since it has no means of enforcing such decrees. Nor can a court under such circumstances proceed to construe the contract and thus render the matter "*res judicata*," since it has no jurisdiction of it. Taylor v. Mutual, etc., Life Ass'n, 97 Va. 60, 33 S. E. Rep. 385.

But They Will Protect a Local Stockholder's Individual Rights.—Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and in the case of a foreign corporation our courts will not take juris-

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diction. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction whenever the cause of action arises here. Taylor v. Mutual, etc., Life Ass'n, 97 Va. 68, 33 S. E. Rep. 385.

How Jurisdiction of Foreign Corporation May Be Acquired.—Jurisdiction over a foreign corporation by the domestic courts can only be acquired in one of three ways. By the cause of action or part thereof having arisen in the state, Code Va., § 3215; by being sued with another who is a resident thereof, § 3214, par. 1, or by having estate or debts owing to it within the state, § 3214, par. 4. Guarantee Co. v. Nat. Bank, 95 Va. 480, 28 S. E. Rep. 909.

Suit May Be Brought in Any County Where Corporation Has Estate or Debts Due It.—A suit against a foreign corporation may be brought in any county wherein it has estate or debts due. It is a nonresident under clause 3, § 1, ch. 123, Code W. Va. Quesenberry v. B. & L. Ass'n, 44 W. Va. 512, 30 S. E. Rep. 73.

Under the act, 1 R. C. 1819, p. 474, ch. 123, directing the method of proceeding in courts of equity against absent debtors, a creditor of a corporation created by another state may maintain a suit in equity against such corporation, as a defendant out of this commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenements within the commonwealth. Bank of U. S. v. Merchants' Bank, 1 Rob. 573.

In West Virginia Suit May Be Brought in Any County Where the Corporation Does Business.—A foreign corporation is liable to suit or garnishment in any county of West Virginia wherein it does business and has an agent upon whom process may be legally served according to sec. 7, ch. 124, Code W. Va. 1891, although the course of action arose without the state. Code W. Va., ch. 123, sec. 1; Mahany v. Kephart, 15 W. Va. 609.

Legislature May Authorize Suit "in Personam" if Process Can Be Legally Served on Foreign Corporation.—It is within the power of a state legislature to authorize a suit against a foreign corporation *in personam* as well as *in rem*. Hence a foreign corporation doing business in West Virginia may be sued in any particular county of said state by clause 2, sec. 1, ch. 123, Code W. Va. 1891, provided service of process can be lawfully had by sec. 7, ch. 124. Humphreys v. Newport News, etc., R. Co., 33 W. Va. 135, 10 S. E. Rep. 39.

When Local Courts Will Render a Personal Decree.

Actual Service of Process or Appearance Necessary.—A *personal* decree for specific performance may be rendered against a foreign corporation when *actual service* of process has been made within the state under the provisions of the Code W. Va., ch. 124, sec. 7. Shafer v. O'Brien, 31 W. Va. 601, 8 S. E. Rep. 298; Crumlish v. R. Co., 28 W. Va. 623.

In Gilchrist v. Land Co., 21 W. Va. 115, the court was forced to follow the construction of the New York courts in holding that no personal decree could be rendered against foreign corporations unless it had appeared, but the doctrine of Shafer v. O'Brien, 31 W. Va. 601, 8 S. E. Rep. 298, is that of the West Virginia courts.

Not Necessary for a Decree in Rem.—It is not denied that a corporation, like an individual, cannot be bound personally, unless it appears or is, by proper summons within its jurisdiction, brought before the court; but it cannot be questioned, that a court may, without personal service, take jurisdiction of the *property* of a nonresident person or foreign corporation, and its decree, to the extent that it takes possession and disposes of the property within its jurisdiction, will be binding upon all parties affected or interested whether resident or nonresident. Crumlish v. Railroad Co., 28 W. Va. 623; Dillard v. Cent. Va. Iron Co., 82 Va. 734, 1 S. E. Rep. 124.

Cannot Be Compelled to Answer.—A foreign corporation cannot be compelled to file an answer. B. & O. R. Co. v. Wheeling, 13 Gratt. 40.

Suit to Settle the Affairs of a Foreign Corporation May Be Brought in Circuit Court in West Virginia.—The doctrine of Nimick v. Iron Works, 25 W. Va. 184, that a general suit to settle the affairs of a foreign corporation must be brought in the state of its domicile, has been superseded by sec. 58, 59, ch. 53, Code W. Va., which gives the circuit court jurisdiction of such suits. Swing v. Furniture Co., 45 W. Va. 283, 31 S. E. Rep. 925; Swing v. Veneer & Panel Co., 45 W. Va. 288, 31 S. E. Rep. 926.

Removal of Suits to Federal Courts.

A Corporation is a Citizen of the State Creating It.—Where a corporation is created by the laws of a state, the legal presumption is that all its members are citizens of the state by which it was created: and in a suit by or against it, it is conclusively presumed to be a citizen of such state. Rece v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. Rep. 214. See full discussion in Hall v. Bank of Va., 14 W. Va. 584.

Citizenship of Stockholders Immaterial.—Where the plaintiff and defendant corporation are both corporations of Virginia the owners of the stock, though nonresidents, are not entitled to have the cause removed to the federal courts. Wash. Alex. & Georg. R. Co. v. Alex. & Wash. R. Co., 19 Gratt. 592

Corporations Created by Two or More States.

Distinct Corporations, Citizens of Each State.—While a corporation, by the same name, may be chartered by two states, clothed with the same capacities and powers, and intended to accomplish the same objects, and be exercising the same powers and duties in both states, yet it will, in law, be two distinct corporations,—one in each state,—with only such corporate powers in each state as are conferred by its creation in that state. Rece v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. Rep. 212.

A railroad extending through two or more states and incorporated by the laws of each is not a joint corporation of the two states but a separate corporation in each state subject only to the laws of each state within the respective jurisdictions, however those laws may conflict as to the operation of the road, and one state cannot impose any restrictions or limitations upon the exercise of corporate powers in the other. Atwood v. R. Co., 85 Va. 966, 9 S. E. Rep. 748.

Such a corporation is a citizen of each state in respect of its rights of suing and being sued in the federal courts, *i. e.* it cannot sue or be sued in such courts by a citizen of any state in which it is incorporated. And at all events a corporation which is chartered in West Virginia and has accepted its charter by actually doing business there, must, in a suit in the West Virginia courts, be regarded as a domestic corporation resident in West Virginia. Hall v. Bank of Va., 14 W. Va. 584.

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A Corporation Rechartered or Licensed to Do Business in More Than One State.—A railroad corporation may have an existence for the purpose of suing and being sued by the citizens thereof in more than one state, if chartered or licensed to build its road and do business in more than one. So the B. & O. R. Co. is a domestic corporation in West Virginia and as such is liable to be sued there and when sued there by a citizen of that state, in a state court such suit cannot be removed into the federal courts and those courts have no jurisdiction in such a case. B. & O. R. Co. v. P. W. & Ky. R. Co., 17 W. Va. 812; Goshorn v. Board, 1 W. Va. 307.

The B. & O. R. Co. under the charter granted by the legislature of Virginia re-enacting the Maryland charter and conferring the same rights and privileges, is a Virginia corporation and liable to be sued in Virginia. B. & O. R. Co. v. Gallahue, 12 Gratt. 655.

Necessary Allegations of Citizenship.—In a petition for the removal of a cause to the federal courts on the ground that defendant is a foreign corporation, it is necessary to allege not only that it is a citizen of another state but also that it is not a resident of Virginia, since a foreign corporation may become a resident of any state for the purposes of suit. Guarantee Co. v. Nat. Bank, 95 Va. 480, 28 S. E. Rep. 909.

When Motion for Removal Must Be Made.—A motion for removal to a federal court on account of diversity of citizenship is not made too late when made after a trial before a justice, a justice's court not being a "state court" within the language of the act of Congress. Rathbone Oil Tract Co. v. Rauch, 5 W. Va. 79.

Foreign Corporation Leasing Railroad in Virginia Liable to Suit in Virginia Courts.—Where a railroad which was incorporated in another state leases a railroad lying in Virginia and operates the same as owner thereof and an injury occurs on said railroad, the person having the right of action for such injury may sue the railroad in the courts of Virginia, and such company has no right to remove the suit to the federal courts. B. & O. R. Co. v. Wightman, 29 Gratt. 431; B. & O. R. Co. v. Noell, 32 Gratt. 394. So also where a corporation is rechartered in West Virginia or receives a license to extend its system into West Virginia. B. & O. R. Co. v. P. W. & Ky. R. Co., 17 W. Va. 812.

In West Virginia an Agreement Not to Remove Suits to Federal Courts as Condition of Admission within the State is Void.—So much of section 30, ch. 54, of Code of West Virginia, as declares that foreign railroad corporations, doing business in West Virginia shall, in all suits and legal proceedings, be held and treated as domestic corporations of West Virginia, and requires any such corporation to file an agreement to that effect, is, so far as it attempts to deprive such corporation of the right to remove to the federal courts suits brought by or against it in the courts of West Virginia, in cases in which it would otherwise be entitled to such right, inoperative and void; and such foreign corporation may exercise such right in any proper case, notwithstanding it has executed and filed such agreement in pursuance of the provisions of said statute. Rece v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. Rep. 212.

Cannot Contract as to Jurisdiction of Suits.—A provision endorsed on the certificates of stock issued by a foreign corporation, that any action brought against said corporation by its stockholders shall be brought in a certain county of the state of its domicil, is void, as jurisdiction cannot be taken away by consent. Savage v. B. & L. Ass'n, 45 W. Va. 275, 31 S. E. Rep. 991.

C. TAXATION OF FOREIGN CORPORATIONS, STATE MAY TAX THEM, IF IT DOES NOT DISCRIMINATE AGAINST NONRESIDENTS.—It is competent for a state to impose a tax upon individuals or corporations within its territory; and such tax, if it does not discriminate against nonresidents or the products of other states, may be upon the property, or franchises, or the business, of the individual or corporation; and its validity is not at all affected by the consideration that the party is engaged in foreign as well as domestic trade and traffic. West. U. Tel. Co. v. City of Richmond, 26 Gratt. 26.

It May Be in the Form of a License Tax.—"The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of Virginia or of the United States which forbids such a tax, if it is equal and just in its provisions. Though the ordinance of the city speaks only of persons or firms doing business in the city, yet, as it imposes a tax in terms on telegraph companies, it is obviously intended to include incorporated companies as well as individuals. Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute." Western Union Telegraph Co. v. City of Richmond, 26 Gratt. 1.

A statute imposing a license tax on foreign corporations and not on those created by Virginia is not in contravention of the Virginia constitution, art. X, sec. 1, providing that taxation shall be equal and uniform, since that does not apply to taxes on licenses, whose values are too unequal to be taxed uniformly. Slaughter v. Com., 13 Gratt. 767.

When Residents within Meaning of Revenue Laws.—A foreign corporation, which has a place of business in Virginia where it sells its machines and has paid the required state tax, is a resident merchant in the meaning of the revenue laws of Virginia. Webber v. Com., 33 Gratt. 898.

Agencies of the Federal Government.

State May Tax Their Property but Not the Instrumentalities of the Government in Their Possession.—The cases recognize a distinction between taxation of the property belonging to a private corporation employed by the government, and taxation of the instrumentalities or means of the government in the possession of such corporation. The state may tax a banking institution; but it cannot tax the currency or the government's bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though not the contract. Western Union Telegraph Co. v. City of Richmond, 26 Gratt. 2.

Provided Congress Has Not Exempted Them from State Taxation.—Corporations, which derive their existence and exercise their franchises under authority of state laws, but are employed by the national government for certain duties and services, may be exempted by Congress from any state taxation which will really prevent or impede such services, yet in the absence of legislation by Congress to indicate that such exemption is deemed essential to the performance of governmental services, it cannot be claimed on the mere ground that the corporation is employed as an agency of

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the government. And the tax may be either upon the property or business of the corporation. Western Union Tel. Co. v. City of Richmond, 26 Gratt. 2.

Manufacturing a Patented Article Gives No Exemption.—The fact that a foreign corporation is manufacturing a patented article does not entitle it to sell them in Virginia without complying with the requirements of the state revenue laws. Webber v. Com., 33 Gratt. 898.

D. EFFECT OF WAR ON POWERS OF FOREIGN CORPORATIONS.—A corporation chartered under the laws of Virginia before the late civil war and having its office and place of business, its officers and directory in the city of Richmond, if not *actually* dissolved, at least was, so far as to suspend its power to make assessments on property outside the jurisdiction of the Confederate government during the war, as being against the policy of the law. Mut., etc., Soc. of Va. v. Board, 4 W. Va. 343. See also, Hall v. Bank of Va., 14 W. Va. 484.

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778 *Burner v. The Commonwealth.

(Absent, ALLEN, P.)

January Term, 1856, Richmond.

1. **Indictment against Ordinary Keeper—Sufficiency of.***—An indictment which charges that the defendant, on a day and time specified, kept an ordinary without obtaining a license to do so, is sufficient, without setting out the facts of his furnishing for compensation lodging or diet, &c.
2. **Same—Surplusage.**—Such an indictment, with the addition that he continued to keep the ordinary from the day stated to another subsequent day, is not defective: the *continuando* is mere surplusage.
3. **Same—Case at Bar.**—A person having a license to keep a house of private entertainment cannot be convicted of keeping an unlicensed ordinary by proving the sale by him of spirits to be drunk at the house of private entertainment, the place of sale, in addition to the furnishing for compensation diet, lodging and provender at that place.†

At the September term 1854 of the Circuit court of Shenandoah, Noah J. Burner was indicted for keeping an ordinary at his house in said county without having obtained a license to do so. There was a verdict and judgment for thirty dollars against the defendant: Whereupon he applied to this court for a writ of error, which was allowed. The case is stated by Judge Samuels in his opinion.

J. W. F. Allen, for the appellant.

The Attorney General, for the commonwealth.

SAMUELS, J. An indictment containing two counts, was found against Noah J. Burner, in the Circuit court of Shenandoah county. The first count alleged, "that Noah J. Burner, on the first day of
779 August 1854, at *his house in Powell's Fort in the county aforesaid, did keep an ordinary without obtaining a license to do so, contrary to the form of the statute in such case made and provided," &c. The second count differs from the first only in alleging the keeping of the ordinary to have been on the second day of August 1854, and from that time to the first day of September 1854. A separate demurrer was filed by the plaintiff in error to each count in the indictment, in which the attorney for the commonwealth joined; the plea of not guilty was also filed and issue made up thereon. The Circuit court overruled the demurrer to the first count, and sustained that to the second count. On the trial of the issue upon the first count the jury found the plaintiff guilty and assessed a fine of thirty dollars; and the court rendered a judgment for the fine. In the progress of the trial several exceptions were taken by the plaintiff to several opinions of the court; and the case is brought to this court to correct errors alleged to exist in the record.

The prosecution was had under the several provisions of the statutes, ch. 38, § 4, 9; and ch. 96, § 1 of the Code of Virginia.

It may be doubted whether the difference between the two counts in the indictment be such as to require a different judgment upon the demurrers to them respectively; the continuando in the second count could not have the effect of making the offense charged therein different from that charged in the first count; it should be regarded as mere surplusage, and did not vitiate, if the count would have been good without it. Code, ch. 207, § 11, p. 770. The commonwealth, however, was not prejudiced by the error herein, if it be error, as any conviction which could be had under the second count, may be had as well under the first count.

I was strongly inclined to doubt
780 the sufficiency of *either count. It seemed to me that the specific facts of furnishing, for compensation, lodging or diet to a person boarding in his house, or provender for a horse feeding in his stable or on his land, (except a drove of live stock and persons attending it,) and selling by retail wine or ardent spirits, or a mixture thereof, to be drunk in or at the place of sale, or such of these things as would constitute the keeping an ordinary, should be alleged to have been done by the plaintiff without license; that the facts themselves and not the conclusion of law upon them should have been alleged. A majority of the court, however, is of a different opinion, and hold that the indictment in the language of the statute creating the offense is sufficient, under many decisions of the late General court, and of the English courts. I therefore waive my doubts, and concur in holding that the demurrer to the first count was properly overruled.

Upon the trial of the issue the commonwealth offered evidence tending to prove that the plaintiff, at the time and place al-

*Indictments.—In State v. Charlton, 11 W. Va. 334, it is said: "In indictments it is generally proper and sufficient to describe the offense in the very terms used by the statute for the purpose. Young's Case, 15 Gratt. 666; *Burner's Case, 13 Gratt. 778.*"

See monographic *note* on "Indictments, Informations and Presentments."

†See the opinion of JUDGE SAMUELS for the statute.

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leged in the indictment, had sold spirits to be drunk there; and for compensation had furnished diet for persons and provender for horses without having a license to keep an ordinary. The plaintiff in error gave in evidence a license from the County court of Shenandoah to keep a house of private entertainment at the place and time in the indictment alleged.

Five several instructions from the court to the jury were prayed for by the plaintiff in error. Of these the first, second, third and fourth in substance propound the same proposition of law, to wit, that if the plaintiff had a license to keep a house of private entertainment, he could not be convicted for keeping an unlicensed ordinary, by proving the sale by him of spirits to be drunk at the house of private entertainment, the place of sale, in addition to
781 the furnishing, *for compensation, diet, lodging and provender at that place. These instructions, I think, propound the law correctly.

The statute, Code, ch. 96, § 1, declares who shall be deemed the keeper of an ordinary. To make up this character a person must for compensation furnish either diet or lodging to a person boarding in his house, or provender for a horse feeding in his stable or on his land; and also sell by retail wine or ardent spirits or a mixture thereof, to be drunk in or at the place of sale. The second section of the statute, ch. 96, declares who shall be deemed the keeper of a house of private entertainment. If he for a time not exceeding one month, if within, or not exceeding a week, if without a city or town, furnish for compensation lodging or diet to one boarding in his house, or provender for a horse feeding in his stable or on his land, except as aforesaid, he shall, if he be not the keeper of an ordinary, according to the preceding section, be deemed to keep a house of private entertainment, unless the place of furnishing the same, when without a city or town, be more than eight hundred yards from a public road or highway. Thus it is seen the subject of diet, or lodging or provender are common to both definitions. One or more of these subjects must be united to the sale of wine, &c. to be drunk, &c. to make an ordinary. It is of the essence of an ordinary that they be combined. If, however, a party have a license to furnish diet, lodging and provender as keeper of a house of private entertainment, he cannot be indicted for doing those things, or any of them: he is justified by law. Thus it seems that as to one part of the offense he cannot be found guilty; and the remaining part of the offense, the sale of wine, &c. to be drunk, &c. if proved, will not sustain an indictment for keeping an ordinary; but it will be an offense punishable under
782 § 18, ch. 38 of the *Code. The law makers seemed to have intended to fix a gradation of offenses, and to graduate the punishment accordingly; the sale of wine, &c. without license, to be drunk at the place of, or elsewhere, is punished by a fine of thirty dollars; § 18; that of keeping unlicensed private entertainment by a fine not exceeding fifty dollars; § 9; that of keeping an unlicensed ordinary, which includes the less offense last above mentioned and also the sale of wine, &c. to be drunk, &c. by a fine not less than thirty nor more than one hundred dollars.

I am thus led to the conclusion that if the plaintiff had the license to keep the house of private entertainment, that in going beyond his license and selling wine, &c. to be drunk, &c. he did not incur the guilt of keeping an unlicensed ordinary.

It was said by the attorney general in the argument here, that as the first four instructions moved for by the plaintiff in error were in substance the same, and as the first and third were given as prayed for, the Circuit court was justified in refusing the second and fourth, because they had already been substantially given; and it would be an idle repetition to give them again. If the Circuit court had placed its refusal upon this ground, and had so informed the jury, there would have been no error of which complaint could be made. The court, however, by a simple refusal without more, left the jury to draw the obvious inference that the instructions refused did not state the law correctly; thus putting the jury in a condition to be misled by the rulings of the court. It is against the theory of trial by jury to confide to their sagacity the duty of extracting the law from contradictory rulings of the court.

However the case may stand in regard to any conflict of decisions on the plaintiff's instructions, there can be no doubt that the one given at the instance of
783 *the commonwealth's attorney, is in conflict with those given at the instance of the plaintiff. This instruction propounds the law to be that the furnishing diet, &c. and the sale of wine, &c. without an ordinary license, of themselves make the offense of keeping an unlicensed ordinary; thus denying all effect whatever to the license to keep private entertainment in mitigating the offense: and this although the unlicensed furnishing diet did not take place. This instruction moreover mistakes the law to be that a sale of wine, &c. of itself, without regard to the place at which it is to be drunk, may form part of the offense of keeping an unlicensed ordinary; the statute in terms prescribes that such sale must be made to be drunk at the place of sale, or it does not enter into the definition of an ordinary.

I am of opinion to reverse the judgment, and award a new trial, upon which the Circuit court shall conform to the law as herein declared.

The other judges concurred.

The judgment was as follows:

It seems to the court here, that the plaintiff should not have been convicted of keeping an ordinary without license, without proof of such and so many of the acts as would make him the keeper of an ordinary

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under the statute, Code, ch. 96, § 1. That if he had a license to keep a house of private entertainment at the time and place in the indictment alleged, he was authorized by law to furnish for compensation the diet, lodging and provender, as mentioned in § 2 of the same statute; and as the unlicensed furnishing of these things, or one or more of them, must concur with the unlicensed sale of liquors named in the first section, to complete the offense of keeping an unlicensed ordinary, the plaintiff
784 could not be convicted *thereof, if he had a license to keep a house of private entertainment. Thus it seems to the court here, that the Circuit court erred in refusing to give the second and fourth instructions prayed for by the plaintiff, and that this error is not cured or obviated by the court's giving the first and third instructions, of the same substance as the second and fourth, without informing the jury that the second and fourth instructions were refused for reasons other than error therein.

It further seems to the court here, that the Circuit court erred in giving the instruction moved for by the attorney for the commonweatlh, as well because it is in conflict with the law as herein declared, as because it assumes that the unlicensed sale of liquor, without regard to the place where it is to be drunk, may enter into the offense of keeping an ordinary without license. Without deciding any other question made in the case, it is considered by the court that the judgment aforesaid be reversed and annulled; and it is ordered that the verdict of the jury be set aside, and the cause remanded to the Circuit court of Shenandoah county for a new trial to be had, upon which, if the evidence shall be substantially the same as that on the first trial, and the plaintiff shall again ask for the first, second, third and fourth instructions moved for on the first trial, the court directs that they be given; and that the instruction moved for by the commonwealth's attorney be refused.

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785 *Bishop v. The Commonwealth.

(Absent ALLEN, P.)

January Term, 1856, Richmond.

1. **Presentments—Requisites of.**—A presentment of a grand jury, to be a proper foundation for an information, must contain every matter necessary to render the act imputed to the defendant unlawful; and the supposed offense must be described with at least reasonable certainty.

2. **Gaming—Presentment Must Charge Public Place.***—A presentment for playing at cards must charge that the place at which it occurred was a public place at the time of such playing; the name of the place not of itself importing that it was at all times a public place.

3. **Same—Same—Same.**—A presentment for playing at cards "at or near" a place, is objectionable for uncertainty.

4. **Appellate Practice—Presentment—Motion to Quash.**—Upon a rule to show cause why an information should not be filed, the defendant appears and moves the court to quash the presentment on the ground that it does not charge any offense against him; but the motion is overruled. The information is then filed, and he pleads "not guilty;" and on the trial there is a verdict and judgment against him. Upon a writ of error to the appellate court, he may object to the insufficiency of the presentment.

At the November term 1852 of the Circuit court of Prince George county, the grand jury presented Charles Bishop for playing at cards for money on a Sabbath, at or near Old Shop meeting-house in that county, within the preceding six months, contrary to law. On this presentment there was a summons to Bishop to show cause why an information should not be filed against him. On the return of the summons Bishop appeared by attorney, and objected to the filing of the information, on the ground that the presentment did not charge any offense against him. But the court overruled the objection; and the information was filed; to which
786 Bishop pleaded "not *guilty:" And upon the trial there was a verdict and judgment for the commonwealth. Bishop thereupon moved the court for a new trial, which was refused; and he excepted; and applied to this court for a writ of error, which was allowed.

John Lyon, for the appellant.

The Attorney General, for the commonwealth.

LEE, J. According to the English practice a criminal information at the crown office is only allowed to be filed upon motion and a rule to show cause grounded upon a proper and legal affidavit: and this affidavit should be full and explicit, should disclose all the material facts of the case and contain all matters necessary to criminate the defendant. 5 Bac. Abr. (Bouv. ed.) "Informations," (D) p. 180; 1 Chit. C. L. 857; Arch. C. P. 73, 74. Our act of assembly expressly requires the leave of the court on a rule to show cause; but by our practice a previous presentment by the grand jury

*Gaming—Presentment Must Charge Public Place.—For the proposition that, a presentment (or indictment) for playing at cards must charge that the place at which it occurred was a public place at the time of such playing, the name of the place not of itself importing that it was at all times a public place, the principal case is cited and followed in State v. Brast, 31 W. Va. 383, 7 S. E. Rep. 12.

See in accord, Roberts v. Com., 10 Leigh 686; Hord v. Com., 4 Leigh 674; Windsor v. Com., 4 Leigh 680; Com. v. Feazle, 8 Gratt. 585; Com. v. Vandine, 6 Gratt. 689.

See monographic *note* on "Gaming" appended to Neal v. Com., 22 Gratt. 917; monographic *note* on "Indictments, Informations and Presentments."

In Huff v. Com., 14 Gratt. 648, citing the principal case, it is held, that a presentment for gaming not setting out any offense against the statute may be quashed on motion. See, in accord, Bell v. Com., 8 Gratt. 600.

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often comes in place of the affidavit required by the English rule. Where however it is thus sought to be made the ground of the rule to show cause, it must like the affidavit, contain enough to show that an offiense has been committed. No matter material to render the act imputed to the defendant unlawful can be omitted, and the supposed offense must be described with at least reasonable certainty. If it be defective in these respects, the presentment cannot avail for any legal purpose whatever.

The presentment in this case charges the defendant with playing at cards for money on a Sabbath at or near Old Shop meeting-house in the county of Prince George within six months previous thereto contrary to law: but it does not allege that Old Shop meeting-house was a public place at the time of such playing. It may or may not have been such public place at that
787 *time. The name of the place does not ex vi termini import that it was at all times a public place. Although whilst the public might be assembled there for religious worship or other purpose or whilst so assembling or afterwards dispersing, it might well be a public place within the meaning of the statute, yet at all other times it might be a strictly private place, the playing at which would not be a violation of the law. Thus a matter most material to show that an offense had been committed, was omitted and the presentment was therefore radically defective. Hord's Case, 4 Leigh 674; Roberts' Case, 10 Leigh 686. Nor will the words "contrary to law" supply the omission. These terms in an indictment serve to preclude all legal cause of excuse for the act imputed, but never to enlarge or extend the force and effect of those employed to describe it so as to make the act unlawful when it is not so by the description itself. In Roberts' Case, ubi sup. the charge was for "unlawfully" playing cards at a grocery, yet the presentment was held to be defective.

The presentment is also objectionable for uncertainty. If Old Shop meeting-house were ex vi termini, a public place playing near it would not necessarily be a violation of the statute unless at a place so near that it too was rendered a public place by reason of its proximity. The very place of the playing should therefore be averred to be a public place, and as it is laid in this presentment to have been in the alternative "at or near," it would seem on that account to be uncertain and defective.

That the defendant subsequently upon the filing of the information appeared and pleaded not guilty, upon which a trial was had and a verdict rendered against him will not preclude him from objecting to the presentment now. In Chalmers' Case, 2 Va. Cas. 76, and Wells' Case, Ibid. 333, the right to object to the presentment
788 *on which the information was founded was held to be taken away by such plea and verdict upon the information: but it does not appear that the defendant in either of those cases made the objection at the proper time upon the rule to show cause. In Wells' Case he did not appear at all upon the rule to show cause though duly summoned. In this case the defendant did appear upon the rule and showed for cause that the presentment did not charge any offense against him and moved the court to refuse leave to file an information. His objection was however overruled, the rule made absolute and leave given to file the information. After that all he could do was to defend himself upon the information as best he might.

I think the Circuit court erred in making the rule absolute and giving leave to file the information. And in this view it is rendered unnecessary to decide the question raised upon the facts approved at the trial.

I am of opinion to reverse the judgment set aside the verdict and quash the information, to discharge the rule to show cause and quash the presentment.

The other judges concurred in the opinion of Lee, J.

Judgment reversed, all the proceedings to the presentment set aside, and quashed.

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789 *Commonwealth v. Nax.

(Absent ALLEN, P.)

April Term, 1856, Richmond.

Indictments*—Sale of Goods without License—Case at Bar.—An indictment which charges that the defendant "unlawfully did sell music not manufactured by the seller within the state without having a license therefor according to law," is good, it sufficiently appearing that music is a species of goods, wares and merchandise.

Joseph Nax was presented by the grand jury of the Corporation court of Fredericksburg, for that he "unlawfully did sell music not manufactured by the seller within this state, without having a license therefor according to law." He pleaded "not guilty," and on the trial of the case the jury found him guilty, and assessed his fine at eighty dollars. Nax thereupon moved the court to arrest the verdict, upon the ground that there was no offense charged in the presentment. But the court overruled the motion, and entered up a judgment upon the verdict. He then applied to the judge of the Circuit court of Spotsylvania for a writ of error, which was awarded; and upon the hearing of the case the Circuit court reversed the judgment of the Corporation court and arrested the verdict. Whereupon the attorney general applied to this court for a writ of error, which was allowed.

The Attorney General, for the commonwealth.

Little, for the appellee.

DANIEL, J. In the description of many of the offenses at the common law certain

*See monographic *note* on "Indictments, Informations, and Presentments."

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technical expressions are required to
790 be used; as in indictments for *murder, burglary, mayhem, and other felonies which it is not necessary to enumerate. In such cases no other words, howsoever descriptive of the offense, will be allowed to stand in the indictment as the substitutes for the precise language to which usage and precedent have attached the peculiar and exclusive office of describing the offense. The like nicety and particularity is also required in indictments for offenses under various statutes; and the precedents are numerous in which very slight departures from the terms in which the offenses are described in such statutes, have been held to vitiate the indictments. In the case of United States v. Gooding, 12 Wheat. R. 460, however, Judge Story, in delivering the opinion of the Supreme court, says, that such instances have not resulted in the establishment of any general rule; but that on the contrary, the course has been to leave every class of cases to be decided very much upon its own peculiar circumstances. And in United States v. Bachelder, 2 Gallis. R. 15, the court say that there is no general rule which requires more than that the offense be set forth with substantial accuracy and certainty to a reasonable intendment.

We have also the authority of the case of the King v. Stevens, 5 East's R. 244, for holding, that, whilst every indictment or information ought to contain a complete description of such facts and circumstances as constitute the offense, there is no rule, except in particular cases, where precise technical expressions are required to be used, which compels the courts, in construing the language of indictments, to reject the aid of such references to the context and the relation and dependence of the words, as are properly resorted to and found useful in ascertaining the true aim and meaning of other pleadings; and that, where a word, used in an indictment, is capable of different meanings, if it is sufficiently
791 marked by the context or *other means in what sense the party framing the charge intended to use it, it does not clash with the rules of construction applied to criminal proceedings, to construe it in that sense.

A proper application of these views to the case before us will, I think, result in showing the correctness of the judgment of the Corporation court, and the consequent error in that of the Circuit court.

The brief charge in the indictment is, that the defendant "unlawfully did sell music not manufactured by the seller within this state, without having a license therefor according to law."

There is no law which forbids the sale of music in terms. But by the 30th section of the act of 1852-3, concerning the assessment and collection of the public revenue, it is declared that no person shall, without obtaining a license as a merchant, sell at any store or place in this state any goods, wares, merchandise or other articles, except such as may have been manufactured by the seller in this state, or been produced or raised by him, &c.: And it is under this law that the indictment has been preferred, and the verdict and judgment had against the defendant.

In this state of things, the enquiries, which would seem to present themselves, are: Is "music" in any well established sense, embraced by the words "goods, wares or merchandise." And if so, does it appear with certainty that the indictment speaks of it in that sense? If so then the indictment in effect charges the sale of goods, wares or merchandise, and specifies the particular class or kind in the sale of which the statute has been violated. That there is such an acceptation of the word, is a matter of public knowledge and general information. The word is used in that sense in the daily advertisements, and the kind of merchandise it imports is to be found exhibited for sale in the store of nearly every bookseller or stationer
792 *in the country. It is said, however, that the word is ambiguous; that it has several other meanings; and that without an averment in the indictment of its being goods, wares or merchandise, the sense in which the word was used is not fixed with certainty; that one learned in the science, or skilled in the arts of a musician may impart instructions therein, or make exhibition of his skill, or grant the license to perform his musical works or compositions, for a price, and that in each of these senses he may be said to "sell music"; and that for none of these acts could he be held amenable as for a violation of the statute; and that, consequently, though the defendant were to admit the truth of every allegation in the indictment, (as he does in the motion to arrest the judgment,) he would not as a legal necessity admit that he had done an illegal act.

The obvious answer to this argument of the defendant's counsel is, that in none of the instances supposed by him, is there a sale in the sense in which that word is most usually received; which is, to indicate the exchange of some material article of property for money; and that the words in the indictment, "not manufactured by the seller within the state," do not admit of any other than the most awkward connection with the word "music" in any of the senses in which the counsel supposes it legally possible it may have been used; whilst they are very proper to be used in reference to "goods, wares and merchandise."

It is true that the phrase, "not manufactured by the seller within this state," is not used in the indictment for the purpose of explaining the preceding portion of the charge. Its special office is that of setting forth a further distinct element of the offense. If, however, from its nature and position, it necessarily reflects on an ambiguous word, the sense in which the
793 *latter must have been used, I know of no rule which constrains us to reject the explanation, and to refuse to

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accept the word in the sense which will give force and validity to the indictment.

If the acceptation of the word "music," as importing a kind or class of goods, wares and merchandise, were not a matter of common understanding, it might have been necessary to aver in the indictment that it was goods, wares and merchandise, or to have given some such description of its properties as would necessarily show that to be the fact. But as such an application of the word is well understood, the law does not recognize the necessity of such averment or description, either to certify the court that the indictment contains a criminal charge, or to notify the defendant of its precise nature. The necessity of such an averment is not only disowned by the general principles to be deduced from the cases already cited, but is expressly denied by a decision of the Supreme court of Mississippi in a case very similar in its features to the one under consideration. I refer to the case of The State of Mississippi v. Borroum, 23 Miss. R. 477, in which the indictment was for buying from a slave "seventy-five pounds of cotton," under an act making it a misdemeanor to buy from a slave without the permission of his master, &c. any corn, fodder, hay, meal, &c. or "other produce or commodity." Cotton is not one of the commodities enumerated in the statute, and the indictment did not contain any averment that cotton was "a product or commodity." Yet the indictment was held sufficient.

The obvious reasons on which that decision was founded, apply with equal force here. The court is presumed to know the sense or senses in which a word is ordinarily used, and is not bound, when met by an ambiguous word in an indictment, to reject that meaning which is made obvious
794 by the context, and to contend *for some other use of the word that every man of ordinary information in the community, untrammeled by rules of construction, would discard as absurd. Neither the court or the defendant could have misunderstood the sense in which the word in question was intended to be used in the indictment.

Under these circumstances, to declare the indictment insufficient would be to revive an unreasonable strictness, and to pay to mere form the scrupulous deference that is shown in some of the early decisions, and is still observed in certain classes of cases before mentioned, but which the courts in modern times have on various occasions properly shown a determination to extend to no case or class of cases in which such observance is not exacted by the strictest analogy.

I think that the judgment of the Circuit court ought to be reversed, and that of the Corporation court affirmed.

The other judges concurred.

The judgment of the Circuit court reversed, and that of the Corporation court affirmed.

795 *Jackson v. The Commonwealth.

April Term, 1856, Richmond.

1. **Order Changing Time of Holding Court—All Justices Present—Effect.**—All the justices of a county being present in court, they make an order changing the months in which the quarterly courts are to be held, and also the day of the month on which the court is to commence. All the justices being present, a notice to them to attend was unnecessary; and the order is valid.*

2. **Indictments—At Least Four Justices Must Be Present—Not Waived by Pleading.**†—A County court at which an indictment is found by a grand jury, must consist of at least four justices, or the indictment is null. And the objection will not be waived by the defendant's pleading to issue, and being tried and found guilty before a court properly constituted, before making the objection.*

At the November term for 1853 of the County court of Lewis county, John G. Jackson was indicted for an assault and battery upon John Flanigan. Upon this indictment process was issued; and at the March term of the court for 1854, he appeared and put in the plea of "not guilty;" on which an issue was made up. At the June term of the court the case was tried and the jury found the defendant guilty, and assessed his fine at thirty dollars; and the court rendered a judgment upon the verdict. And at a subsequent day of the same term Jackson moved the court to arrest the judgment, "because the prosecution was conducted by a court composed of a less number of justices than that which is necessary to constitute a court for the prosecution" of the offense aforesaid. The cause was continued on this motion until the next term; and at the next term the court overruled the motion, and gave judgment against Jackson for the fine of thirty dollars. Whereupon he excepted.

796 *It appeared from an inspection of the record, that at the terms when the indictment was found by the grand jury, and when the defendant filed his plea, and the issue was made up thereon, the court was composed of but three justices; and the same was the case when the motion in arrest of judgment was overruled: But at the term when the cause was tried, and whilst the trial was progressing, there were more than four justices on the bench.

At the same term of the court, and on the 10th of August, Jackson moved the court to set aside the judgment rendered in the cause on the 8th day of the month, because by law the first day of the term was fixed to commence on the second Monday of the month, which in that month was the 14th day, and had not then arrived. But it appeared that at the June term 1854 the County court, without having been previously summoned for that purpose, but all the justices being present, entered an order,

*See the opinion of JUDGE LEE for the statutes.

†See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

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directing that there should be four terms of the court for the trial of causes by juries, to wit, March, June, August and November; and that the said terms in the months of March and August should be held on the first Mondays in said months; and the court therefore overruled the motion, and refused to set aside the judgment: And the defendant again excepted.

Jackson applied to the judge of the Circuit court for a writ of error to the judgment of the County court, which was allowed. But when the cause came on to be heard the Circuit court affirmed the judgment: Whereupon Jackson obtained a writ of error to this court.

Bennett, for the appellant.

The Attorney General, for the commonwealth.

LEE, J. By the Code of Virginia
797 (ch. 157, § 2, *p. 616,) authority is given to the County courts to change from time to time, the days for the commencement of the terms thereof, all the justices of the county having been first summoned and a majority concurring in such change. The object of the provision requiring the summons is to give notice of the proposed change and to enable all the justices to be present and give their voices if they will, upon the question. If then without having been previously summoned, all the justices shall yet be actually present at the time a change is proposed and thus have the opportunity of being heard, and the requisite majority shall be found to concur in the measure, the object and spirit of the law will be fully satisfied and all questions as to the regularity or the fact of previous summons must be at an end and it will be in vain afterwards to say that the order is without effect because the justices had not been formally summoned previously to attend the court for the purpose of considering the subject. I think therefore there is nothing in the objection that the term at which the judgment occurred commenced upon a day not authorized by the law.

The other objection going to the constitution of the court at which the indictment against the plaintiff in error was found by the grand jury and of that at which the plea was entered is one of a much more serious and difficult character.

The constitution provides (art. 6, § 25,) that there shall be in each county of the commonwealth a county court which shall be held monthly by not less than three nor more than five justices except where the law shall require the presence of a greater number. By § 22 of the act passed April 22, 1852 (Sess. Acts p. 65,) it is provided that there shall be in each county in four of the months of every year, a quarterly term of every county court, and in
798 every other month a *monthly term thereof, to be held at the times and with the jurisdiction, so far as consistent with the constitution and that act, then prescribed by law. The section then proceeds to declare that the number of justices necessary to constitute a court of oyer and terminer a court of examination and courts in all criminal prosecutions shall be the same as then prescribed by law: in all civil cases and in matters of county police and in all other cases, except criminal, the presiding justice and two other justices, or in the absence of the presiding justice any three justices, to constitute a court, except where more than four are necessary under the laws then in force. By the Code (ch. 212, § 2, p. 877,) a court of oyer and terminer must consist of five justices at the least, and an examining court (ch. 205, § 4, p. 765,) of the same number: and by the general county court law of the Code (ch. 157, § 1, p. 615,) it is declared that the County court in each county shall be held by the justices of the county or any four or more of them, except where otherwise expressly provided. So that at the passage of the act of April 22, 1852, the number of justices necessary to constitute a court in a criminal prosecution other than cases for a court of oyer and terminer or of examination was four at the least. Does an indictment for an assault and battery or other misdemeanor constitute a criminal prosecution? Notwithstanding in some of the sections of the Code the term "criminal cases" may seem to be used in the sense of felonies only, in this there can be no doubt it is used to embrace both felonies and misdemeanors. The section itself refers to and recognizes the usual classification of causes inter partes, into civil and criminal cases, the latter of which embraces all prosecutions for offenses against the laws of whatever grade. And in the Code it will be seen, chapter 199 which is entitled "General provisions concerning crimes and punishments"
799 embraces alike misdemeanors *and felonies. The same is to be said of chapter 201, entitled "For preventing the commission of crimes" and of chapter 211, entitled "General provisions as to proceedings in criminal cases." Indeed throughout the body of the criminal code commencing with title 54, headed "Crimes and punishments" misdemeanors and felonies are alike contemplated as the subjects of criminal proceedings and by ch. 199, § 1, all offenses against the laws are declared to be the former or the latter. In § 22 the term "criminal prosecution" is expressly used in a sense embracing all offenses of both classes. Its language is "In a criminal prosecution other than for perjury, &c.;" yet perjury with a single exception (when committed on a trial for felony) is but a misdemeanor. By § 37 of ch. 208, provision is made for the adjournment of questions of law in "criminal case" to the General court; and it was never questioned that it embraced misdemeanors as well as felonies. And in ch. 201, § 11, provision is made where there is a conviction in a "criminal case" before a justice of the peace, which must be of course for a misdemeanor. Other sections will be found of similar import. And it will be observed this § 22

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speaks of courts of oyer and terminer, courts of examination and courts in all criminal prosecutions: and as the county courts have no jurisdiction of felonies except as courts of oyer and terminer and of examination, to satisfy the terms employed, misdemeanors must be deemed to be intended.

It follows then that in a prosecution for a misdemeanor, the court to be legally constituted must consist of four justices at the least.

Nor is there any thing to restrict the necessity of the presence of four justices to the final trial of the cause. In many misdemeanors the court upon conviction, may, and in some, must impose corporal punishment by confinement in the county
800 jail and in *others by stripes. In certain cases still further penalties are incurred. Such being the grave character of many misdemeanors, and moreover as no writ of error lies for the commonwealth except in prosecutions for breach of the revenue laws, it may be supposed it was the purpose and policy of the law to secure in all criminal prosecutions the collective intelligence and information of four justices at least as affording a surer guaranty of a correct decision and the attainment of the ends of justice than that of a less number. And this reason would apply with equal force to other stages of the prosecution as to the final trial. For a case might be as effectually disposed of at a previous stage upon a motion to quash or a demurrer, or the tender of a plea, as at the trial before a jury. So upon the impaneling of a grand jury and in directing the subjects and the mode of its investigations and in receiving its presentments, important questions might arise upon which a party not yet charged with an offense would not be entitled to be heard. The reason and spirit of the law therefore would seem to require the presence of at least four justices when a grand jury is impaneled and the prosecution is commenced as well as upon the final trial of the case, whilst there is certainly nothing in its terms to render a less number sufficient. The language is "courts in all criminal prosecutions shall be &c." not "courts for the trial of criminal cases."

I think therefore the objection that the record upon its face shows there were but three justices present when a grand jury was impaneled and when an indictment was found, is fatal under the law as it stands, and that the only remaining question is whether it has been waived in this case or the benefit of it otherwise lost to the party by his pleading to issue and failing to raise it until after a verdict against him.

If the objection but imported some
801 imperfection or defect of *form in the indictment, or went merely to the qualification of the grand jurors or any one of them or any other matter of abatement it would be of course too late after verdict to attempt to raise it. But it is not of this character. It goes to the constitution of the court in which the prosecution was commenced by the finding of the indictment and in effect to the very fact of there being any indictment against the party. For if the court as constituted had no authority to impanel a grand jury and no jurisdiction either to commence or determine a prosecution by trial, the indictment must be of necessity a nullity. From its nature therefore it is an objection which is not waived by any pleading and which is not cured by any thing that afterwards transpired. In Cawood's Case, 2 Va. Cas. 527, the clerk had omitted to record the fact of the finding of the indictment, which had however in fact been endorsed by the foreman "a true bill" and presented in court with other bills. In the record of the proceedings had it was thus recited: "Benjamin Cawood who stands indicted for murder, was led to the bar in custody &c. and thereof arraigned and pleaded not guilty to the indictment &c." Another order spoke of the prisoner as "accused of murder" and made provision for a jury "for the trial" of the prisoner. An ineffectual trial was had and in the entry of the same the prisoner was spoken of again as standing indicted for murder. The jury having failed to agree, the prisoner petitioned for a change of venue which was granted. Yet held that the omission to record the finding of the indictment was fatal and could not be supplied by the paper itself nor the endorsement thereon nor by the subsequent recitals; and that the prisoner's plea of not guilty or the subsequent proceedings did not cure the defect. I think the reason for not holding the defect to be cured in the present case is at least as strong as in the case just
802 cited; and *regarding the objection as going to the foundation of the whole proceeding, the authority and jurisdiction of the court itself in which the prosecution was commenced, I think it was not and could not be cured by the subsequent proceedings and might be taken advantage of at any time either before verdict or after.

I am of opinion to reverse the judgment of the Circuit court and that of the County court and to render judgment for the plaintiff in error.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

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803 *Richards v. The Commonwealth.

October Term, 1856, Richmond.

Larceny—Case at Bar.—A person is staying at a tavern, and the landlord offers him a gun to go and shoot robins, which he takes, and after shooting once or twice near the house, goes off with the gun and disposes of it. HELD: Under the circumstances of the case, he is guilty of larceny.

William Richards was indicted in the Circuit court of Henrico county at its April term 1856, for larceny in stealing a gun, a bird bag and a powder flask, the property

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of Stephen B. Sweeney. At the same term of the court he was tried and convicted, and the jury fixed the term of his imprisonment in the penitentiary at one year. The prisoner then moved the court for a new trial; but the motion was overruled, and sentence was passed upon him; and he excepted. The facts certified by the court are as follows:

It was proved that on the morning of the 16th day of March 1856, the prisoner was discharged from the penitentiary, and that he arrived at the tavern or public house of Stephen B. Sweeney, about twelve miles below Richmond, on the evening of that day, and took up lodgings here, and spent the night. That shortly after the prisoner arrived at said place, two other men came in, and after some conversation, determined to stay all night. These men, upon being interrogated during their stay, refused to give their names. The one of them, whose name is Livingston, was seen in custody on a criminal charge before the mayor of Richmond on the morning of the day this cause was tried. They and the prisoner were seen during their stay at Sweeney's to have several conversations together. The
804 prisoner said his name was *Blitz, and that he as the son of a man of that name who formerly resided at City Point, and was known to Sweeney. He stated to Sweeney that he and his father were still in business largely at City Point. That their store had been burned, and that they had set up in another place. That they were in the business of making barrels, tubs, &c. and that he the prisoner was on the look out for a contract for barrel timber. He was referred by Sweeney to James W. Binford, who was in that business in his neighborhood. He further stated that he had staid at Dr. Lyne's in Henrico the night before, and his mare had got away from him, and he supposed had crossed the river on her way home. All of these statements were proved to be false. The two other men went away the next morning, stating that they were going to Dr. Mettert's, who lived near Binford. The prisoner declined going with them, but said he would remain about during the day, and see what he could do. That Sweeney not liking to leave him by himself at his house during the day, asked him to walk with him to his field, which he did, and remained with him until Sweeney returned to dinner. After dinner Sweeney's son had been shooting some birds within a short distance of the house, and on his return to the house with his father's gun, Sweeney asked the prisoner if he was fond of shooting. Prisoner said yes, and then Sweeney offered prisoner his gun to shoot some robins. Prisoner took the gun and a bird bag and powder flask, and went over the road, and Sweeney heard him shoot once or twice before he Sweeney left the house on his return to the field. Prisoner did not solicit the use of the gun, but it was tendered by Sweeney of his own accord. This was about two o'clock on Monday, the day after prisoner came to Sweeney's. Prisoner did not return to the house with the gun, and in the evening Sweeney made pursuit and enquiries after him.

805 *It was further proved that prisoner was in Chesterfield at Shell's store about ten miles from Sweeney's on Tuesday, and traded off the gun with a young man named Shell for another gun and two dollars and fifty cents boot, and gave the shot bag and powder flask to the person to whom he traded the gun. He also sold Sweeney's pointer dog to said Shell for two dollars and fifty cents; which dog Sweeney missed after he had ascertained that the prisoner had left. He then sold the gun he had traded for to the father of said Shell, and left Shell's store soon after, and was seen going in a fast walk towards the woods. The gun and dog were advertised by Sweeney, who offered a reward of twenty-five dollars for them, and were received by him, and the reward paid some day or two after.

Prisoner was arrested a few days after, above Richmond.

While at Shell's store he stated that his name was Patterson, and that he was the son of Dr. Patterson of Manchester. It was proved that the articles specified in the indictment and disposed of by the prisoner were worth twenty dollars. The articles were proved to be the property of Sweeney. Prisoner went from Sweeney's without paying his bill. And these were all the material facts proved.

The prisoner applied to this court for a writ of error, which was allowed.

McRae, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, J., delivered the opinion of the court:

This case presents for decision the question, whether the goods, of the larceny of which the prisoner was convicted, were taken by him against the will or without the consent of the owner.

Larceny, at common law, is the
806 taking and carrying *away of the personal goods of another, against his will or without his consent, and with a felonious intent. There must be a taking or severance of the goods from the possession of the owner on the ground that larceny includes a trespass. If there be no trespass in taking goods, there can be no larceny in carrying them away. 2 Russ. 95; 1 Hawk. c. 33, § 2. But the possession of the owner may be actual or constructive. If it appear that although there is a delivery by the owner, yet the legal possession still remains exclusively in him, larceny may be committed exactly as if no such delivery had been made. Thus, if a person to whom goods are delivered has the bare charge, custody or use of them, and the legal possession remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use. 2 Russ. 106; 1 Hale 506; 1 Hawk. c. 33, § 6;

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Arch. Crim. Pl. edition of 1846, p. 192. The most familiar application of the rule is, to the case of servants, whose possession of their master's goods by his delivery or permission is the possession of the master himself; 2 Russ. 197; 2 East P. C. 564, 682, 683; Walker v. Commonwealth, 8 Leigh 743; and to the case of a guest at an inn, who may be guilty of larceny in taking a piece of plate or other thing set before him for his accommodation; for he hath not the possession delivered to him, but merely the use. 2 Russ. 107; Arch. 192; 1 Hale 506; 1 Hawk. c. 33, § 1. "The distinction, (says Russell,) between a bare charge or special use of goods, and a general bailment of them, seems to be sufficiently intelligible; and it seems consistent with principle, that in the former case the legal possession should be considered as remaining in the owner: and in the latter as having passed to the bailee; and that therefore in the former case larceny may be committed of them by the person to whom they have been delivered, and that in the
807 *latter it may not, unless there be a determination of the privity of contract: but it is in the application of this doctrine to particular cases that the distinctions seem to become obscure." 2 Russ. 108. How does the doctrine apply to the facts of this case? Were the goods delivered to the prisoner on a bailment; or merely for special use, and without changing the legal possession of the owner?

If the prisoner had fraudulently converted to his own use a piece of plate, or other thing delivered to him for his accommodation as a guest in the tavern of the prosecutor, we have seen that he would have been guilty of larceny. If he had so converted to his own use a book handed to him to read for his amusement while he continued to be such guest, there can be no doubt he would have been guilty of larceny. Why does not the same principle apply to this case, in which the prisoner fraudulently converted to his own use a gun delivered to him "to shoot some robins" for his amusement while he continued to be such guest? Is it because the gun was not to be used in the house? The rule under consideration does not require the property to be used in the house of the owner. Suppose the prosecutor had accompanied the prisoner when he went over the road to shoot the robins, and the gun had been converted in the presence of the prosecutor: Or, suppose the gun had been handed to the prisoner to shoot some robins in full view of the house, and that, instead of shooting them, he had walked off with the gun and converted it to his own use: Would he not, in either case, have been guilty of larceny? But the rule does not require that the property should be converted in the presence or the sight of the owner. Nor indeed does it require that the relation of master and servant, or landlord and guest, should exist between the owner of the property and the person converting it. No writer has
808 *laid down the rule under any such restriction. As laid down by all the writers, it only requires that the person converting the property should be entitled merely to a charge or special use, and not the legal possession of it. In the familiar cases of master and servant, and landlord and guest, the rule generally, if not always, applies; because generally, if not always, a servant or guest has a mere charge or special use of the property of the master or landlord. These cases are therefore stated by writers as instances of the application of the rule; but as instances only, and not as limitations or restrictions of the rule. The question in every case is, Whether, under all the circumstances, a bare charge or special use, or a legal possession under a bailment exists? There is rarely any difficulty in solving the question when the relation of master and servant, or landlord and guest subsists between the parties at the time of the conversion, or where the property is delivered to be used in the presence of the owner. In cases of this kind, the property being resumable by the owner every moment, his dominion over it is as perfect as before; and the person to whom it is delivered has at most no more than a bare limited use or charge and not the legal possession of it. 2 Russ. 108. The same principle seems to be generally applicable wherever property, whether it be a gun or any thing else, held by a person, whether he be an inn keeper or not, for the use and accommodation of his family, is delivered to a member or visitor of the family to be temporarily used by him as such, whether in the presence of the owner or not.

A difficulty sometimes arises in the application of the rule to other cases. Generally, though not always, where property is delivered to a person who is not a servant or guest of the owner, or a member or
visitor of his family, and to be used
809 elsewhere than in the *owner's presence, a bailment, and not a mere charge or special use, is created. There is no difficulty, we think, in the application of the rule to this case. The relation of landlord and guest subsisted between the prosecutor and prisoner, who were strangers to each other at the time of the conversion. The relation was expected to be of very short duration, and to terminate during the same evening, or at least the next morning. The occasion for delivering the gun was very sudden; and was induced by the return of the prosecutor's son from shooting some birds within a short distance of the house. The object of it was to afford the prisoner some amusement during the evening while the prosecutor was absent in his field. It was not intended that the use should continue longer than the prisoner continued to be a guest; nor expected that the gun would be carried far from the house, and perhaps not off the land of the prosecutor. It was offered to the prisoner "to shoot some robins;" and he took the gun, bird bag and powder flask, and went over the road; and prosecutor heard him shoot once or twice before he left the house on his

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return to the field. Under these circumstances, we think the prisoner had a mere special use of the property, and not a legal possession of it; that the owner's legal possession was unbroken by such special use; that the property was in his legal possession when it was fraudulently carried away by the prisoner; and that the prisoner took it against the will or without the consent of the owner. He was therefore properly convicted of larceny.

Being of opinion that the delivery of the property by the prosecutor to the prisoner did not amount to a bailment, it is of course unnecessary to consider whether the evidence was sufficient to warrant the jury in finding that the felonious intent existed at the time of such delivery; or whether,
810 if such delivery *had amounted to a bailment, and the felonious intent had not existed at the time of the delivery, but had arisen afterwards, the prisoner would have been guilty of larceny under the Code, ch. 192, § 21, p. 730.

We are of opinion that there is no error in the judgment, and that it be affirmed.

DANIEL, J. The certificate of facts shows that the delivery of the property, of the theft whereof the prisoner has been convicted, was made to him by the owner. In order, therefore, to vindicate the judgment of the Circuit court, it must, I apprehend, be shown, either that the delivery was fraudulently procured by the prisoner with a felonious intent, at the time, to convert the property to his own use, or that the purposes and uses with and for which the delivery was made, were of a nature so restricted and special as to leave the legal possession of the property, notwithstanding the delivery, still exclusively in the owner, and to place the prisoner, on his subsequent conversion of the property, in the same predicament as if he had then acquired the possession, against the consent of the owner, and with a felonious design.

It must be conceded that the conduct of the prisoner is well calculated to produce the impression that he came to Sweeney's with some bad design. It does not seem uncharitable to found, on the various false statements which he made to Sweeney about himself, his business, his plans, and his relationship and connexion with others, and his subsequent conduct in the conversion of the property of Sweeney, the suspicion that he was on the look-out for a favorable opportunity to practice some fraud on Sweeney, or perhaps to perpetrate a larceny of some of his goods. It must, however, I think, be also conceded that the conduct of the prisoner, in making these false statements, is not irreconcilable with the idea that he designed and
811 *wished thereby merely to produce upon Sweeney's mind favorable impressions as to his character and standing, without any purpose of ulterior fraud or wrong to him or others. It is obvious that the testimony does not disclose the resort to any trick, device, stratagem or artifice by the prisoner, which from its very nature held out an immediate inducement or motive to Sweeney to lend the gun, or indeed to trust the prisoner with the possession of any of his goods. Indeed, it does not appear that the prisoner gave any intimation, by word or deed, that he desired the use of the gun. He was the mere recipient of an unsolicited act of courtesy or kindness gratuitously proffered by the owner of the property. And unless it can be maintained that every man who resorts to falsehood for the purpose of creating or maintaining with another a character for respectability, trustworthiness or responsibility, may be treated as a thief when he converts to his own use property which may have been entrusted to him on the faith of such character, I do not see how we can hold that the delivery of the property was in this case procured by fraud. The conduct of the prisoner preceding the delivery of the property is reconcilable with too many hypotheses—the pointings of his falsehoods seem to me too indeterminate and vague—the delivery of the property appears too remotely connected with the means supposed to have been used by him to effect it—to justify us in deducing the loan of the gun or license to use it as the legal consequence of the prisoner's fraud.

The verdict of the jury, it is true, especially in respect to what it must be taken to say relative to the prisoner's motives and designs, is entitled to great weight. Still, after allowing to the verdict the fullest weight authorized by the practice now prevailing in this court, I have been unable to discover, in the certificate
812 *of facts, any sufficient warrant for the prisoner's conviction, so far as it rests on the first ground here taken in its support.

Can it be sustained on the second ground? There can, I apprehend, be no doubt that when the delivery of goods is fairly obtained on hire or loan, no subsequent wrongful conversion of them pending the contract will amount to larceny.

There are, it is true, many cases in the English courts holding that when the purpose of the hiring or loan for which the delivery was made had ended, felony might be committed by a conversion of the goods. This doctrine, so far as it could be invoked here, was, however, fully considered by the judges in the case of Rex v. Banks, 1 Russ. & Ry. Cr. Cases 441, and decided to be wrong.

It appeared that the prisoner had borrowed a horse for the purpose, as he said, of carrying a child to a surgeon. Whether he carried the child thither did not appear; but the day following, after the purpose for which he borrowed the horse was over, he took the horse in a different direction, and sold it. The jury (it is stated) thought the prisoner had no felonious intention when he took the horse; but as it was borrowed for a special purpose, and that purpose was over, when the prisoner took the horse to the place where he sold it, the judge presid-

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ing at the trial submitted it to the consideration of the judges whether the subsequent disposing of the horse, when the purpose for which it was borrowed was no longer in view, did not in law include in it a felonious taking. Upon consideration, the judges were of opinion that the doctrine on the subject asserted in previous cases was not correct. They held that if the prisoner had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it did not
813 *constitute a new felonious taking, or make him guilty of felony; and that consequently the conviction could not be supported.

I have seen no subsequent decision, in which the authority of this case has been questioned: And in the 2d vol. of Russell on Crimes, p. 57, the author, after citing the case, declares upon the force of it, that it is now settled, that when the owner parts with the possession of goods for a special purpose, and the bailee, when that purpose is executed, neglects to return, and afterwards disposes of them, if such bailee had not a felonious intention when he originally took the goods, a subsequent withholding and disposing of them will not constitute a new felonious taking, nor make him guilty of felony.

So again, at page 21 of his second volume, the author says that there were decisions to the effect that when the delivery of goods is made for a certain special and particular purpose, the possession is still supposed to reside unparted with in the first proprietor. And that if a watchmaker steal a watch delivered to him to clean; or if a person steal goods in a chest delivered to him with the key for safe custody; or clothes delivered for the purpose of being washed: In all these instances he says the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony. But (he adds) unless in these cases the privity of contract under which the goods were delivered, appeared by some means to have been determined, it seems difficult to distinguish them from the cases of a goldsmith to whom plate is delivered to work or to weigh; a tailor to whom cloth is delivered that he may make clothes with it; and a friend who is entrusted with property to keep for the owner's use; in which cases an embezzlement or conversion of the goods by the party to whom they are
814 delivered, has *been said not to amount to felony. In these latter cases, (he continues,) as well as in the former, the delivery of the goods is made only for a special purpose; yet it seems that the possession of them has not been considered as remaining with the owner, but as having passed to the party by lawful delivery without fraud, and therefore not the subject of subsequent felonious taking.

It is argued here, however, that as the prisoner was the guest of Sweeney at the time when he acquired possession of the gun, though he took it not only by the consent but at the instance of Sweeney, he does not stand on the same footing as if no such relation between the parties existed. It is argued that, because of such relation, and the character of the license given to him, he is to be treated as having the bare custody of the gun, and that the exclusive legal possession must still, notwithstanding such custody, be held to have remained with Sweeney.

As the main stress of the effort to sustain the conviction was laid on this ground, I have made it the subject of the fullest examination and consideration in my power. But I have been unable to discover in the authorities to which I have had access, any sufficient warrant for such distinction. It is true, in Hale's Pleas of the Crown, vol. 1, p. 505, it is said that he that hath the care of another's goods hath not the possession of them, and therefore may by his felonious embezzling of them be guilty of felony; as the butler that hath the charge of the master's plate, the shepherd that hath the charge of his master's sheep. The like law for him that takes a piece of plate set before him to drink in a tavern, &c. for he hath only a liberty to use, not a possession by delivery.

So in East's Crown Law, vol. 2, p. 682, after citing instances in which the delivery had been held to confer the bare charge or custody, as distinguished from
815 *the possession, the author says, the same rule applies to him who has a bare special use of goods; as in the case of a guest in the owner's house: for none of these persons have properly speaking the possession. The proposition is stated in like terms in other elementary works.

I can perceive nothing in these declarations and illustrations of general principles, from which to infer that there is any thing in the relation between a transient guest and the inn keeper, with whom he is staying, which places the guest on a footing of criminal responsibility, in respect to the goods of the inn keeper, different from that which would be occupied by any other person to whom goods might be delivered for a momentary purpose to be accomplished in the house, or in the presence of the owner. Thus I apprehend, in the case of the piece of plate, if instead of being placed before the guest to drink, it were handed to a mere stranger to admire its style or workmanship, and then hand it back to the owner, the carrying it away by the stranger with a felonious intent would be as clearly a larceny as if the same act were done by the guest. So I suppose if an artisan or mechanic should go into a room of an inn, by the direction or permission of the owner to repair the furniture, and he should avail himself of the opportunity feloniously to carry away the furniture, the measure of his guilt would be the same with that of the guest who should wrongfully convert any article of the landlord's furniture put in his room for his temporary use. And so again, in the familiar case (so often mentioned in the books) of one

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invited to try the paces of a horse in the presence of the owner, and going off with the horse, I apprehend that it would make no difference whether the wrongdoer were the guest of the owner or a mere stranger. In either case, there would be a larceny of the horse.

816 *The true reason, I apprehend, why the guest, in the cases just mentioned, would be held guilty of larceny, is drawn not from the nature of any relation between him and the inn keeper, but from the consideration that the property used by him is expected to remain in the house or presence of the owner, and so within his constant and immediate control. This will, I think, be fully seen by a further reference to the paragraph in East, from which the citation, in respect to the wrongful conversion by a guest in the owner's house, has been made. So (in the very next sentence he proceeds) if a weaver or silk throwster deliver yarn or silk to be wrought by journeymen in his house, and they carry it away with intent to steal it, it is felony; for the entire property remains then only in the owner, and the possession of the workman is the possession of the owner. But if the yarn had been delivered to a weaver out of the house, and he having the lawful possession, had afterwards embezzled it, this would not be felony; because by the delivery he had a special property and not a bare charge; in the same manner as one who is entrusted with the care of a thing for another to keep. It is worthy of consideration (he continues) whether the above mentioned distinction concerning the legal possession remaining in the owner, after a delivery in fact to another, does not extend to all cases where the thing so delivered for a special purpose is intended to remain in the presence of the owner. For in such case, the owner cannot be said to give any credit to, or to repose any confidence in, the party in whose hands it is so in fact placed; and the thing being intended to be returned to the owner again, and resumable by him every moment, his dominion over it is as perfect as before; and the person to whom it is so delivered has at most no more than a bare limited use or charge, and not the legal possession of it.

817 *This fiction, (he adds,) such as it is, is generally admitted to exist in the case of servants, and even in the case of other persons having a special use of goods in the owner's house: the best reason for which is the presumed presence and superintendence of the owner. And it does not seem more unreasonable to regard goods in the actual presence of the owner, out of his house, as being in his legal possession, though put into another's hands for a particular purpose, than if such goods were delivered to another for the like purpose in the owner's house during his absence.

The same author shows, I think, conclusively, that this fiction of the supposed superintendence and consequent exclusive legal possession, by the owner, of goods entrusted to another for a special use, can have no application (except in the case of servants) when, by the terms of the delivery, the goods are to be used neither in the house nor presence of the owner. For at p. 564, after stating that the rule holds universally in the case of servants whose possession of their master's goods by their delivery or permission is the possession of the master himself, he adds, that supposing the maxim well founded, it leads to an important difference between the case of servants and others: for if there be a delivery of goods by a master to his servant for a particular purpose, and he embezzle them, it amounts to felony, although there be no evidence of a prior felonious intent at the time he received the goods; because even after the delivery to him the goods continued in the legal possession of the master and not of the servant; and therefore the act of converting them fraudulently is in law a tortious taking from the possession of the master. But it is otherwise in the case of a legal delivery to any other than a servant; for then unless such delivery were procured by fraud and the jury find a previous felonious intent to convert the goods, ex-

818 isting at the *time of the delivery, a subsequent conversion is not felony; unless (he further adds) in those cases (which he says will be subsequently pointed out) where the privity of contract is determined. The last expression in the way of exception cannot impair the force of the general proposition asserted by the author, inasmuch as it will be found, on looking to the cases referred to by him in respect to the determination of the privity of contract, that they belong to a class of cases which, so far as they could apply here, have been overruled by the decision in Rex v. Banks, already cited.

There are several English decisions, (some of which were cited at the bar,) in respect to the conversion of cattle by parties employed to drive them to market, which may seem at first view to be in conflict with the general principle asserted by East. But in those cases and in cases of a like kind, where convictions have been sustained, it will be found that the judges (when they have assigned the reasons from their opinion) have generally if not invariably declared that they regarded the accused as having acquired the charge or custody of the property as servants. If, however, some of these cases may still be considered as having established exceptions to the general principle, it cannot, I apprehend, be affirmed of any of them, that they have gone to the extent of placing the possession of one to whom property has been loaned, on the footing of the charge or custody by a servant of his master's goods, or that they assert any doctrine from which to deduce that a transaction, which would otherwise be defined as a bailment, becomes a mere charge, by the consideration that the party to whom the property is delivered, is the visitor or guest of the owner.

But if it were so that the relation in which the prisoner stood to Sweeney

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819 could affect the case, it would, *I apprehend, have still to be shown that the delivery and use of the gun was incidental or accessory to that relation. Of this there is no proof. It does not appear that it was the custom of Sweeney to furnish his guests with guns for their amusement, or that he held out to the public any expectation that he would do so. The transaction is one which might have taken place between Sweeney and any one of his neighbors (not a guest) as naturally as between him and the prisoner. And if it had, could we have hesitated to say that there was a bailment of the gun by loan? The gun was delivered, not that something might be done to it, or with it, for the benefit of the owner, but to be used by the prisoner for his own amusement. There was nothing said from which it can be inferred that it was to be used merely in the presence of Sweeney or within his hearing or call or upon his farm.

The prisoner, without any violation of the terms or spirit of the license given him, might, in pursuit of his game, have gone to any place from which he could return before the expiration of the time when his return might be reasonably expected. And he might thus have lawfully placed himself and the property in his possession during such time entirely beyond the control or supervision of Sweeney. And there is nothing in the record from which we can infer he did not. During such period the dominion of Sweeney over his property was to a certain extent, by his own consent, necessarily suspended by his want of the present power either to resume the possession, or to demand it, and place the prisoner in the position of a wrong-doer on his refusal to return it.

The transaction seems to me, therefore, to have all the features of a loan. As such, it invested the prisoner with a legal possession. In the subsequent conversion of the property he was guilty of no trespass, and consequently of no felony.

820 *It may be that the prisoner's conduct, considered morally, is in little or no degree less deserving of punishment than if he had acquired the possession of the property by fraud or stealth; still I have been unable to see (as the proofs stand) on what established rule of criminal law he can be treated as guilty of larceny. And having as I conceive no warrant to stretch or fashion the law to meet the supposed or real moral exigencies of the case, I cannot concur in a judgment affirming his conviction.

I am of the opinion that the prisoner is entitled to a new trial.

Judgment affirmed, for the reasons stated in the opinion of Moncure, J.

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2. A proceeding for a contempt in disobeying an injunction is not an order in the cause; but is in the nature of a criminal proceeding; and the judgment in such a proceeding can only be reversed by a superior tribunal by writ of error; and not always in that way.
Baltimore & Ohio R. R. Co. *v.* City of Wheeling, 40

3. The court for good cause shown may overrule a motion to dissolve an injunction, and continue it to the hearing, without adjudicating the principles *of the cause; in which case no appeal will lie from the order. Idem, 40

4. Where the principles of the cause are adjudicated by an order an appeal may be refused if the court or judge to whom the petition of appeal is presented, deems it most proper that the cause should be proceeded in further in the court below before an appeal is allowed therein. And if in such case an appeal is allowed it may be dismissed as improvidently awarded.
Idem, 40

5. In a case which is purely an injunction cause, and the parties having had time to prepare their case, and having introduced evidence as to all the facts that it is probable can affect its principles, a motion in vacation to dissolve the injunction as improvidently awarded is overruled, and it is continued to the hearing. This is an adjudication of the principles of the cause to the extent that the injunction had not been improvidently awarded, and that the cause as it then stood ought to be continued; and it is an order which may be appealed from, and is a proper case for an appeal.
Idem, 40

6. A cause is heard upon the report of a commissioner which had not been returned

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for the legal period. The decree being interlocutory, the error should be corrected by application to the court which rendered the decree; and it is not ground for an appeal unless, upon application, that court refuses to correct it.

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A house though it was built for a dwelling-house and had been used as such, and although it was about to be used as such again, yet having been unoccupied for ten months previous, and being unoccupied when it was burned, is not a dwelling-house within the meaning of the statute, Code, ch. 199, § 2, p. 727. Hooker's Case, 763

ASSETS.

1. Land on which there is a deed of trust to secure a debt due, is sold, purchaser retaining the amount of the debt out of the purchase money, to pay it. On his death, the land is the primary fund for the payment of the debt, and his widow is not entitled to have it paid out of the personal estate.

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2. A devises land to each of three sons, and directs that one of them shall pay one-half of his debts, and the other two each one-fourth. By accepting the devises the devisees became personally liable, in respect to the subject devised to them respectively, each for his share of the debts; and the creditors were under no obligation to look to the general estate of A before asserting their claims against the devisees and the subject devised.

Baylor's lessee *v.* Dejarnette, 152

3. One of the sons having become the executor of another, and having executed a bond as executor, and received assets, that other's fourth of the debts was charged upon the real estate of the executor after his death (if not otherwise) by his executorial bond. Idem, 152

4. A deed of trust to secure a debt though not recorded, is after the death of the grantor, valid against all his general creditors.

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5. The act, Code, ch. 131, § 3, p. 545, which declares that all the real estate of the party dying, which he has not subjected by his will to the payment of his debts, shall be assets for the payment of debts in the order in which personal estate is to be applied, does not apply, except subject to the charge, to the real estate on which the debtor has created a bona fide lien, which is good against himself. Idem, 615

6. Testator having subjected his whole estate to the payment of his debts, his general creditors must take the real estate under the charge in the will; and must take it in the plight and condition in which he held it; and it is equitable assets, though the statute would have subjected it to the payment of his debts if there had been no such charge in the will. Idem, 615

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823 to *a suit to set aside a deed of trust under which he claims.

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2. Where the attachment is issued against the effects of the defendant generally, and is levied upon the property of a third person, such third person has no remedy on the attachment bond. Idem, 139

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Jenkins *v.* Liston & als., 535

BALTIMORE AND OHIO R. R. CO.

1. The act of March 6, 1847, Sess. Acts, ch. 99, p. 86, in securing to the city of Wheeling the benefit of the western terminus of the road, does not forbid said company to connect with the Ohio river, or a rail road in the state of Ohio, at any point between the mouth of Grave creek and Wheeling.

Balt. & Ohio R. R. Co. *v.* City of Wheeling, 40

2. A contract between the Baltimore and Ohio R. R. Co. and Wheeling, in which Wheeling undertakes to do certain things specified, and the committee of the company agree to advise the acceptance of the act of March 6, 1847: "It being the intention of the parties, among other things, to secure to Wheeling the practical benefits of the terminus of the road, according to the provisions of said act;" does not restrict the company from connecting with the Ohio river, or a rail road in the state of Ohio,

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at any point between the mouth of Grave creek and Wheeling. Idem, 40

3. The Baltimore and Ohio R. R. company having been subjected by the act of March 6, 1847, to the provisions of the act in relation to rail roads, passed March 13, 1837, so far as the same are properly applicable, under this last act the company has power to make a branch from the line of its road to low water mark on the Ohio river between Grave creek and Wheeling, in order to form a connection with the river, or with a rail road in Ohio, terminating opposite on the other bank of the river. Idem, 40

BANKRUPTS.

1. A decree discharging a bankrupt from his debts, under the act of congress of August 19th, 1841, is conclusive upon all his creditors in all suits which may be brought against him in any court; except where the discharge is impeached for some fraud, or willful concealment by the bankrupt of his property or rights of property, contrary to the provisions of that act.
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2. Creditors who have not proved their debts in the proceeding in bankruptcy, may institute suits to set aside fraudulent conveyances made by their debtor before he petitioned for the benefit of the bankrupt law; and may impeach his discharge in bankruptcy on the ground of fraud or the willful concealment of his property or rights of property, contrary to the provisions of the act of congress; such suits being instituted more than two years after the decree of discharge in bankruptcy. Idem, 15

3. Such suits may be instituted in any court, state or federal, in which, independent of the bankrupt act, a suit may be properly brought against the bankrupt. Idem, 15

4. The limitation of two years after the decree in bankruptcy, or after the cause of suit shall first have accrued, provided in § 8 of the bankrupt act, has relation to proceedings by or against the assignee in bankruptcy; and does not apply to suits by creditors who have not proved their debts, to set aside fraudulent conveyances by the bankrupt. The only effect of this provision is to prevent such a suit until the two years have expired. Idem, 15

5. A creditor of a discharged bankrupt who has not proved his debt in the proceeding in bankruptcy, may, under the act, Code, ch. 179, § 2, p. 677, file his bill to set aside a fraudulent conveyance made by the bankrupt, and to impeach his discharge on the ground of fraud or the willful concealment of his property, without having first recovered a judgment against the bankrupt. Idem, 15

824 *BONDS.

1. The bond authorized by the act, Code, ch. 151, § 8, p. 602, in relation to attachments, is not a general indemnifying bond; but where the attachment issues against the effects of the defendant generally, he alone can sue upon the bond; and where the attachment is against specific property, only the defendant or the owner of the specific property can sue upon the bond.
Davis *v.* Commonwealth for Leon, 139

2. Where the attachment is issued against the effects of the defendant generally, and is levied upon the property of a third person, such third person has no remedy upon the attachment bond. Idem, 139

3. The official bond of a guardian is not invalidated by the omission to recite in it the fact of his appointment as guardian.
Pratt *v.* Wright & als., 175

4. A guardian's bond contains a covenant to indemnify the justices constituting the court at the time it is taken. Although this is not required by the statute, and therefore is not obligatory, it does not avoid the bond. Idem, 175

5. Although the condition in a guardian's bond is not as extensive as the statute requires, yet if it relates to a part of the duty of the guardian, the bond is not void, but binds the obligors to the extent of the condition. Idem, 175

6. There is no solid distinction between bonds and other deeds containing conditions, covenants and grants not malum in se but illegal at the common law, and those containing conditions or grants illegal by express prohibition of statute. In each case the bonds or other deeds are void as to the conditions, covenants or grants that are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is where the statute has avoided the whole instrument to all intents and purposes. Idem, 175

7. A condition of a guardian's bond having been in general use for many years, quære, if the court would not sustain it though it was not in conformity to the statute. Idem, 175

8. The official bond of an executor is made payable to four justices, one of whom was not a member of the court at the time: *held*:

1st. The surety having executed the bond is estopped from pleading that it is not his bond because so executed.

2d. That by the act, Code, ch. 168, § 3, p. 640, the suit may be maintained upon the bond though it is made payable to a justice who was not sitting in the court at the time of its execution.
Franklin's adm'r *v.* P. Depriest, 257

9. In an action on the official bond of an executor against one of his sureties, to recover the amount of a decree against the executor, rendered in favor of the trustee of a woman, the trustee is the proper relator in the action.
Calahan's adm'rs *v.* J. R. Depriest, trustee, 274

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10. Courts of equity will decree interest upon a bond or judgment beyond the penalty, against the principal debtor.
Tazewell's ex'or *v.* Saunders' ex'or & al., 354

11. A conveyance of a pretensed title to land is not void; and the bonds given for the purchase money of the same are valid.
Middleton for Warren's heirs *v.* Arnolds, 489

12. An executor having received assets of his testator, the debts are charged upon his real estate by his official bond.
Baylor's lessee *v.* Dejarnette, 152

13. If the liability of one joint obligor in a bond is defeated on a ground not personal to himself, (as infancy, bankruptcy or death,) the liability of all the obligors is at an end; and therefore one obligor is an incompetent witness for his co-obligor in an action on the bond.
Brown's adm'r *v.* Johnson, 644
Isbell's ex'or *v.* Johnson, 644

14. The statute, 1 Rev. Code, ch. 98, § 3, p. 359, Code, ch. 144, § 13, p. 582, in relation to joint obligations, though it gives an action against the personal representative of a deceased obligor, does not affect the principle, that the defeat of the remedy against one joint obligor upon a ground not personal to himself, defeats it as to all the obligors. Idem, 644

BOUNDARIES.

1. Three or four corners of a large survey are ascertained; but between these ascertained corners the patent calls for several lines and courses. In fixing the boundaries of the land, the lines calling for these ascertained corners must be run thereto, though this may require a variation of both course and distance; but where a corner is called for which is not found, the course and distance called for in the patent must govern; and an average allowance of variation in each course and line called for between the ascertained corners is not to be made.
Clements *v.* Kyles, 468

2. The land in controversy lying in
825 the *western part of a large survey, it is error to instruct the jury that if they are satisfied that certain specified corners of the survey are established, and the courses of the patent between these corners are correctly laid down upon the plat of the survey made in the cause, it is all that is necessary for them to ascertain, in this suit; as it is in that portion of said patent that the survey of the defendants lies, as appears by the plat, and it is only to that portion of said land that they have set up title. Idem, 468

3. A patent of S calls to commence at a certain point admitted to be a corner of M's survey, and to run with his line a certain course and distance to a white oak, corner of C; and thence with C's line a certain course and distance to another corner of C. Following the first call it comes to a white oak corner of M, but not to the corner of C; but to get to C's corner the line must leave the second corner of M at nearly right angles, and run seventy-nine poles, not running on the line of either M or C for this distance. The call for the line of M will, under the circumstances, be considered the correct call; and S's patent will be held to include all the land up to the line of M.
Marlow *v.* Bell's lessee, 527

4. As to the boundaries of counties, see Counties, and
Hamilton *v.* McNeil & als., 389

CAVEATS.

1. In a case of caveat the caveator should state in his caveat the grounds on which he claims to have the better right to the land in controversy. And if this is not done the caveatee may either move the court to dismiss the caveat, or to require the caveator to file a specification of the alleged better right on which his claim is founded. But after the jury is sworn to ascertain the facts, it is then too late to object to the form of the caveat.
Clements *v.* Kyles, 468

2. In a case of caveat all the facts agreed by the parties, or found by the jury, or, if a jury is dispensed with, ascertained by the court, necessarily become and should be made a part of the record of the cause.
Hamilton *v.* McNeil & als., 389

3. In a case of caveat, if the court shall certify the evidence instead of the facts, yet if there is no conflict in the parol evidence, and taking the whole as true, the appellate court may proceed safely to judgment upon the same, it is the duty of such court to proceed and give judgment according to the very right of the cause.
Idem, 389

4. In a case of caveat, where a jury is dispensed with and the whole cause is submitted to the court, it is not necessary for the losing party to file a bill of exceptions to the judgment of the court, or to move for a new trial, and if it is refused, to except to the opinion of the court refusing it; but it is sufficient that the Circuit court shall make the facts agreed and ascertained, or the evidence, where the parol evidence is in no respect conflicting, a part of the record by its order to that effect upon rendering judgment. Idem, 389

5. A case in which the cause was sent back to the court below to have a more perfect finding of the facts upon which the rights of the parties depend.
Clements *v.* Kyles, 468

CHARGES ON LAND.

1. See Trusts and Trustees, No. 10, and
McCandlish *v.* Keen & als., 615

2. See Vendor and Purchaser, No. 5, and
McCandlish *v.* Keen & als., 615

3. See Wills, No. 5, 6, and
Baylor's lessee *v.* Dejarnette, 152
Tazewell's ex'or *v.* Whittle's adm'r, 329

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CHARITABLE TRUSTS.

See Religious Congregations.

CIRCUIT COURTS.

See Courts.

CODEFENDANTS.

Bill by vendee of land to enjoin the payment of the purchase money on the ground of defect of title to a part of the land; and vendor and adverse claimant of the land are made defendants. There being no privity between the plaintiff and the adverse claimant, and an equity between the latter and the vendor not arising on the pleadings and proofs between plaintiff and defendants, it is not a proper subject of a decree between codefendants.

Steed *v.* Baker & al., 380

CONSTITUTIONALITY OF STATUTES.

1. An act is passed providing for the establishment of a system of free schools in a particular district in a county; and it provides that it shall not be carried
826 into effect until the people of the district shall, by a vote taken for the purpose, approve it. A majority of the people of the district having approved it by their vote, it is a valid and constitutional law.

Bull & als. *v.* Read & als., 78

2. The act provides for the election of certain commissioners, who are authorized to establish schools in the district, and to levy taxes for their support. This is constitutional. Idem, 78

3. The general assembly has full power to authorize counties, municipal corporations and the like, to levy taxes within their bounds for their peculiar purposes. And the mode, subjects and extent of such taxation is not limited or regulated by the provisions of the constitution in relation to taxation and finance.

Gilkeson *v.* Frederick justices, 577

4. The act of June 7, 1852, Sess. Acts of 1852, p. 12, authorizing assessments in certain cases on the office of sheriffs and sergeants, is not in violation of the constitution. Idem, 577

5. See Taxation by Counties, &c., No. 3, 4, and Idem, 577

Bull & als. *v.* Read & als., 78

6. The general conference of the Methodist Episcopal church in the United States had the constitutional power to adopt the plan for the separation of the church, adopted in 1844.

Brooke & als. *v.* Shacklett, 301

7. The act, Code, ch. 38, § 25, p. 210, in relation to taxation of agents of foreign insurance offices, is not in violation of the constitution of the state of Virginia or of the United States.

Slaughter's Case, 767

8. The privileges and immunities guaranteed to the citizens of the states of the Union, are annexed to their status of citizenship; they are personal and may not be assigned or imparted by them or any of them to any other person, natural or artificial. Idem, 767

9. The general assembly of Virginia has authority to forbid foreign corporations engaging in any pursuit within the state; and of consequence to grant permission to engage therein only upon terms.

Idem, 767

10. Taxes on licenses are not required by the constitution of Virginia to be equal and uniform. Idem, 767

CONSTITUTION OF VIRGINIA.

1. See Constitutionality of Statutes, No. 1, 2, 3, 4, and

Bull & als. *v.* Read & als., 78
Gilkeson *v.* Frederick justices, 577

2. The constitution of Virginia, article 4, § 22, 23, 25, in relation to taxation and finance, relates to taxation by the general assembly for purposes of state revenue, and do not apply to taxes, levies, &c., by counties, corporations, &c., for the local purposes of such bodies.

Gilkeson *v.* Frederick justices, 577

3. See Constitutionality of Statutes, No. 7, 8, 9, 10, and Slaughter's Case, 767

CONSTRUCTION OF STATUTES.

As to the construction of statutes in relation to the boundaries of counties, see Counties, and

Hamilton *v.* McNeil & als., 389

CONTEMPTS.

A proceeding for a contempt in disobeying an injunction is not an order in the cause, but is in the nature of a criminal proceeding; and the judgment in such a proceeding can only be reviewed in a higher court by writ of error; and not always in that way.

Baltimore & Ohio R. R. Co. *v.* City of Wheeling, 40

CONTINGENT REMAINDERS.

Devise to G for life, and at his death in fee simple to his eldest son then living. A son E is afterwards born. This is a contingent remainder in fee in the son E, dependent upon his being alive at the death of G.

Baylor's lessee *v.* Dejarnette, 152

CONTRACTS.

1. The 17th section of 29 Charles 2, ch. 3, requiring that to make good a contract for the sale of goods, &c. (for the price of ten pounds or upwards), the buyer shall accept and actually receive in whole or in part the thing sold, or give something in earnest to bind the bargain or in part payment; or that some note or memorandum of the bargain be made and signed by the parties or their agents, has not been adopted in this state.

Chapman *v.* Campbell, 105

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2. Where there is a contract for an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the vendor immediately acquires a property in the price, and the vendee a property in the goods; and then all the consequences resulting from the vesting of the property follow, one of
827 *which is that if it be destroyed the loss falls on the vendee. Idem, 105

3. Any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy it, in presenti, for a specified price, would be a sale and transfer of the right to the chattel: and neither the delivery or tender of the property, nor the payment or tender of the purchase money, is necessary to constitute the contract. Idem, 105

4. A slave on trial before a county court for larceny, is sold; and before he is discharged he makes his escape and is not heard of again. The contract of sale being complete, the purchaser is bound for the price, though the slave was not and could not be delivered. Idem, 105

5. Testator bequeaths to his widow lands, slaves, &c., for her life or widowhood, for the support of herself and her younger children. One of these children grows up and marries, and the widow contracts with her husband to sell him two of the slaves for her life; and these two slaves are not more than will be the share of his wife in the slaves. This is no breach of the trust of the will; and a court of equity will enforce the contract at the suit of the purchaser, with a provision that the slaves shall be surrendered for division if the widow shall marry.

Summers & al. *v.* Bean, 404

6. N sells to A all the salt he has on hand or which he shall make by the 1st of the next January, except what may become due to L his landlord for rent. A sends his boat early in December to N's wharf for a load of salt, and the salt is put on board the boat, and then L and the sheriff come, and L claims the salt for rent, and the sheriff forbids the boatman to remove it, saying he had a landlord's warrant, though he does not appear to have had it; whereupon the boatman leaves the boat and L takes possession of it. The salt having been delivered by N to A's boatman, and by him received and put into his boat, it was A's salt. And the boatman had no authority to abandon the salt to L.

Lewis *v.* Arnold, 454

CONVEYANCES.

1. Prior to 1849 a deed conveying land in the actual adverse possession of another did not operate to transfer the title.

Early *v.* Garland's lessee, 1

2. A party having an interest in or claim to land held adversely by another, may under the Code, ch. 116, § 3, p. 500, sell and convey the same; and his grantee may maintain ejectment for it.

Carrington *v.* Goddin, 587

3. A decree directs a commissioner to convey land to T. The fact that he was not in possession of the land at the date of the decree or of the deed of the commissioner, would not restrict the operation of the deed to a mere transfer of a right of entry which he could not transfer to another. To prevent the transfer of title, the possession must have been adversary in another.

Early *v.* Garland's lessee, 1

4. An insolvent merchant living in Virginia, fraudulently buys goods in Baltimore, and sends them to Ohio to conceal them. He then conveys to a trustee, for the purpose of paying his debts, his property, describing it by its location, which does not include the goods in Ohio; and after stating the trusts upon which the property is conveyed, the deed says, "And it is further expressly understood, that if by accident or forgetfulness or inadvertence the said M G (the grantor) may have omitted to mention any claim or property, that the same shall be understood as being conveyed to the said trustees to all intents and purposes as fully as if specifically mentioned." The goods in Ohio passed by the deed.

Wickham and Goshorn *v.* Lewis Martin & Co., 427

5. A conveyance of a pretensed title to land is not void.

Middleton for Warren's heirs *v.* Arnolds, 489

6. If it is doubtful on the face of a deed, whether one or two adjoining lots was intended to be conveyed, the deed will be construed most strongly against the grantor, and so as to give it effect, rather than that it should be void for uncertainty.

Carrington *v.* Goddin, 587

7. See Deeds, No. 7, and

Humphrey *v.* Foster & wife, 653

CONVEYANCES—Fraudulent.

1. When creditors of a discharged bankrupt may sue in equity to impeach the discharge, and set aside deeds fraudulently made by the bankrupt before he applied for the benefit of the bankrupt act. See Bankrupts, No. 1, 2, 3, 4, 5, and

Tichenor *v.* Allen, 15

2. An insolvent merchant purchases goods not intending to pay for them, and after getting possession he conveys them and all his other estate in trust for the payment of his debts, the trustee having no notice of the fraud. The trustee is a
828 *purchaser for value without notice; and the conveyance is therefore valid in favor of the creditors secured by it.

Wickham and Goshorn *v.* Lewis Martin & Co., 427

3. In such a case the grantor and trustee live in Virginia, the goods were sold in Baltimore, and were sent by the purchaser to Ohio, apparently for the purpose of con-

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cealing them; and the seller of the goods there gets possession of them after the trustee had taken possession; and trustee sues the seller in Virginia for the goods. The deed is to be construed according to the law of Virginia. Idem, 427

4. Devise of a large estate to numerous devisees, and for the purpose of making division among the devisees with greater facility, testator gives his executors full power to sell or otherwise dispose of the whole or any part of said property, in such time and in such manner as to them may seem most beneficial for the whole. The executors by a deed reciting that it is made in execution of the powers vested in them, in consideration of an exchange of land made with A (one of the executors) and for the further consideration of one dollar paid by the purchaser, convey a lot belonging to their testator's estate. Such a deed on its face is not invalid; but passes the title to the purchaser.
Carrington *v.* Goddin, 587

CORPORATIONS.

1. In an injunction case a foreign corporation being a party defendant, and not having answered, and the answer not being required for a discovery, the absence of such defendant is not a ground for refusing to dissolve the injunction.
Baltimore & Ohio R. R. Co. *v.* City of Wheeling, 40

2. As a corporation cannot be sworn, it must put in its answer under its common seal. Not being sworn to, the answer is not evidence for the corporation, though responsive to the bill; but it puts in issue the allegations of the bill to which it responds; and this as well on a motion to dissolve an injunction as upon the hearing, Idem, 40

3. Although a stockholder of a corporation may enjoin it from employing the property or powers of the corporation in a way wholly or materially different from that which was designed by the act of incorporation, yet such stockholder has no right to enjoin it from doing what is in direct furtherance of the object of its creation, and is for the benefit of all the stockholders as such; though it may be injurious to such stockholder in another character; or the interest of some other person or the public may be injuriously affected by the act about to be done. Idem, 40

4. The constitution, article 4, § 22, 23, 25, in relation to taxation and finance, relate to taxation by the general assembly for purposes of state revenue; and do not apply to taxes, levies, &c., by counties, corporations, &c., for the local purposes of such bodies.
Gilkeson *v.* Frederick justices, 577

5. The general assembly has full power to authorize counties, municipal corporations and the like, to levy taxes within their bounds for their peculiar purposes. And the mode, subjects and extent of such taxation is not limited or regulated by the provisions of the constitution in relation to taxation and finance. Idem, 577

6. The general assembly of Virginia has authority to forbid foreign corporations engaging in any pursuit within this state; and of consequence to grant permission to engage therein only upon terms.
Slaughter's Case, 767

COUNTIES.

1. In a case of caveat, upon a question involving the boundary line between two counties, the court in construing the acts in relation to their boundaries, may look to the acts forming other counties both before and subsequent, for the purpose of ascertaining the intention of the legislature as to said boundary line.
Hamilton *v.* McNeil & als., 389

2. The acts forming new counties are not to be construed with the same strictness which is to be observed in the construction of a grant or a contract between individuals affecting rights of property; but a more liberal rule should be adopted; the object being to ascertain the true meaning and intention in any given act by considering the same in connection with all others in pari materia and with the general policy of the legislature, and to effectuate such intention. Idem, 389

3. In determining the territorial boundaries specified in said acts, due weight should be given to the cotemporaneous interpretation placed upon them by the courts and other lawful authorities within the same, and by the population at large residing therein. And maps of such territory made out and published by authority
829 *of law may properly be referred to as evidence on the question. Idem, 389

4. It has been the general policy of the legislature to establish and preserve the top of the Main Alleghany mountain as the line of boundary between the adjacent counties on either side: And in the construction of these acts this policy should be respected, and no intention to depart from it should be imputed to the legislature, unless it be plainly expressed, or the purpose be sufficiently manifested. Idem, 389

5. To carry out this policy, a call in one of these acts which if taken literally would conflict with the intent, should be disregarded or modified, and any error in the same arising from an imperfect knowledge of the topography of the country, or any other fortuitous cause, should be corrected. Idem, 389

6. In the arrangement of counties it has been the policy of the legislature to avoid inconvenient elongation or awkward or undue contractions of the territory of a county, and to preserve the same in as compact a form as practicable; and especially to keep the same in one body, not separated by the interposition of another

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county. And in construing such an act it should be presumed that such was the intention of the legislature, and no different interpretation should be admitted, unless a contrary intention is clearly manifest.
Idem, 389

7. The constitution, article 4, § 22, 23, 25, in relation to taxation and finance, relate to taxation by the general assembly for purposes of state revenue, and do not apply to taxes, levies, &c., by counties, corporations, &c., for the local purposes of such bodies.
Gilkeson *v.* Frederick justices, 577

8. The general assembly has full power to authorize counties, municipal corporations and the like, to levy taxes within their bounds for their peculiar purposes. And the mode, subjects and extent of such taxation is not limited or regulated by the provisions of the constitution in relation to taxation and finance. Idem, 577

COUNTY COURTS.

See Courts.

COURTS.

1. It is the duty of a County court acting under the Code, ch. 37, § 15, p. 203, in relation to land sold for taxes, to admit the report of the surveyor to record, if it conforms to the act. And the court has no authority to enquire into the regularity or validity of the sale made by the sheriff.
Randolph justices *v.* Stalnaker, 523

2. The Circuit court may proceed by mandamus to compel the County court to admit the survey to record. Idem, 523

3. For the power of the county courts to lay taxes, &c. See Counties, No. 7, 8, and
Gilkeson *v.* Frederick justices, 577

4. All the justices of a county being present in court, they make an order changing the months in which the quarterly courts are to be held, and also the day of the month on which the court is to commence. All the justices being present, a notice to them to attend was unnecessary; and the order is valid.
Jackson's Case, 795

5. A County court at which an indictment is found by a grand jury, must consist of at least four justices, or the indictment is null. Idem, 795

CREDITORS AND DEBTORS.

1. As to the rights of creditors of a bankrupt to question his discharge, and assail deeds made by him before his bankruptcy. See Bankrupts, passim, and
Tichenor *v.* Allen, 15

2. Devise of land to testator's three sons, and direction that one shall pay one-half and each of the others one-fourth of his debts. A debt not being barred by the statute at the death of the testator, his will creates a charge upon the lands devised for the payment thereof in the proportions stated in the will; and this charge will prevent the bar of the statute as to the estate taken by the sons under the devise to them.
Baylor's lessee *v.* Dejarnette, 152

3. By accepting the devises each of the sons became personally liable to the extent of the subject decreed to him for his share of the debt; and the creditor is not bound to look to the general estate of testator before asserting his claim against the sons.
Idem, 152

4. One of the sons having qualified as executor of another of them, and given bond; and having received assets, on his death his real estate is chargeable with the one-fourth which his testator's estate was bound to pay. Idem, 152

5. When creditors cannot come into equity to subject trust property to payment of debts. See Equitable Jurisdiction and Relief, No. 12, and
Armstrong's adm'r & als. *v.* Pitts & als., 235

830 *6. A charge in a will for the payment of debts will not revive a debt barred by the statute of limitations.
Tazewell's ex'or *v.* Whittle's adm'r, 329

7. If the creditor relies upon a charge in a will to prevent the operation of the statute, it is for him to show that the testator died before his debt was barred.
Idem, 329

8. See Laches, No. 1, 2, and
Idem, 329

9. See Assets, No. 4, 5, 6, and
McCandlish *v.* Keen & als., 615

10. See Partnership, and
McArthur *v.* Chase & als., 683

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. Upon a trial for the forgery of an endorsement on a note, the commonwealth having proved that the note went into the prisoner's possession, and notice to him to produce it, may prove the note and the forgery in its absence; and the note having been deposited in bank for collection, the original entries in the book of the note clerk of the bank, proved by the clerk to have been made by him from the note, are competent evidence to prove that the note and endorsement thereon were as described in the indictment. Cocke's Case, 750

2. The indictment charges in one count the forgery of a note, and in another count the forgery of an endorsement upon the note. The jury find the prisoner not guilty on the first count; and then say, "On the second count, viz: that of uttering a negotiable note, knowing it to be forged, we find the prisoner guilty, and affix the term of his imprisonment for the term of two years." The verdict upon the second count is too uncertain to authorize any judgment upon it; and a venire facias de novo on that count should be awarded.
Idem, 750

3. A verdict having been found against

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a prisoner, he moves the court to set it aside as contrary to evidence; which motion is on another day overruled. On the day when the motion was made, and also when it was overruled, the record states that the prisoner appeared by attorney; and there is nothing in the record to show that he was present. This is error.

Hooker's Case, 763

4. Upon a rule to show cause why an information should not be filed, the defendant appears and moves the court to quash the presentment on the ground that it does not charge any offense against him; but the motion is overruled. The information is then filed, and he pleads "not guilty;" and there is a verdict and judgment against him. Upon a writ of error to the appellate court, he may object to the insufficiency of the presentment. Bishop's Case, 785

5. The County court at which an indictment is found by a grand jury must consist of at least four justices, or the indictment is null. And the objection may be taken after trial and conviction upon plea of not guilty and issue.

Jackson's Case, 795

DEBT.

There is a statement of account of rents received through a number of years by an agent for his principal. And at the foot of the account there is a written statement setting out the gross amount of rents received, certain deductions for commissions and expenses, leaving the net sum of eleven hundred and thirty-seven dollars and thirty-five cents; and it concludes, "In the foregoing statement all errors to be corrected. As witness my hand and seal." And it is signed and sealed by the agent:

1st. Quære: If this paper will sustain an action of debt.

2d. If the paper will sustain an action of debt, in declaring upon it, if the plaintiff claims the sum stated in it, as the net rents, it must be averred that there is no error in the bond. And if she seeks to recover more or less than the sum stated, she should aver such error in the bond as will sustain her demand.

Davis' adm'rs *v.* Mead, 118

DECREES.

1. In a suit in equity to recover land C is a party. He dies, and the suit is revived against his administrator, but not against his heirs; and then there is a decree. The heirs are not concluded by the decree upon the principle which binds parties to a cause.

Early *v.* Garland's lessee, 1

2. In such a case there being nothing in the bill and proceedings having special reference to the part of the lot held by C, which is in controversy in an action of ejectment, the decree does not ascertain that C was a pendente lite purchaser; and the heirs of C are not estopped from setting up an adversary title anterior to its date.

Idem, 1

3. Though the decree is conclusive evidence that such a decree was made,
831 *it is not conclusive against the heirs of C that he was a pendente lite purchaser.

Idem, 1

4. A decree discharging a bankrupt from his debts under the act of congress of August 19, 1841, is conclusive upon all his creditors, in all suits which may be brought against him in any court, except where the discharge is impeached for some fraud or willful concealment by the bankrupt of his property, or rights of property, contrary to the provisions of that act.

Tichenor *v.* Allen, 15

5. A decree erroneous in itself, or if collusive between the parties to it, cannot be examined into in a collateral proceeding; but it is conclusive upon the matters thereby adjudicated until set aside in some proceeding for the purpose. And a sale of land having been made under the decree, the title passes.

Baylor's lessee *v.* Dejarnette, 152

6. A bill in equity having been dismissed generally without a reservation of any right in the plaintiff to sue thereafter, is conclusive between the parties and those claiming under them, upon all the issues made up in the cause.

Taylor & als. *v.* Yarbrough & wife, 183

7. A cause is heard upon the report of a commissioner which had not been returned for the legal period. The decree being merely interlocutory, the error should have been corrected by application to the court below; and it is no ground for an appeal unless, upon application, the court below refuses to correct it.

Armstrong's adm'r & als. *v.* Pitts & als., 235

8. A decree against an executor de bonis testatoris when it should have been de bonis propriis, is an error of which claimant under it might complain, but it is not an error which can avail the surety of the executor.

Franklin's adm'r *v.* P. Depriest, 257

9. What not a proper case for a decree between codefendants. See Codefendants, No. 1, and

Steed *v.* Baker & al., 380

DEEDS.

1. As to what will pass by a deed. See Conveyances, No. 4, and

Wickham & Goshorn *v.* Lewis Martin & Co., 427

2. As to construction of deeds. See Conveyances—Fraudulent, No. 2, and

Idem, 427

3. As to deeds executed under a power. See Conveyances—Fraudulent, No. 4, and

Carrington *v.* Goddin, 587

4. If it is doubtful on the face of a deed whether one or two adjoining lots were intended to be conveyed, the deed will be construed most strongly against the grantor, and so as to give it effect, rather than that it shall be void for uncertainty.

Idem, 587

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5. Deed of trust to secure a debt is, after the death of the grantor, valid against all his general creditors, though not recorded.
McCandlish *v.* Keen & als., 615
Same *v.* Coke's ex'or & als., 615

6. See as to such unrecorded deed, Trusts and Trustees, No. 9, 10, 12, and
Idem, 615

7. A deed conveys land to the grantee forever, habendum for life. As the premises would only convey a fee by virtue of the statute, and by the statute the whole deed is to be looked to, to ascertain what is intended to be passed, the habendum in this deed is not void, but only a life estate passes by the deed.
Humphrey *v.* Foster & wife, 653

DEPOSITIONS.

See Evidence, No. 4, 17, and
Clements *v.* Kyles, 468
Brown's adm'r *v.* Johnson, 644
Isbell's ex'or *v.* Johnson, 644

DESCENT.

There are three negroes, children of the same mother, born slaves, and the mother and children are afterwards emancipated. One of the three, a female, dies, having acquired real estate, intestate and without children: The mother is dead. The other two take the estate as heirs of the deceased sister.
Hepburn & als. *v.* Dundas & als., 219

DEVISEES.

See Heirs and Devisees.

DWELLING-HOUSE.

A house, though it was built for a dwelling-house, and had been used as such, and though it was about to be used as such again, yet having been unoccupied for ten months previous, and being unoccupied when it is burned, is not a dwelling-house within the meaning of the statute, Code, ch. 192, § 2, p. 727.
Hooker's Case, 763

*EJECTMENT.

1. As to the effect of a decree and sale under it, in passing the title. See Decrees, No. 5, and
Baylor's lessee *v.* Dejarnette, 152

2. In ejectment the defendant claims as purchaser under a decree; the record of the chancery cause is legal evidence for him as a link in his chain of title, though the plaintiff was not a party to the cause.
Idem, 152

3. Prior to the Code, ch. 177, § 14, p. 673, interest could not be allowed by a jury in an ejectment, upon profits; and the jury having allowed such interest it is mere surplusage, and the judgment will be for the principal sum and interest from the date of the verdict.
Hepburn & als. *v.* Dundas & als., 219

4. A party having an interest or claim to land held adversely by another, may, under the Code, ch. 116, § 5, p. 500, sell and convey the same; and his grantee may maintain ejectment for it.
Carrington *v.* Goddin, 587

5. In an action of ejectment, the tenant, without disclaiming title to any part of the land in the declaration mentioned, proves upon the trial that he is only in possession and claiming title to a part of it. A verdict and judgment in favor of the plaintiff for all claimed in the declaration, is not erroneous; or if it is, it is not an error by which the tenant is injured, or for which he can complain in an appellate court.
Idem, 587

EMANCIPATION.

A deed of emancipation sets the slave free upon the payment of a certain sum and the interest thereon; and provides that a receipt in full for the payment shall be taken as complete testimony of such discharge. The payment of the money may be inferred from circumstances; and it is not essential to produce the receipt.
Hepburn & als. *v.* Dundas & als., 219

EQUITABLE DEFENCES.

See Setoff.

EQUITABLE JURISDICTION AND RELIEF.

1. When creditors of a discharged bankrupt may go into equity to impeach the discharge, and to set aside fraudulent conveyances made by the bankrupt before his bankruptcy. See Bankrupts, passim, and
Tichenor *v.* Allen, 15

2. Although a stockholder of a corporation may enjoin it from employing the property or powers of the corporation in a way wholly or materially different from that which was designed by the act of incorporation, yet he has no right to enjoin it from doing what is in direct furtherance of the object of its creation and is for the benefit of all the stockholders as such; though it may be injurious to such stockholder in another character, or the interest of some other person or the public may be injuriously affected by the work about to be executed.
Baltimore & Ohio R. R. Co. *v.* City of Wheeling, 40

3. A statute having provided for a system of free schools in a particular district in a county, and provided for commissioners to establish and manage the schools, some of the inhabitants of the district may file a bill in behalf of themselves and the other inhabitants, against the commissioners, to test the validity of the act, and the propriety of the proceedings of the commissioners under it.
Bull & als. *v.* Read & als., 78

4. Where a large number of persons are interested in a common subject, and acts are done to the injury of the common right, the approval of the majority will neither

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excuse the wrong, nor take from the other parties their remedy by suit. Idem, 78

5. A court of equity may hold a guardian to account, and his sureties with him, for the payment of any balance found due to the ward; though the guardian lives out of the state and has no property within it.
Pratt *v.* Wright & als., 175

6. D purchases land subject to a trust to secure a debt due, and retains the amount of the debt out of the purchase money, to pay it. He dies indebted to more than the whole of his personal estate. The land is the primary fund to pay the debt; and the widow of D may institute a suit in equity to have the land sold and the debt paid, and to have her dower out of the residue of the purchase money; though D's heirs are infants.
Daniel & als. *v.* Leitch, 195

7. In such case what prayer in widow's bill will not vitiate the proceedings as against the infant heirs, so as to release a purchaser under the decree. See Infants, No. 2, and Idem, 195

8. Where the proceedings to have a sale of infants' land have been irregular, 833 *how they may be corrected. See Infants, No. 3, and Idem, 195

9. When purchaser under a decree for the sale of infants' lands, will be compelled to complete his purchase. See Infants, No. 3, 4, and Idem, 195

10. Courts of equity have at least as large a discretion in giving time to perfect the title in cases of sales made under their decrees as in cases of purchases by private contract. Idem, 195

11. Wife brings suit against her trustee and purchaser from him, to recover the trust property sold and hires. Pending the suit she dies, and bequeaths her property to her husband. Husband may bring an independent suit against trustee, purchaser and wife's administrator, to recover the property sold and the hires not paid to the wife: Or he may file a bill setting out the proceedings in the previous suit, and ask to have the benefit of said proceedings.
McDaniel *v.* Baskervill, 228

12. Devise to trustees for use of A for his life, with the privilege to live on the farm and use the slaves so far as necessary, for support of himself and family; but not to be liable for any debt A then owed or thereafter might owe; and at his death to his children. Creditors of A not having recovered a judgment against him, cannot come into equity to subject the trust property, though the debts were contracted for necessaries for the support of the family.
Armstrong's adm'r & als. *v.* Pitts & als., 235

13. Though a creditor's debt is evidenced by deed, yet where there has been gross laches in its prosecution, and the account cannot be settled without injustice to the estate of the deceased debtor, a court of equity will not give the creditor relief.
Tazewell's ex'or *v.* Whittle's adm'r, 329

14. Laches in the assertion or prosecution of a claim is not always enough to defeat it. The laches must be such as afford a reasonable presumption of the satisfaction or abandonment of the claim; or such as to prevent a proper defense by reason of the death of parties, loss of evidence or otherwise.
Tazewell's ex'or *v.* Saunders' ex'or & al., 354

15. Courts of equity will decree interest upon a bond or judgment beyond the penalty, against the principal debtor.
Idem, 354

16. A claimant of land in possession under his deed, the question of its validity, independent of the ground of fraud, is proper to be tried at law; and a court of equity has no jurisdiction to try it.
Steed *v.* Baker, 380

17. When a court of equity will enforce a specific execution of a contract for the sale of slaves, at the suit of the purchaser. See Specific Performance, No. 1, 2, and
Summers & al. *v.* Bean, 404

18. In an action at law on a bond against a surety, he defends it on the ground of usury; but there is a judgment against him. The surety then files a bill for relief against the judgment, on the ground of after discovered evidence; but there was evidence to the same point before the jury. The after discovered evidence being merely cumulative, it is not ground for relief.
Harnsbarger's adm'r *v.* Kinney, 511

19. In such a case the surety seeks relief on the ground that the principal obligor had sold to the obligee a tract of land for three thousand dollars, which was to be credited on the bond, but that only twenty-five hundred had been so credited. This defense might have been made at law, and is no ground for relief. Idem, 511

20. The surety further charges that the obligee agreed upon the sale and purchase of said land, to release the sureties; but although there is proof that pending the negotiation, the obligee said he would take a bond for the balance from the principal obligor, with his sons as sureties, and would wait with him for the money during his life, upon his paying the interest, and it was proved also that the principal obligor was anxious to relieve his sureties, yet in the final execution of the contract nothing having been provided to carry out the arrangement, and the obligee retaining the old bond credited with the price of the land, and the obligor paying interest upon it, there is no ground for relief on that account. Idem, 511

21. The obligor having been remiss in paying the interest upon the bond promptly, as he was required to do, on two occasions when he sent an agent to pay the interest due, directed him to pay the interest up to the period when the interest would next become due. This, however, was voluntary on his part, and not required by the obligee; but endorsements of the payments were

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made upon the bond. This is no ground of relief to the surety. Idem, 511

22. A bill is filed by one of three sureties, for relief against a judgment recovered on a bond, which sets out a parol promise of the obligee, made at the time
834 *the surety signed the bond, that the plaintiff should not be required to pay any part of it, and that said obligee would give him a written indemnity to save him harmless, as the ground of relief. As proof to sustain the case made by the bill would be inadmissible, the bill is demurrable.
Towner *v.* Lucas' ex'or, 705

23. When court of equity will proceed to do full justice in a cause. See Partnership, No. 6, and
McArthur *v.* Chase & als., 683

ESTATES.

1. Devise to G for life, and at his death in fee simple to his eldest son then living. A son E, is afterwards born. This is a contingent remainder in fee in the son E, dependent upon his being alive at the death of G.
Baylor's lessee *v.* Dejarnette, 152

2. Testator says, "I give the use and profits of all my estate real and personal to my daughters who may remain single. Should they all marry or when they die, then it is my will that my property shall be equally divided among my surviving children. My land in the county of King George, called Dissington and Friedland, I give to my son G. I do this in consideration of the attention and kindness that he has paid and will continue to pay to his sisters. Testator had three sons who had means to support themselves, and six daughters, five of whom were at the time unmarried. He lived on the land mentioned as given to G, and it was all the land he owned, and he owned about thirty slaves: *held*:

1st. By the first clause of the will an estate for life was given to the daughters in the property therein described; determinable as to each on her marriage.
Hooe & als. *v.* Hooe, 245

2d. That the devise of the land to G, which was in the third clause of the will, is not an exception out of the general devise to the daughters, nor a revocation of said devise pro tanto, upon the ground of repugnancy thereto. Idem, 245

3d. That the daughters did not take a mere equitable right to the use and profits of the property devised, dependent, as to the land, upon a legal estate vested in possession in G; but took such a legal estate in the use and profits of the testator's whole estate, including the land, as entitled them to retain possession thereof until they should marry or die; and the estate given to G will not vest in possession until that time.
Idem, 245

3. B died in 1807, and by his will devised a tract of land to each of his two sons J and F. He then says, "It is my will, if my said son J die without issue, that the property heretofore given him shall go to his brother F, who in that case will lose the land heretofore given him. It being my will and desire then and in that case, and upon the happening of the event of my son J's death, that the land near W which would otherwise be F's share, be sold and the money equally divided between my surviving children. J dies without issue. J took an estate tail in the land devised to him, which was converted by the statute into a fee simple; and therefore the limitation over to F is void.
Tinsley *v.* Jones & als., 289

ESTOPPELS.

1. See Decrees, No. 1, 2, 3, 4, 5, 6, 7, 8, and
Early *v.* Garland's lessee, 1
Tichenor *v.* Allen, 15
Baylor's lessee *v.* Dejarnette, 152
Taylor & als. *v.* Yarbrough & wife, 183

2. The official bond of an executor is made payable to four justices, one of whom was not a member of the court at the time. The surety having executed the bond, is estopped from pleading that it was not his bond because so executed.
Franklin's adm'r *v.* P. Depriest, 257

3. A paper is propounded for probat in the County court of C, as the will of B, and is rejected on the ground that B was incompetent to make a will. Afterwards the paper is propounded for probat in the Circuit court of C; and that court, with knowledge that it had been rejected by the County court, admits it to probat. The sentence of the County court is conclusive against the will, and the sentence of the Circuit court is a nullity.
Ballow & als. *v.* Hudson & als., 672

EVIDENCE.

1. In ejectment the tenant claims under a purchaser at a judicial sale; the record of the cause in which the sale was made is legal evidence for him as a link in his chain of title, though the plaintiff was not a party in the cause.
Baylor's lessee *v.* Dejarnette, 152

2. In a case of caveat the caveator claims under a patent issued to W in 1756, which does not refer to any survey. To show that the patent was founded on a survey, caveator offers in evidence a copy from
835 the books of the surveyor of *Augusta county, of a certificate of a survey and plat made for W, dated in November 1749. The certificate does not contain the calls for course and distance or other marks, but these are given on the plat, and they agree with the locative calls of the patent. It is competent evidence for the purpose for which it is offered.
Clements *v.* Kyles, 468

3. Surveys made many years after W's survey, and by a different surveyor, are not competent evidence as to the boundaries of W's survey. Idem, 468

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4. Deposition of a witness taken in a controversy about the same land between the ancestor of the caveators and the caveatee, is admissible evidence.
Idem, 468

5. A purchaser of a part of the same survey though not of the land in controversy, who then had a controversy with a third person in which it was important to him to establish the bounds of the patent under which caveators claimed, is a competent witness. Idem, 468

6. Statements by person dead at a time he lived on the land, pointing out two of the corners of the survey; he not having been the surveyor or chain carrier, or having any motive or interest to ascertain the facts, are not competent evidence.
Idem, 468

7. In ejectment by devisees, tenant claims under a deed executed by executors under a power. A bona fide purchaser will not be affected by their failure to account for the purchase money; and therefore evidence to prove such failure is properly excluded.
Carrington *v.* Goddin, 587

8. Upon the question whether a deed conveyed one or two lots which adjoined, it is not competent to prove by the grantor, that he intended to convey both; though there is no objection to his competency as a witness. Idem, 587

9. But the grantor may identify the lot, and may show that it answers the description embraced in the deed. Idem, 587

10. In an action for the seduction of plaintiff's daughter, to enhance the damages, he may prove that the defendant promised to marry her, and by means of said promise had succeeded in debauching her.
White *v.* Campbell, 573

11. Parol evidence will not be received to engraft upon or incorporate with a valid written contract, an incident occurring cotemporaneously therewith, and inconsistent with its terms.
Towner *v.* Lucas' ex'or, 705

12. The fraud which will let in such evidence, must be fraud in the procurement of the instrument, which goes to its validity, or some breach of confidence in using a paper delivered for one purpose, and fraudulently perverting it to another.
Idem, 705

13. Parol evidence is not admissible to prove, in behalf of one of three sureties in a bond, that he was induced to sign it upon the express promise of the obligee, that he should not be required to pay any part of it, and that said obligee would give the said surety a written indemnity to save him harmless. Idem, 705

14. The principles upon which parol evidence to affect a written contract, is admitted or excluded, investigated and stated by Allen, P. Idem, 705

15. When the entries in the book of the note clerk of a bank are competent evidence in a prosecution for forgery. See Criminal Jurisdiction and Proceedings, No. 1, and
Cocke's Case, 750

16. As to the competency of a co-obligor in a bond, as a witness. See Witness, No. 2, 4, 5, and
Brown's adm'r *v.* Johnson, 644
Isbell's ex'or *v.* Johnson, 644

17. There are two actions pending by the same plaintiff against obligors in the same bond; a deposition taken by the defendant in one of the cases, can, under no circumstances, be competent evidence for the defendant in the other case. Idem, 644

EXCEPTIONS—Bill of.

1. Quære: What should be the form of a bill of exceptions to the refusal of the court to grant a new trial where the whole case has been submitted to the court.
Wickham and Goshorn *v.* Lewis Martin & Co., 427

2. On a bill of exceptions to the refusal of the court to grant a new trial because the verdict is contrary to the evidence, the evidence, and not the facts proved, is stated. The court will reject all the parol evidence of the exceptor, and give full faith and credit to all the evidence of his adversary; and will not reverse the judgment unless it then appears to be wrong.
Carrington *v.* Goddin, 587

3. As to a bill of exceptions in a caveat case. See Caveats, No. 4, and
Hamilton *v.* McNeil & als., 389

EXECUTORS AND ADMINISTRATORS.

1. C takes a devise of land charged
836 with the payment of one-fourth of testator's debts. B, his executor, receives assets, and dies. C's fourth of the debts for which C's land was chargeable, are charged upon the real estate of B (if not otherwise) by his executorial bond.
Baylor's lessee *v.* Dejarnette, 152

2. D purchases land subject to a deed of trust to secure payment of a debt which is due, and retains so much of the purchase money to pay it. He dies indebted to more than the whole amount of his personal estate. The land is the primary fund for the payment of the debt; and the widow of D is not entitled to have it discharged out of the personal estate.
Daniel & als. *v.* Leitch, 195

3. The official bond of an executor is made payable to four justices, one of whom was not a member of the court at the time:
1st. The surety having executed the bond, he is estopped from pleading that it is not his bond because so executed.
2d. By the act, Code, ch. 168, § 3, p. 640, the suit may be maintained upon the bond, though it is made payable to a justice who was not sitting in the court at the time of its execution.
Franklin's adm'r *v.* P. Depriest, 257

4. In a bill by creditor of testator against

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executor and legatee, the latter relies on the statute of limitations in his answer. This is sufficient to protect the estate from a decree against the executor.
Tazewell's ex'or *v.* Whittle's adm'r, 329

5. The plaintiff having stated in his bill, that his debt was evidenced by deed, if it appears in the progress of the cause, that it was by parol, the executor may set up the defense of the statute, by exception to the commissioner's report. Idem, 329

6. That the creditor has furnished the executor at his request, with a statement of his debt, which the executor does not object to, will not remove the bar of the statute. Idem, 329

7. To take a debt out of the statute the acknowledgment of the executor must be express. And quære, if there must not be an express promise to pay. Idem, 329

8. A charge in a will for the payment of debts will not revive a debt barred by the statute of limitations. Idem, 329

9. If a creditor relies upon a charge in a will to prevent the operation of the statute, it is for him to show that the testator died before his debt was barred. Idem, 329

10. Though a creditor's debt is evidenced by deed, yet where there has been gross laches in its prosecution, and the account cannot be settled without injustice to the estate of the deceased debtor, a court of equity will not give the creditor relief. Idem, 329

EXPECTANT INTERESTS.

1. A sale of a reversion in real estate by a young man who had just arrived at the age of twenty-one years, there having been no fraud or imposition on the part of the purchaser, and no confidential relation between the parties, will not be set aside for mere inadequacy of price.
Cribbins *v.* Markwood, 495

2. The English doctrine in relation to the sale of expectant interests, as far as it relates to vested interests, held not to be law in this state. Idem, 495

FORFEITURES.

As to forfeiture of a lease by tenant. See Landlord and Tenant, No. 1, 2, and
McKildoe's ex'or *v.* Darracott, 278

FORGERY.

1. See Indictment, No. 1, and
Cocke's Case, 750

2. See Criminal Jurisdiction and Proceedings, No. 1, 2, and Idem, 750

FRAUD.

1. A general allegation of fraud in a bill is not sufficient to raise a question of fraud.
Steed *v.* Baker & al., 380

2. Quære: What fraud in the purchaser of goods will authorize the seller to reclaim them whilst in the possession of the purchaser.
Wickham and Goshorn *v.* Lewis Martin & Co., 427

3. As to sales of expectant interests. See Expectant Interests, No. 1, 2, and
Cribbins *v.* Markwood, 495

FRAUDS—Statute of.

The 17th section of 29 Charles 2, ch. 3, requiring part payment, or a memorandum in writing, to bind a contract of sale, not in force in Virginia.
Chapman *v.* Campbell, 105

FREE SCHOOLS.

1. A statute having provided for a system of free schools in a particular district
837 *in a county, and provided for commissioners to establish and manage the schools; some of the inhabitants of the district may file a bill in behalf of themselves and the other inhabitants, against the commissioners, to test the validity of the act, and the propriety of the proceedings of the commissioners under it.
Bull & als. *v.* Read & als., 78

2. An act is passed providing for a system of free schools in a particular district in a county; and it provides that it shall not be carried into effect until the people of the district shall, by a vote taken for the purpose, approve it. A majority of the people of the district having approved it by their vote, the act is a valid and constitutional law. Idem, 78

3. The act provides for the election of certain commissioners who are authorized to establish schools in the district, and to levy taxes for their support. This is constitutional. Idem, 78

4. The commissioners being authorized to establish schools and levy taxes sufficient to defray the expenses thereof; they may build the necessary school-houses, and levy sufficient taxes to pay for them.
Idem, 78

5. The act authorizes the commissioners to levy a capitation tax upon the white male inhabitants, and an ad valorem tax upon the property in the district, sufficient to raise the amount necessary to defray the expense of the schools. This provision is to be construed in accordance with the constitution; and the capitation tax is properly levied upon the white male inhabitants above twenty-one years of age only; and the ad valorem tax upon slaves is properly levied upon slaves over twelve years of age and valued each at three hundred dollars. And the ratio of the capitation to the ad valorem tax may be greater than that prescribed in the constitution, article 4, § 25. Idem, 78

GUARDIANS.

1. The official bond of a guardian is not invalidated by the omission to recite in it the fact of his appointment.
Pratt *v.* Wright & als., 175

2. A guardian's bond contains a covenant to indemnify the justices constituting the court at the time it is taken. Although this is not required by the statute, and

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therefore not obligatory, it does not avoid the bond. Idem, 175

3. Although the condition in a guardian's bond is not as extensive as the statute requires, yet as it relates to a part of the duty of guardian, the bond is not void, but binds the obligors to the extent of the condition. Idem, 175

4. A condition of a guardian's bond having been in general use for many years, quære, if the court would not sustain it though it did not conform to the statute. Idem, 175

5. A court of equity has jurisdiction to hold a guardian to account, and his sureties with him, to the payment of any balance found due to the ward; though the guardian lives out of the state and has no property within it. Idem, 175

HEIRS AND DEVISEES.

1. When heirs not concluded by a decree. See Decrees, No. 1, 2, 3, and
Early *v.* Garland's lessee, 1

2. There are three negroes, children of the same mother, born slaves, and the mother and children are afterwards emancipated. One of the three dies, having acquired real estate, intestate and without children; and the mother is also dead. The other two take the estate as heirs of the deceased sister.
Hepburn & als. *v.* Dundas & als., 219

3. See Estates, No. 2, 3, and
Hooe & als. *v.* Hooe, 245
Tinsley *v.* Jones, 289

4. Devise to G for life, and at his death in fee simple to his eldest son then living. A son E is afterwards born. This is a contingent remainder in fee in the son E dependent on his being alive at the death of G.
Baylor's lessee *v.* Dejarnette, 152

5. In such case there is a suit in equity by a creditor of testator against G, before the birth of E, and a decree after his birth without making him a party. He is bound by the decree. Idem, 152

6. A devise of land charged with payment of one-fourth of testator's debts. By accepting the devise the devisee becomes liable personally, in respect to the subject devised to him, for the one-fourth of testator's debts; and the creditors are not bound to look to the general estate of testator before asserting their claim against the devisee and the subject devised. Idem, 152

HUSBAND AND WIFE.

1. T lends to his daughter D a married woman, three negro women during her life, and they go into the possession of
838 the *husband; and by deed T gives her the future increase of the three women. D survives her husband, and keeps possession of the three women as belonging to her; and whilst so in her possession they have a number of children: *held*:

1st. The women not having been expressed to be given for the separate use of D, and not having been conveyed to a trustee, they were the property of the husband for the life of the wife.

2d. The gift of the future increase of the women was a valid gift.

3d. The wife having survived her husband, the increase of the three women born after his death, belong to the wife.
Taylor & als. *v.* Yarbrough & wife, 183

2. See Equitable Jurisdiction and Relief, No. 11, and
McDaniel *v.* Baskervill, 228

INDICTMENTS AND PRESENTMENTS.

1. An indictment charges the forgery of an endorsement on a negotiable note, which is described as to the amount, date, to whom payable and when due; but it does not state who is the maker of the note. or where it is payable. It is a good indictment. Cocke's Case, 750

2. An indictment against S for keeping an office and transacting business as agent of the Protection insurance company of Hartford, incorporated and authorized by the state of Connecticut, without having a license therefor, against the act, &c., does not state that the said company is an insurance company. This is cured by the verdict. Slaughter's Case, 767

3. An indictment which charges that the defendant, on a day and time specified, kept an ordinary without obtaining a license to do so, is sufficient, without setting out the facts of his furnishing for compensation lodging, or diet, &c. Burner's Case, 778

4. Such an indictment with the addition that he continued to keep the ordinary from the day stated to another subsequent day, is not defective; the continuando is mere surplusage. Idem, 778

5. An indictment which charges that the defendant "unlawfully did sell music not manufactured by the seller within the state, without having a license therefor according to law," is good; it sufficiently appearing that music is a species of goods, wares and merchandise. Nax's Case, 789

6. A County court at which an indictment is found by a grand jury must consist of at least four justices, or the indictment is null. Jackson's Case, 795

7. A presentment of a grand jury, to be a proper foundation for an information, must contain every matter necessary to render the act imputed to the defendant unlawful; and the supposed offense must at least be described with reasonable certainty. Bishop's Case, 785

8. A presentment for playing at cards, must charge that the place at which it occurred was a public place at the time of such playing; the name of the place not of itself importing that it was a public place. Idem, 785

9. A presentment for playing at cards "at

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or near" a place, is objectionable for uncertainty. Idem, 785

10. When the objection to a presentment may be taken in the appellate court. See Criminal Jurisdiction and Proceedings, No. 4, and Idem, 785

INFANTS.

1. D purchases land subject to a trust for the payment of a debt due, and retains so much of the purchase money to pay it. He dies indebted for more than his personal estate will pay, leaving a widow and infant children. The land being the primary fund for the payment of the debt, the widow may file a bill against the creditor and the infants, to have the land sold and the debt paid, and for her dower out of the residue of the purchase money.

Daniel & als. *v.* Leitch, 195

2. After stating the case, and that it would be for the interest of the infants to have the whole land sold and the proceeds invested in certain slaves, and praying for a sale, the payment of the debt and the investment of the residue of the purchase money in slaves, she also prays that if the trust creditor will consent, the land may be sold subject to the trust: but this the creditor declines. The addition of this prayer does not vitiate the proceeding as against the infant heirs; but the decree directing a sale and the payment of the debt, a purchaser under the decree may obtain a valid title to the land sold, and will be compelled to complete the purchase. Idem, 195

3. A sale of a part of the land having been made under a decree in the widow's suit, and that sale having been confirmed by the court, even if the proceeding was irregular as to the infant heirs, yet the purchaser will not be discharged from his purchase if the title can be perfected
839 *in a reasonable time: And the guardian of the infants having filed his bill according to the statute, in which he asks to have the sale confirmed as very beneficial to the infants, the court may in that case confirm the sale, and thus assure to the purchaser a good title against the infant heirs; and compel him to complete his purchase. Idem, 195

4. After a sale of infants' land has been confirmed by the court, although the proceeding has been irregular, yet if the title of the purchaser can be made good, and it is for the interest of the infants to confirm the sale, the purchaser will not be released from his purchase; but if the interest of the infants is injured by the sale, it will be set aside. Idem, 195

5. Courts of equity have at least as large a discretion in giving time to perfect the title in cases of sales under their decrees, as in cases of purchases by private contract. Idem, 195

INJUNCTIONS.

*1. An appeal may be taken from an order made in vacation overruling a motion to dissolve an injunction, when the principles of the cause are thereby adjudicated.

Baltimore & Ohio R. R. Co. *v.* City of Wheeling, 40

Richmond & York River R. R. Co. *v.* Wicker, 375

2. A proceeding for a contempt in disobeying an injunction, is not an order in the cause; but is in the nature of a criminal proceeding.

Balt. & Ohio R. R. Co. *v.* City of Wheeling, 40

3. The court for good cause shown may overrule a motion to dissolve an injunction and continue it to the hearing, without adjudicating the principles of the cause; in which case no appeal will lie from the order. Idem, 40

4. What is an order adjudicating the principles of the cause. See Appellate Jurisdiction, No. 5, and Idem, 40

5. A foreign corporation being a party and not having answered, and the answer not being necessary for a discovery, the absence of such is not a ground for refusing to dissolve an injunction. Idem, 40

6. On a motion to dissolve an injunction all the allegations in the bill not denied by the answer are taken as true, and it is no objection to the motion to dissolve, that exceptions to the answer for insufficiency have not been acted on. Idem, 40

7. As a corporation cannot be sworn, it must put in its answer under its common seal. Such answer is not evidence for the corporation, though responsive to the bill; but it puts in issue the allegations of the bill to which it responds; and this as well on a motion to dissolve an injunction as upon the hearing. Idem, 40

8. When a stockholder of a corporation may or may not enjoin its action. See Corporations, No. 3, and Idem, 40

INSTRUCTIONS.

Where there is any evidence tending to make out a case supposed in an instruction, it is best and safest to give it, if it propounds the law correctly.

Early *v.* Garland's lessee, 1

INTEREST.

1. Courts of equity will decree interest upon a bond or judgment beyond the penalty, against the principal debtor.

Tazewell's ex'or *v.* Saunders' ex'or & al., 354

2. Prior to the act, Code, ch. 177, § 14, p. 673, interest could not be allowed by a jury in an ejectment, upon the profits; and the jury having allowed such interest, it is mere surplusage, and the judgment will be for the principal sum and interest from the date of the verdict.

Hepburn & als. *v.* Dundas & als., 219

3. Upon a judgment in an action for a tort depending when the act, Code, ch. 177, § 14, p. 673, went into operation, it is proper to charge interest from the date of the verdict.

Lewis *v.* Arnold, 454

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JAMES RIVER & KANAWHA CO.

1. The James river and Kanawha company not having completed the improvement of the Kanawha river, as prescribed in their charter, and not having charged tolls as authorized by said charter, are not liable for damages occurring in the navigation of the river, for not having such an improvement as the charter prescribes.

James River & Kanawha Co. *v.* Early, 541

2. The said company being authorized by law to charge tolls on the Kanawha river not exceeding those allowed to be charged by their predecessors the James river company, are bound to keep the navigation of the river in the condition in which the James river company were required to
840 keep it, and are liable for any *damages sustained by their failure so to keep it. Idem, 541

3. The James river company was only required to improve the Kanawha river in the mode suggested in the report of the principal engineer of the state made in January 1820, and referred to in the act of the 17th of February 1820. This did not contemplate a continued improvement, but that specified works should be done at specified places. And for damages occurring in consequence of obstructions at other places, the successors of the James river company are not responsible. Idem, 541

4. The ninth section of the act of February 27th, 1829, Sup. R. C. p. 469, does not require the company to place buoys or beacons on a snag lodged temporarily in the river, at a place at which, by the plan of improvement suggested by the principal engineer, and adopted by the act of February 17th, 1820, no work was required to be done. Idem, 541

5. The tenth section of the act of February 27th, 1829, only refers to depositions of sand, &c., in the artificial channels and sluices made in the improvement of the navigation of the river, and not to such depositions in the natural channels of the river. Idem, 541

JOINT OBLIGATIONS.

See Bonds, No. 13, 14, and

Brown's adm'r *v.* Johnson, 644

Isbell's ex'or *v.* Johnson, 644

JUDICIAL SALES.

1. When a purchaser under a decree, of infants' lands, will not be discharged from his purchase. See Infants, No. 3, 4, and

Daniel & als. *v.* Leitch, 195

2. Courts of equity have at least as large a discretion in giving time to perfect the title in cases of sales under decrees, as in cases of purchases by private contract. Idem, 195

KANAWHA RIVER.

See James River & Kanawha Company.

LACHES.

1. Though a creditor's debt is evidenced by deed, yet where there has been gross laches in its prosecution, and the account cannot be taken without injustice to the estate of the deceased debtor, a court of equity will not give the creditor relief.

Tazewell's ex'or *v.* Whittle's adm'r, 329

2. Laches in the assertion or prosecution of a claim is not always enough to defeat it. The laches must be such as to afford a reasonable presumption of abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence or otherwise.

Tazewell's ex'or *v.* Saunders' ex'or & al., 354

LANDLORD AND TENANT.

1. A lease being forfeited by the act of the lessee in subletting the premises, the forfeiture will be waived if the lessor, with knowledge of the forfeiture, accepts rent, or sues out a distress for rent, accruing after the forfeiture.

McKildoe's ex'or *v.* Darracott, 278

2. A subletting is not a continuing act of forfeiture, and if the forfeiture is once waived, it cannot afterwards be retracted. Idem, 278

LARCENY.

Upon a trial for the larceny of a bank note the property of G, of the value of twenty dollars, it is error to instruct the jury, that if they believe from the evidence, that G lost a bank note of the value of twenty dollars, and that the same was afterwards found in the possession of the prisoner, they ought to find him guilty unless his possession of the note was explained by testimony. Hunt's Case, 757

2. The mere possession of goods which had been actually lost, does not furnish any conclusive or even prima facie proof of guilt: of itself it does not raise the suspicion of guilt. Idem, 757

3. To constitute larceny in the finder of goods actually lost, it is not enough that the party has general means by the use of proper diligence, of discovering the true owner. He must know the owner at the time of finding, or the goods must have some marks about them understood by him, or presumably known by him, by which the owner can be ascertained: And he must appropriate them, at the time of finding, with intent to take entire dominion over them. Idem, 757

4. A person is staying at a tavern, and the landlord offers him a gun to go and shoot robins, which he takes, and after shooting once or twice near the house,
841 *goes off with the gun and disposes of it. Under the circumstances of the case he is guilty of larceny. Richards' Case, 803

LEASES.

See Landlord and Tenant.

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LICENSES.

1. Taxes on licenses are not required by the constitution of Virginia to be equal and uniform. Slaughter's Case, 767

2. A person having a license to keep a house of private entertainment, cannot be convicted of keeping an unlicensed ordinary, by proving the sale by him of spirits to be drunk at the house of private entertainment, the place of sale, in addition to the furnishing for compensation, diet, lodging and provender at that place.
Burner's Case, 778

LIEN.

As to a vendor's lien. See Vendor and Purchaser, No. 5, 6, and
McCandlish *v.* Keen & als., 615
Same *v.* Coke's ex'or & als., 615

LIMITATION OF ACTIONS.

1. When creditor of bankrupt may sue to impeach his discharge, and set aside conveyances made by him. See Bankrupts, No. 2, 4, and
Tichenor *v.* Allen, 15

2. The statute, Code, ch. 149, § 5, 6, p. 591, limiting actions against sureties of fiduciaries, does not begin to run in favor of a surety of an executor, until there is a decree or judgment against the executor, ascertaining his indebtedness.
Franklin's adm'r *v.* P. Depriest, 257

3. A charge by a will upon land for payment of debts, will prevent the running of the statute as to the land against all debts of the testator not barred at his death.
Baylor's lessee *v.* Dejarnette, 152

4. A charge in a will for the payment of debts will not revive a debt barred by the statute at the death of the testator.
Tazewell's ex'or *v.* Whittle's adm'r, 329

5. If the creditor relies upon a charge in a will to prevent the operation of the statute, it is for him to show that the testator died before his debt was barred.
Idem, 329

6. Any thing in an answer which will apprise the plaintiff that the defendant relies on the statute, is sufficient, if such facts are stated as are necessary to show that the statute is applicable.
Idem, 329

7. In a bill by creditor of testator against executor and legatee, the latter relies on the statute in his answer. This will protect the estate from a decree against the executor. Idem, 329

8. The plaintiff having stated in his bill that his debt was evidenced by deed, if it appears in the progress of the cause that it was by parol, the executor may set up the defense of the statute by exception to the commissioner's report. Idem, 329

9. That the creditor has furnished the executor, at his request, with a statement of his debt which the executor does not object to, will not remove the bar of the statute. Idem, 329

10. To take a debt out of the statute the acknowledgment of an executor must be express. And quære, if there must not be an express promise to pay. Idem, 329

LIMITATION OF ESTATES.

1. See Estates, No. 1, 2, 3, and
Baylor's lessee *v.* Dejarnette, 152
Hooe & als. *v.* Hooe, 245
Tinsley *v.* Jones & als., 289

2. See Powers, and
Carrington *v.* Goddin, 587

LIMITED PARTNERSHIPS.

See Partnerships.

MANDAMUS.

The Circuit court may proceed by mandamus to compel the County court to admit the report of the surveyor of a tract of land sold for taxes, to record.
Randolph justices *v.* Stalnaker, 523

METHODIST CHURCH.

See Religious Congregations, No. 3, 4, 5, 6, 7, and
Brooke & als. *v.* Shacklett, 301
Carter & als. *v.* Wolfe, 301

NOTICE.

In a proceeding under the Code, ch. 167, § 5, p. 640, to recover money due upon contract, by notice, the notice must be returned forty days before the commencement
842 *of the term, and put upon the docket of the court, or it cannot be tried at that term.
Hale *v.* Chamberlain, &c., 658

NUISANCES.

City authorities change the channel of a drain so as to throw the water flowing along it upon the lot of T lying below. He cannot shut up the channel, so as to cause the water to flow back upon and injure the lot of A lying above his.
Amick *v.* Tharp, 564

ORDINANCES.

1. What indictment is good for keeping an ordinary without license. See Indictments and Presentments, No. 3, 4, and
Burner's Case, 778

2. A person having a license to keep a house of private entertainment cannot be convicted of keeping an unlicensed ordinary, by proving the sale by him of spirits to be drunk at the house of private entertainment, the place of sale, in addition to the furnishing for compensation, diet, lodging and provender at that place.
Idem, 778

PARTIES.

1. Upon a bill to set aside a deed of trust to secure a debt, an assignee of the debt is a necessary party; and the debtor and trustee in their answers stating that the debt has been assigned to a certain person,

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plaintiff should be required to make him a party, if upon a rule for the purpose, it appears he is such assignee.
Tichenor *v.* Allen, 15

2. A statute having provided for a system of free schools in a particular district of a county, and provided for commissioners to manage the schools; some of the inhabitants of the district may file a bill in behalf of themselves and the other inhabitants, against the commissioners, to test the validity of the act, and the propriety of the proceedings of the commissioners under it.
Bull & als. *v.* Read & als., 78

3. Where a large number of persons are interested in a common subject, and acts are done to the injury of the common right, the approval of the majority will neither excuse the wrong, nor take away from the other parties their remedy by suit.
Idem, 78

4. Devise to E for life with remainder in fee to his eldest son living at his death. In a suit by creditor of testator to subject the land, before E had a son, E represents the fee, and it is not necessary to make a son born pending the suit, a party.
Baylor's lessee *v.* Dejarnette, 152

5. D purchases land subject to a deed of trust to secure a debt, and retains the amount out of the purchase money to pay it. He dies indebted more than his personal estate will pay, leaving a widow and infant children. The land is the primary fund to pay the debt, and the widow may sue to have the land sold and the debt paid, and for her dower out of the residue.
Daniel & als. *v.* Leitch, 195

6. In a bill to recover trust property sold by trustee and for an account, the trustee is a necessary party.
McDaniel *v.* Baskervill, 228

7. In a suit in equity by purchaser of slaves for the life or widowhood of the vendor, to enforce the contract. there being no controversy as to the right of the remaindermen in the slaves, they are not necessary parties.
Summers & al. *v.* Bean, 404

8. By the act, Code, ch. 168, § 3, p. 640, a suit may be maintained upon the official bond of an executor, though it is made payable to a justice who was not sitting in court at the time of its execution.
Franklin's adm'r *v.* P. Depriest, 257

9. In an action on such bond against a surety to recover the amount of a decree against the executor rendered in favor of a trustee of a married woman, the trustee is the proper relator in the action.
Calahan's adm'r *v.* J. R. Depriest, trustee, 274

PARTITION.

On a bill claiming a share of a tract of land and asking for partition, and for general relief, the plaintiff's right to partition being established, under the prayer for general relief, there may be a decree for an account of rents and profits.
Humphrey *v.* Foster & wife, 653

PARTNERSHIP.

1. In the act of March 29, 1837, Sess. Acts 1836–7, p. 41, in relation to limited partnerships, the word "insolvency" in § 20 of said act, means that the partnership has not sufficient property to pay its debts.
McArthur *v.* Chase & als., 683

2. A deed made by a limited partnership conveying all its property in trust to pay a debt to a firm of which the special partner is a member, at a time when the debts
843 of the partnership exceeded *the value of its property, and when the acting partners knew that the partnership must stop business unless the special partner or his firm would advance money to enable them to carry on the business, and without an undertaking on his part to make such advances, though they may have had some expectations that he would do it, is void as to the other creditors of the partnership.
Idem, 683

3. Under such circumstances confessions of judgments in favor of some creditors in order to give them a preference, are void as to the creditors. Idem, 683

4. A special partner taking a deed of trust to secure a debt due to a firm of which he is a member, under such circumstances, makes himself liable as a general partner to the creditors of the partnership.
Idem, 683

5. In the distribution of the assets of such partnership among its creditors, a debt due to a firm of which the special partner is a member, is to be paid ratably with the debts due to the other creditors.
Idem, 683

6. A court of equity having obtained jurisdiction of a suit by creditors to set aside a deed improperly made to give preference to a creditor of the partnership, and to have a distribution of the assets of the partnership among all the creditors, may proceed to do complete justice in the cause, and to make a personal decree against the special partner who has made himself liable as a general partner, in favor of creditors, for the balance due them respectively after distributing the assets of the partnership ratably among them. Idem, 683

7. The fact that the creditors have recovered judgments at law against the general partners, will not defeat their remedy against the special partner. Idem, 683

8. The share of the special partner in the debt due to the firm of which he is a member, will be retained under the control of the court, and applied to the satisfaction of the creditors of the partnership.
Idem, 683

9. To ascertain the share of the special partner in said debt, the court will direct an enquiry into the ability of the firm of which he is a member to pay their debts, independent of their claim upon the partnership, and into the interest of the special partner in said firm; and will direct that if no evidence is offered, it shall be presumed that the firm is able to pay its debts, and

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that the special partner has an equal interest in the concern. Idem, 683

PLEADING AT LAW.

A paper contains an account of rents collected by an agent for his principal; and at the foot of the account there is a written statement setting out the gross amount, certain credits, and the net balance; and it concludes, "In the foregoing statement all errors to be corrected. As witness my hand and seal." And it is signed and sealed by the agent.

1st. Quære: If this paper will sustain an action of debt.

2d. If the paper will sustain an action of debt, if the plaintiff claims the sum stated in it as net rents, he must aver that there is no error in the bond. And if he seeks to recover more or less than the sum stated, he must aver such error in the bond as will sustain his demand.

Davis' adm'rs *v.* Mead, 118

PLEADING IN EQUITY.

1. What additional prayer in a suit against infants for sale of their land, will not render the proceedings irregular. See Infants, No. 2, and

Daniel & als. *v.* Leitch, 195

2. A general allegation of fraud in a bill is not sufficient to raise that question.

Steed *v.* Baker & al., 380

3. Any thing in an answer which will apprise the plaintiff that the defendant relies on the statute of limitations, is sufficient, if such facts are stated as are necessary to show that the statute is applicable.

Tazewell's ex'or *v.* Whittle's adm'r, 329

4. In a bill by creditor of testator against executor and legatee, the latter relies on the statute of limitations in his answer. This is sufficient to protect the estate from a decree against the executor.

Idem, 329

POWERS.

Testator empowers his executors to set apart so much of his estate not specifically bequeathed, as they may think sufficient to produce a clear income of two thousand dollars, which is directed to be paid to certain legatees for their lives. And after some unimportant provisions, he gives the balance of his estate among his nephews and nieces: and then he says, "And for the purpose of making such division with greater facility, I hereby give to my executors, or such of them as may
844 *choose to act, full power to sell or otherwise dispose of, the whole or any part of said property, in such time and manner and on such credit as to them may seem most beneficial for the whole."

1st. Quære: If the legal title to the real estate vested in the executors.

Carrington *v.* Goddin, 587

2d. The executors had full power and authority to sell all or any part of the real estate; and a bona fide purchaser from them is not bound to show that such sale was necessary for the purpose of making division among the devisees.

Idem, 587

3d. A bona fide purchaser will not be affected by the failure of the executors to account for the purchase money.

Idem, 587

4th. The executors by deed reciting that it was made in execution of the powers vested in them, in consideration of an exchange of land made with A (one of the executors) and for the consideration of one dollar paid by the purchaser, convey a lot belonging to the estate of their testator. Such a deed on its face is not invalid, but passes the title to the purchaser. Idem, 587

PRACTICE AT COMMON LAW.

1. An instruction which propounds the law correctly, should be given if there is any evidence to sustain it.

Early *v.* Garland's lessee, 1

2. Prior to the act, Code, ch. 177, § 14, p. 673, interest could not be allowed by a jury in ejectment, upon the profits; and the jury having allowed such interest, it is mere surplusage, and the judgment will be for the principal sum and interest from the date of the verdict.

Hepburn & als. *v.* Dundas & als., 219

3. Upon a judgment in an action for a tort depending when the act, Code, ch. 177, § 14, p. 673, went into operation, it is proper to charge interest from the date of the verdict.

Lewis *v.* Arnold, 454

4. How the evidence shall be put upon the record in a caveat case. See Caveats, No. 2, 3, 4, and

Hamilton *v.* McNeil & als., 389

5. In an action of ejectment the tenant, without disclaiming title to any part of the land in the declaration mentioned, proves upon the trial, that he is only in possession and claiming title to a part of it. A verdict and judgment for all claimed in the declaration is not erroneous; or if it is, it is not an error by which the tenant is injured, or of which he can complain in an appellate court.

Carrington *v.* Goddin, 587

6. A proceeding under the Code, ch. 167, § 5, p. 640, to recover money due upon contract, by notice, must be returned forty days before the commencement of the term, and put upon the docket of the court, or it cannot be tried at that term.

Hale *v.* Chamberlain, &c., 658

PRACTICE IN CHANCERY.

1. Upon a bill to set aside a deed of trust to secure a debt an assignee of the debt is a necessary party; and the debtor and trustee in their answers stating that the debt has been assigned to a person named, plaintiff should be required to make him a party, if, upon a rule for the purpose, it appears he is such assignee.

Tichenor *v.* Allen, 15

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2. The court for good cause shown, may overrule a motion to dissolve an injunction, and continue it to the hearing, without adjudicating the principles of the cause; in which case no appeal will lie from the order.

Baltimore & Ohio R. R. Co. *v.* City of Wheeling, 40

3. A foreign corporation being a party and not having answered, and the answer not being necessary for a discovery, the absence of such is not a ground for refusing to dissolve an injunction. Idem, 40

4. On a motion to dissolve an injunction all the allegations of the bill not denied by the answer are to be taken as true; and it is no objection to the motion to dissolve that exceptions to the answer for insufficiency have not been acted on.

Idem, 40

5. As a corporation cannot be sworn, it must put in its answer under its common seal. Such answer is not evidence for the corporation, though responsive to the bill; but it puts in issue the allegations of the bill to which it responds; and this as well on the motion to dissolve an injunction as upon the hearing. Idem, 40

6. How irregularities occurring in the proceedings for the sale of infants' lands may be cured. See Infants, No. 3, 4, 5, and

Daniel & als. *v.* Leitch, 195

7. How husband, legatee of his wife, may proceed with a suit commenced by her to recover the trust propery. See Equitable Jurisdiction and Relief, No. 11, and

McDaniel *v.* Baskervill, 228

8. A cause is heard upon the report
845 of *a commissioner, which had not been returned for the legal period. The decree being interlocutory, the error should be corrected by the court, upon application of the party aggrieved.

Armstrong's adm'r & als. *v.* Pitts & als., 235

9. In a bill by legatees against executor for settlement of his account and distribution, the decree against him for the amount found due, should be de bonis propriis; but if it is de bonis testatoris, it is an error of which the plaintiffs might complain, but it is not an error which can avail the surety.

Franklin's adm'r *v.* P. Depriest, 257

10. In a bill by creditor against executor the plaintiff having stated that his debt was evidenced by deed, if it appears in the progress of the cause that it was by parol, the executor may set up the defense of the statute of limitations by exception to the commissioner's report.

Tazewell's ex'or *v.* Whittle's adm'r, 329

11. Courts of equity will decree interest upon a bond or judgment beyond the penalty, against the principal debtor.

Tazewell's ex'or *v.* Saunders' ex'or & al., 354

12. Bill by vendee of land to enjoin the payment of the purchase money on the ground of defect of title to a part of the land, makes vendor and adverse claimant parties, and charges generally fraud in the latter in procuring his deed to the land. Vendor answers and also charges adverse claimant with fraud:

1st. The general allegation of fraud in the bill is not sufficient to raise that question.

2d. That there is no privity between plaintiff and adverse claimant, and the equity between the latter and the vendor does not arise upon the pleadings and proofs between plaintiff and defendants, and is not therefore the proper subject of a decree between codefendants.

Steed *v.* Baker & al., 380

13. In an action at law on a bond against a surety, he defends it on the ground of usury; but there is a judgment against him. The surety then files a bill for relief against the judgment, on the ground of after discovered evidence: but there was evidence to the same point before the jury. The after discovered evidence being merely cumulative, it is not ground for relief.

Harnsbarger's adm'r *v.* Kinney, 511

14. A sale of a tract of land made by a commissioner under a decree of the chancery court, on a day so inclement that persons intending to be present and to bid for a part of the land, are deterred from attending, and when there was but one bidder present who lived at the place, will be set aside without weighing the evidence, which is conflicting, as to the sufficiency of the price at which it was sold.

Roberts *v.* Roberts, 639

15. According to the practice in Virginia, upon objection to a sale of land made by a commissioner, it is not necessary to ask that the biddings may be opened by the offer of a substantial advance upon the price reported. But the court will consider the objections to the sale, and confirm or set it aside as the merits of the case may require. Idem, 639

16. On a bill claiming a share of a tract of land, and asking for partition, and for general relief, the plaintiff's right to partition being established, under the prayer for general relief there may be a decree for an account of rents and profits.

Humphrey *v.* Foster & wife, 653

17. Errors in the details of a decree for an account are not a proper subject for appeal and correction in the appellate court; but they may be corrected by exceptions to the commissioner's report. Idem, 653

18. Bill to set aside a will, states the facts showing the probat is a nullity, but asks for an issue devisavit vel non, and for general relief. The court may disregard the prayer for an issue, and give the proper relief under the prayer for general relief.

Ballow & als. *v.* Hudson & als., 672

19. When the court having obtained possession of a case will go on to do complete justice in the cause. See Partnership, No. 6, and

McArthur *v.* Chase & als., 683

20. How the court will proceed against a

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special partner, who has made himself liable as a general partner. See Partnership, No. 8, 9, and Idem, 683

PRACTICE IN CRIMINAL CASES.

See Criminal Jurisdiction and Proceedings.

PRETENSED TITLE.

The conveyance of a pretensed title to land is not void; and the bonds given for the purchase money of the same are valid.
Middleton for Warren's heirs *v.* Arnolds, 489

846 *PURCHASER FOR VALUE.

1. An insolvent merchant purchases goods, not intending to pay for them, and after getting possession of them he conveys them, and all his other estate, in trust for the payment of his debts; the trustee having no notice of the fraud. The trustee is a purchaser for value without notice.
Wickham and Goshorn *v.* Lewis Martin & Co., 427

2. When a purchaser from an executor selling under a power is not affected by a breach of the trust by the executor. See Powers, and
Carrington *v.* Goddin, 587

3. What will not be a violation of the power by the executor. See Powers, and Idem, 587

RAIL ROADS.

1. See Baltimore and Ohio Rail Road Company, and
Baltimore & Ohio R. R. Co. *v.* City of Wheeling, 40

2. The act, Code, ch. 56, § 4, p. 292, does not apply to a case in which a rail road is not entering upon the land of the owner of a dwelling-house.
Richmond & York River R. R. Co. *v.* Wicker, 375

RECORDS.

When a record is evidence. See Evidence, No. 1, and
Baylor's lessee *v.* Dejarnette, 152

REGISTRY OF DEEDS.

See Trusts and Trustees.

RELATOR.

In an action on the official bond of an executor against one of his sureties, to recover the amount of a decree against the executor rendered in favor of the trustee of a woman, the trustee is the proper relator in the action.
Calahan's adm'rs *v.* J. R. Depriest, trustee, 274

RELIGIOUS CONGREGATIONS.

1. The case of Gallego's ex'ors *v.* The Attorney General, 3 Leigh 450, approved.
Brooke & als. *v.* Shacklett, 301
Carter & als. *v.* Wolfe, 301

2. The act, Code, ch. 77, § 8, 9, 10, 11, 12, 13, relates only to conveyances, devises and dedications of property for the use of "religious congregations," in the limited and local sense of that term; viz: for the members of those religious congregations, who from their residence at or near the place of public worship, may be expected to use it for such purpose. Idem, 301

3. No deed which does not respect the rights of the local society or religious congregation, and no deed which does not design the enjoyment of the uses of the property conveyed, by the local religious society or congregation, can be placed within the influence of the statute. Idem, 301

4. A deed conveying property in trust for the use of the local society, is not without the operation of the statute, by reason that it sanctions the appointment of the ministers, and authorizes them to use the house for preaching, without any reference to the vote or wish of the congregation; it being a Methodist church, and the ministers being to be appointed by the conference, according to the constitution of that church. Idem, 301

5. Deed conveys a house of worship in trust for a local religious congregation; and provides, that the trustees are at all times to permit the ministers belonging to the Methodist Episcopal church, who shall be duly authorized by the conferences of the church, to preach in the house. Upon a question of the right of a minister to preach in the house, that question is to be determined by enquiring, not whether he represents the wishes of a majority of the members of the society, but whether he has been appointed and assigned to the society in accordance to the laws of the church. Idem, 301

6. The general conference of the Methodist Episcopal church in the United States had the constitutional power to adopt the plan for the separation of the church, adopted in 1844. Idem, 301

7. A society of the church which, according to the plan of separation, is a border society, having by a majority of its members resolved to adhere to the Methodist Episcopal church south, is entitled to the use of the church house in exclusion of those who repudiate the authority of said church, and refuse to receive the pastors appointed by it. Idem, 301

SALES.

1. The 17th section of 29 Charles 2, ch. 3, in relation to the sale of goods, &c., has not been adopted in Virginia.
Chapman *v.* Campbell, 105

847 *2. When there is a contract for an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the vendor immediately acquires a property in the price, and the vendee a property in the goods; and then all the consequences resulting from the

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vesting of the property follow, one of which is that if it be destroyed the loss falls on the vendee. Idem, 105

3. Any words importing a bargain whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another shall signify his willingness and consent to buy it, in presenti, for a specified price, would be a sale and transfer of the right to the charter: and neither the delivery or tender of the property, nor the payment or tender of the purchase money, is necessary to constitute a contract. Idem, 105

4. A slave on trial for larceny before a County court is sold; and before he is discharged he makes his escape and is not heard of again. The contract of sale being complete, the purchaser is bound for the price, though the slave was not and could not be delivered. Idem, 105

5. An insolvent merchant purchases goods not intending to pay for them, and after getting possession of them, he conveys them and all his other estate, in trust for the payment of his debts; the trustee having no notice of the fraud. The trustee is a purchaser for value without notice, and the vendor cannot reclaim the goods.
Wickham and Goshorn *v.* Lewis Martin & Co., 427

6. Quære: What fraud in the purchaser of goods will authorize the seller to reclaim them whilst in possession of the purchaser. Idem, 427

7. What is a delivery so as to vest title, where the subject is not a specific thing, but salt to be made. See Contracts, No. 6, and
Lewis *v.* Arnold, 454

8. As to sales of expectant interests and reversions. See Expectant Interests, No. 1, 2, and
Cribbins *v.* Markwood, 495

SEDUCTION.

1. In an action for the seduction of plaintiff's daughter, to enhance the damages, he may prove that the defendant promised to marry her, and by means of said promise had succeeded in debauching her.
White *v.* Campbell, 573

2. The action by a father for the seduction of his daughter is founded on the relation of master and servant, and not of parent and child.
Lee *v.* Hodges, 726

3. In such case the declaration must allege the relation of master and servant, or it will be fatally defective on demurrer. Idem, 726

4. The only change made by the act, Code, ch. 148, § 1, p. 589, in relation to the action of seduction, is to dispense with proof of the loss of service: The act does not give the action in any case where it did not lie at common law. Idem, 726

5. Where a daughter over the age of twenty-one years, who lives away from her father's house, under a contract for her services made by herself after she came of age, for her own benefit, is seduced, the action by the father will not lie either at common law or under the statute. Idem, 726

SETOFF.

1. A plea of equitable setoff under the statute, must show that the offset is such as may be set up under the statute, and must be verified by affidavit.
Watkins *v.* Hopkins' ex'or, 743

2. In an action on a bond for five hundred dollars, given for the last payment of the purchase money of a tract of land, a plea that the plaintiff was to make defendant a good title to the land upon the payment of the bond, and that the defendant had offered to pay it upon the making of the title, and that the plaintiff had failed and refused to make the title; by reason whereof the consideration had failed to the extent of two hundred and fifty dollars; is not a good plea in substance. Idem, 743

3. In such an action, a plea, that the plaintiff had failed to give the defendant possession of two acres of the land; or a plea, that plaintiff had failed to deliver possession of the land for two months after the time at which by the contract he was to deliver possession; or that he had not delivered the tenement in the plight and condition in which it was at the time of the sale, and in which he was to deliver it, but delivered it in a damaged condition from injuries done or permitted in the mean time to the tenement and freehold; is a good plea setting out a partial failure of the consideration. Idem, 743

SHERIFFS.

1. The act of June 7, 1852, Sess. Acts of 1852, p. 12, authorizing assessments
848 in *certain cases on the office of sheriffs and sergeants, is not in violation of the constitution.
Gilkeson *v.* Frederick justices, 577

2. An assessment of four hundred dollars upon the sheriff of Frederick county, laid on the 4th of October, and to be paid on the 1st of February following, is not in violation of the act of 1852. Idem, 577

3. If the time of payment fixed by the court was inconsistent with the act, that would not render the assessment void; but it would be corrected as to the time of payment. Idem, 577

SLAVES AND FREE NEGROES.

1. The gift of the future increase of female slaves is a valid gift.
Taylor & als. *v.* Yarbrough & wife, 183

2. Such gift being to a married woman who survives her husband, the increase of the slaves born after the death of the husband, belong to the wife. Idem, 183

3. As a general rule a court of equity will decree the specific execution of a contract for the sale and delivery of slaves, at the

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suit of the purchaser, without any allegation or proof of peculiar value.
Summers & al. *v.* Bean, 404

4. See Specific Performance, No. 2, 3, 4, and Idem, 404

5. See Emancipation, No. 1, and
Hepburn & als. *v.* Dundas & als., 219

6. There are three negroes, children of the same mother, born slaves, and the mother and children are afterwards emancipated. One of the three dies, having acquired real estate, intestate and without children; and the mother is dead. The other two take the estate as heirs to their deceased sister. Idem, 219

SPECIFIC PERFORMANCE.

1. As a general rule a court of equity will decree specific execution of a contract for the sale and delivery of slaves, at the suit of the purchaser, without any allegation or proof of peculiar value.
Summers & al. *v.* Bean, 404

2. The purchase of slaves being for the life or widowhood of the vendor, upon her refusal to execute the contract, the inadequacy of the purchaser's remedy at law will give equity jurisdiction to relieve him.
Idem, 404

3. In a suit in equity by purchaser of slaves for the life or widowhood of the vendor, there being no controversy as to the right of the remainderman in the slaves, they are not necessary parties.
Idem, 404

4. Testator bequeaths to his widow land, slaves, &c., for her life or widowhood, for the support of herself and her younger children. One of these children grows up and marries, and the widow contracts with her husband to sell him two of the slaves for her life; and these two slaves are not more than will be the share of the wife in the slaves. This is no breach of the trust of the will, and a court of equity will enforce the sale at the suit of the purchaser, with a provision that the slaves be surrendered for division if the widow shall marry.
Idem, 404

STATUTES.

1. The act of congress of August 19, 1841, establishing a system of bankruptcy, § 4, 8, construed in
Tichenor *v.* Allen, 15

2. The act, Code, ch. 179, § 2, p. 677, in relation to suits by creditors to set aside deeds, construed in Idem, 15

3. The act of March 6, 1847, Sess. Acts of 1847, ch. 99, p. 86, in relation to the Baltimore and Ohio R. R. Company, construed in
Balt. & Ohio R. R. Co. *v.* City of Wheeling, 40

4. The act of March 31, 1853, Sess. Acts of 1853, in relation to free schools in Accomack, construed in
Bull & als. *v.* Read & als., 78

5. The constitution of Virginia, article 4, § 22, 24, 25, in relation to taxation and finance, construed in Idem, 78
Gilkeson *v.* Frederick justices, 577

6. The act, Code, ch. 122, § 11, p. 517, in relation to the construction of wills, construed in
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7. The act, Code, ch. 151, § 8, p. 602, in relation to attachment bonds, construed in
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8. The act, Code, ch. 177, § 14, p. 673, in relation to the allowance of interest by a jury, construed in
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9. The act, Code, ch. 168, § 3, p. 640, in relation to plaintiffs in actions on official bonds, construed in
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10. The act, Code, ch. 56, § 4, p. 849 292, *in relation to the entry on lands by rail road companies, construed in
Richmond & York River R. R. Co. *v.* Wicker, 375

11. The act, Code, ch. 181, § 6, p. 681, in relation to amendments of judgments, &c., construed in
Lewis *v.* Arnold, 454

12. The act, Code, ch. 148, § 1, p. 589, in relation to the action of seduction, construed in
White *v.* Campbell, 573
Lee *v.* Hodges, 726

13. The act of January 7, 1852, Sess. Acts of 1852, p. 12, in relation to taxing sheriffs, construed in
Gilkeson *v.* Frederick justices, 577

14. The act, Code, ch. 116, § 5, p. 500, in relation to the sale of interest in land, construed in
Carrington *v.* Goddin, 587

15. The act, Code, ch. 167, § 5, p. 640, in relation to notices to recover money on contracts, construed in
Hale *v.* Chamberlain, &c., 658

16. The act, Code, ch. 192, § 2, p. 727, in relation to burning a dwelling-house, construed in Hooker's Case, 763

17. The act, Code, ch. 131, § 3, p. 545, declaring real estate not charged by the will with debts, assets, construed in
McCandlish *v.* Keen & als., 615

18. The act, Code, ch. 118, § 11, p. 509, in relation to unrecorded deeds, construed in Idem, 615

19. The act, Code, ch. 38, § 25, p. 210, in relation to taxing agents of foreign insurance companies, construed in
Slaughter's Case, 767

20. The act, Code, ch. 38, § 4, 9, p. 207, 208, in relation to ordinaries, construed in
Burner's Case, 778

21. The act of March 29, 1837 Sess. Acts 1836–7, p. 41, in relation to special partnerships, construed in
McArthur *v.* Chase & als., 683

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SURETIES.

1. A court of equity has jurisdiction to hold a guardian to account, and his sureties with him, to the payment of any balance found due to the ward; though the guardian lives out of the state and has no property within it.
Pratt *v.* Wright & als., 175

2. As to guardians' bonds. See Guardians, No. 1, 2, 3, 4, 5, and Idem, 175

3. The surety of an executor having executed the bond, is estopped from pleading that it is made payable to a justice who was not on the bench at the time.
Franklin's adm'r *v.* P. Depriest, 257

4. By the act, Code, ch. 168, § 3, p. 640, suit may be maintained upon such bond, though it is made payable to a justice who was not sitting in the court at the time of its execution. Idem, 257

5. The statute of limitations in favor of sureties of fiduciaries, Code, ch. 149, § 5, 6, p. 591, does not begin to run until there is a decree or judgment against the executor, fixing his liability. Idem, 257

6. That the decree against the executor was de bonis testatoris, when it should have been de bonis propriis, is an error of which the plaintiff might complain, but it is not an error which can avail the surety. Idem, 257

7. If such a decree was erroneous as to the surety, this would not render it a nullity. So long as it remains unreversed, full force and effect must be given to it as well against the surety as the executor; and it cannot be questioned in an action upon the official bond of the executor. Idem, 257

8. In an action on the official bond of an executor against one of his sureties, to recover the amount of a decree against the executor rendered in favor of the trustee of a woman, the trustee is the proper relator in the action.
Calahan's adm'rs *v.* J. R. Depriest, trustee, 274

9. See Equitable Jurisdiction and Relief, No. 18, 19, 20, 21, and
Harnsbarger's adm'r *v.* Kinney, 511

SURVEYS.

1. When surveys are or are not evidence. See Evidence, No. 2, 3, and
Clements *v.* Kyles, 468

2. See Boundaries, No. 1, and
Idem, 468

TAXATION BY COUNTIES, &c.

1. An act for the establishment of free schools, provides for the election of certain commissioners who are authorized to establish schools in the district and to levy taxes for their support. This is constitutional.
Bull & als. *v.* Read & als., 78

2. The commissioners being authorized to establish schools and levy taxes sufficient to defray the expenses thereof, they may build the necessary school-houses, and levy sufficient taxes to pay for them. Idem, 78

3. The act authorizes the commissioners to levy a capitation tax upon white male inhabitants, and an ad valorem tax upon the property of the district, 850 *sufficient to raise the amount necessary to defray the expense of the schools. The capitation tax may be levied upon the white male inhabitants above twenty-one years of age, only; and the ad valorem tax upon slaves may be upon slaves over twelve years of age, and valued each at three hundred dollars. And the ratio of the capitation to the ad valorem tax may be greater than that prescribed in the constitution, article 4, § 25. Idem, 78

4. The constitution of Virginia, article 4, § 22, 23, 25, in relation to taxation and finance, relates to taxation by the general assembly for purposes of state revenue, and do not apply to taxes, levies, &c., by counties, corporations, &c., for the local purposes of such bodies.
Gilkeson *v.* Frederick justices, 577

5. The general assembly has full power to authorize counties, municipal corporations and the like, to levy taxes within their bounds for their peculiar purposes. And the mode, subjects and extent of such taxation is not limited or regulated by the provisions of the constitution in relation to taxation and finance. Idem, 577

6. The act of June 7, 1852, Sess. Acts of 1852, p. 12, authorizing assessments in certain cases on the office of sheriffs and sergeants, is not in violation of the constitution. Idem, 577

7. An assessment of four hundred dollars upon the sheriff of Frederick county, laid on the 4th of October and to be paid on the 1st of February following, is not a violation of the act of 1852. Idem, 577

8. If the time of payment fixed by the court was inconsistent with the act, that would not render the assessment void; but it would be corrected as to the time of payment. Idem, 577

TAXATION AND FINANCE.

1. See Taxation by Counties, &c.

2. See Licenses, No. 1, and
Slaughter's Case, 767

TAX SALES.

1. It is the duty of a County court, acting under the Code, ch. 37, § 15, p. 203, in relation to land sold for taxes, to admit the report of the surveyor to record, if it conforms to the act. And the court has no authority to enquire into the regularity or validity of the sale made by the sheriff.
Randolph justices *v.* Stalnaker, 523

2. The Circuit court may proceed by mandamus to compel the County court to admit the report of the surveyor to record. Idem, 523

TRUSTS AND TRUSTEES.

1. See Equitable Jurisdiction and Relief, No. 11, and
McDaniel *v.* Baskervill, 228

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2. On a bill filed by claimant of trust property sold, to recover it, the trustee is a necessary party. Idem, 228

3. Testator devises land and negroes to trustees for the use and benefit of his son A during his life, with the privilege that he may reside on said farm and have the use of said negroes, so far as may be necessary for his support and maintenance, and for the support and maintenance of his family; and at his death the property to be equally divided among his children. And he directs that the property shall not be liable for any debt which his son A might then or thereafter owe. Creditors of A not having recovered a judgment against him, cannot come into equity to subject the trust property, though the debts were contracted for necessaries for the support of the family.
Armstrong's adm'r & als. *v.* Pitts & als., 235

4. What sale of trust property is no breach of the trust. See Specific Performance, No. 4, and
Summers & al. *v.* Bean, 404

5. See Religious Congregations, passim, and
Brooke & als. *v.* Shacklett, 301
Carter & als. *v.* Wolfe, 301

6. The trustee in a deed of trust to secure creditors without notice of a fraud, is a purchaser for value without notice.
Wickham and Goshorn *v.* Lewis Martin & Co., 427

7. A trustee in whose favor a decree against an executor has been rendered, is the proper relator in an action on the official bond of the executor, to recover the money.
Calahan's adm'rs *v.* J. R. Depriest, 274

8. A deed of trust to secure a debt is valid against the general creditors of the grantor after his death, though not recorded.
McCandlish *v.* Keen & als., 615
Same *v.* Coke's ex'or & als., 615

9. Though the recording the deed after the death of the grantor is not necessary to give it validity, yet it seems, if recording were necessary to give it validity, the recording after the death of the grantor would be sufficient. Idem, 615

10. The act, Code, ch. 131, § 3, p. 545, which declares that all the real estate of a party dying, which he has not subjected *by his will to the payment of his debts, shall be assets for the payment of debts in the order in which personal estate is to be applied, does not apply, except subject to the charge, to the real estate on which the debtor has created a bona fide lien which is good against himself. Idem, 615
851

11. See Assets, No. 6, and
Idem, 615

12. The act, Code, ch. 118, § 11, p. 509, in relation to the creditors and purchasers who shall be protected against unrecorded deeds, does not include creditors claiming under a devise for the payment of debts, or under the statute subjecting real estate to their payment. But the creditor who may avoid such a deed must have some lien by judgment or otherwise, which entitles him to charge the subject conveyed specifically.
Idem, 615

USURY.

A principal obligor in a bond having been remiss in paying the interest upon it promptly, as he was required to do, on two occasions when he sent an agent to pay the interest due, directed him to pay the interest up to the period when the interest would next become due. This however was voluntary on his part, and not required by the obligee; but endorsements of the payments were made upon the bond. This is not usury; and is no ground of relief to the surety.
Harnsbarger's adm'r *v.* Kinney, 511

VENDOR AND PURCHASER.

1. The trustee in a deed of trust to secure debts, is a purchaser for value.
Wickham & Goshorn *v.* Lewis Martin & Co., 427

2. A sale of a reversion in real estate by a young man who had just arrived at the age of twenty-one years, there being no fraud or imposition on the part of the purchaser, and no confidential relations between the parties, will not be set aside for mere inadequacy of price.
Cribbins *v.* Markwood, 495

3. The English doctrine in relation to the sale of expectant interests, so far as it relates to vested interests, held not to be law in this state. Idem, 495

4. See Powers, and
Carrington *v.* Goddin, 587

5. A conveys real and personal property on a consideration of a sum of money and of an annuity for the life of the grantor, if she survives the grantee, from the death of the grantee; and in the deed the grantee covenants that his estate shall pay to the grantor if she survives him, the annuity.
1st. This does not create a charge upon the property conveyed, so as to entitle the grantor to subject the same to the payment of the annuity after the death of the grantee, in preference to other creditors of the grantee.
2d. The conveyance is in consideration of the covenant of the grantee that his estate shall pay the annuity; and the vendor's lien does not attach upon the property.
McCandlish *v.* Keen & als., 615
Same *v.* Coke's ex'or & als., 615

6. A case in which it was held from the nature of the property conveyed and of the consideration for it, a part of which was an annuity to be paid if the grantor survived the grantee, that the grantor did not retain a lien upon the property conveyed, for the payment of the annuity.
Idem, 615

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VENIRE DE NOVO.

See Criminal Jurisdiction and Proceedings, No. 2, and Cocke's Case, 750

WATER COURSES.

City authorities change the channel of a drain so as to throw the water flowing along it upon the lot of T lying below. He cannot obstruct the channel so as to cause the water to flow back upon and injure the lot of A lying above.

Amick *v.* Tharp, 564

WILLS.

1. Testator made his will in 1842, purchased a tract of land in 1849, and died in 1852. His will in respect to this land, is to be construed as the law was prior to the Code of 1849.

Raines *v.* Barker & als., 128

2. The construction given to the act of 1785, authorizing the devise of after acquired lands, in the case of Allen *v.* Harrison, 3 Call 289, adhered to.

Idem, 128

3. A case in which it was held that a tract of land purchased after making the will, did not pass by it, although testator disposes of "the balance of his estate."

Idem, 128

4. Testatrix by her will, made when she possessed no real estate, gave two slaves to her daughter M, and six to her
852 *son S, and then says, "All the balance of my property of every description, real or personal, I give and bequeath to my son S;" but if her daughter had a child or children, three of the slaves given to S should go to them. Land afterwards acquired by the testatrix does not pass by the devise to S.

Gibson *v.* Carrell & als., 136

5. Testator devises lands, and charges that the devisee shall pay one-fourth of his debts. The charge prevents the running of the statute of limitations against a debt not barred at the death of the testator.

Baylor's lessee *v.* Dejarnette, 152

6. But the charge in the will does not revive a debt barred by the statute.

Tazewell's ex'or *v.* Whittle's adm'r, 329

7. The will of W having been made in 1746, before a survey or patent to him, the land embraced in said patent did not pass by his will, but descended to his heir at law.

Clements *v.* Kyles, 468

8. See Estates, No. 2, 3, and

Hooe & als. *v.* Hooe, 245

Tinsley *v.* Jones & als., 289

9. The name of a testator at the commencement of an olograph will is an equivocal act, and unless it appears affirmatively from something on the face of the paper, that it was intended as a signature, it is not a sufficient signing under the statute. Code, ch. 122, § 4, p. 516.

Ramsey & als. *v.* Ramsey's ex'or, 664

10. A paper is propounded for probat to the County court of C, as the will of B, and is rejected on the ground that B was incompetent to make a will. Afterwards the paper is propounded for probat to the Circuit court of C, and that court, with the knowledge that it had been rejected in the County court, admits it to probat. The sentence of the County court is conclusive against the will, and the sentence of the Circuit court is a nullity.

Ballow & als. *v.* Hudson & als., 672

11. See Practice in Chancery, No. 18, and Idem, 672

WITNESS.

1. See Evidence, No. 5, and

Clements *v.* Kyles, 468

2. In an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant.

Brown's adm'r *v.* Johnson, 644

Isbell's ex'or *v.* Johnson, 644

3. Where a witness is offered as competent on the ground, that though interested in favor of the party offering him, his interest is equal or greater the other way, this last interest must be as direct and immediate as the former. Idem, 644

4. In an action against one of two obligors in a bond, the interest of the other arising from his liability to the defendant for contribution, is more direct and immediate than his liability as obligor in the bond to the obligee; and he is therefore an incompetent witness for the defendant. Idem, 644

5. If the liability of one obligor in a bond is defeated on a ground not personal to himself, (as infancy, bankruptcy or death,) the liability of all the other obligors is at an end; and therefore one obligor is an incompetent witness for his co-obligor in an action on the bond. Idem, 644

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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME XIV.

FROM APRIL 1, 1857, TO OCTOBER 1, 1858.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.

WILLIAM DANIEL, RICHARD C. L. MONCURE,

GEORGE H. LEE, GREEN B. SAMUELS.*

Attorney General: JOHN RANDOLPH TUCKER.

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*Judge Samuels died on the 5th day of January, 1859.

Entered according to Act of Congress, in the year one thousand eight hundred and fifty-nine, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Davis v. Miller, &c.

April Term, 1857, Richmond.

1. **Negotiable Paper—Dishonored—Transfer of—Effect of Payment to Transferror.***—Payment by the maker to the payee and endorser of a negotiable note, after it has been protested for non-payment, taken up by the payee and transferred by him to his creditor as collateral security for a larger debt, such payment being made without knowledge of the transfer, is not a good defence to an action brought on the note by the transferee and holder against the maker.

2. **Same—Same—Payment by Endorser—Effect on Negotiability.**†—Payment of a dishonored note by an endorser, does not extinguish its negotiability as to him and all parties liable thereon to him; though it discharges the liability of subsequent endorsers, whose liability will not be revived by his putting the note again in circulation.

3. **Same—Overdue—Transfer of—Subject to Equities.**‡—Where an over-due note is transferred, the holder takes it subject to all the defences and equities to which it was subject in the hands of his immediate endorser, whether or not he has any notice thereof: except that an accommodation note in his hands is not therefore invalid.

4. **Same—Same—Same—Subject to What Equities—Quære.**—*Quære:* If the equities to which such over-due note is subject, in the hands of the endorsee are or are not only such equities as attach to the note itself; as illegality or want of failure of consideration, *or a release or payment, or a counter claim agreed to be set off, which is equivalent to payment.

5. **Same—Same—Same—Set-Off between Maker and Payee.**§—A set-off as between the maker and the payee acquired after the transfer of an over-due note, though acquired without notice of the transfer of the note, cannot be set off against the holder.

6. **Same—Same—Endorsement Passes Legal Title.**‖—By the endorsement of negotiable notes, though after due, the legal title passes without notice to the maker. But in the case of transfers of choses in action not negotiable, only the equitable title passes, and the maker may make payments to the payee or obligee until he has notice of the transfer.

7. **Same—Same.—Statute—Not Applicable.**¶—The act, Code, ch. 144, § 14, p. 583, in relation to suits by assignees does not apply to negotiable paper, though such paper has been transferred after due.

8. **Same—Pleading and Practice—Variance between Declaration and Note—How Taken Advantage of.****—The declaration on a negotiable note, states the

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***Negotiable Paper—Dishonored—Transfer of—Effect of Payment to Transferror.**—The proposition of the principal case, that off-sets acquired or payments made after the endorsement of an overdue note, though the off-sets were acquired or payments made before notice of the endorsement, constitute no defence as against the endorsee, was approved in Smith v. Lawson, 18 W. Va. 224, 225.

Same—Pre-Existing Debt—Valid Consideration.—It will be conceded on all hands, that a pre-existing debt is a valid consideration for the pledge of a negotiable note, as of any other property. These words used by JUDGE MONCURE in the principal case were approved in Cammack v. Soran, 30 Gratt. 295. See also, *foot-note* to Cammack v. Soran, 30 Gratt. 292, where authority in points are collected.

†**Same—Dishonored—Payment by Endorser—Effect on Negotiability.**—See Smith v. Lawson, 18 W. Va. 212.

‡**Same—Overdue—Transfer of—Subject to Equities.**—It seems well established that, where an overdue negotiable note is transferred, the holder takes it subject to all the defence and equities to which it was subject in the hands of his immediate endorser, whether he had notice thereof or not. The principal case is cited in Arents v. Com., 18 Gratt. 758, 779; Cottrell v. Watkins, 89 Va. 811, 812, 17 S. E. Rep. 328; Karn v. Blackford (Va.), 20 S. E. Rep. 149, as authorizing the proposition. See also, *foot-note* to Arents v. Com., 18 Gratt. 759.

§**Same—Same—Same—Set-Off between Maker and Payee.**—Exchange Bank v. Knox, 19 Gratt. 747, says: "It is a principle of law, too well settled to admit of doubt or argument now, that a set-off as between original parties, acquired after the assignment for a *bona fide* purpose, of the subject in controversy and notice thereof, cannot be set off against a holder for value. 12 Johnson R. 343; 1 John. Ca. 51; 5 Munf. 388; *14 Gratt. 1.*"

See Farmers' Bank v. Willis, 7 W. Va. 50; and also, *note* to first head-note of this case.

‖**Same—Same—Endorsement Passes Legal Title.**—Endorsement of a dishonored negotiable instrument passes the legal title without notice to the maker; for such notes are still negotiable. See the principal case approved as to this point in Moses v. Trice, 21 Gratt. 563, 564. See also, Davis v. Noll, 38 W. Va. 66, 17 S. E. Rep. 791.

¶**Non-Negotiable Paper—Assignment of—Effect of Statute.**—Bentley v. Fire Ins. Co., 40 W. Va. 729, 23 S. E. Rep. 585, and Bantz v. Basnett, 12 W. Va. 779, 780, cite the principal case as authorizing the proposition that, though the statute changed the common-law principle that choses in action, not negotiable, could not be assigned, and validated such assignments, and gave the assignee an action in his own name, the assignee has only equitable title, and the assignor retains legal title. See also, Garland v. Richeson, 4 Rand. 266; Clarksons v. Doddridge, 14 Gratt. 44.

**Negotiable Paper—Pleading and Practice—Variance between Declaration and Note—How Taken Advantage

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endorsement and delivery as at the time of the making; and the proof is that the delivery was after the note fell due: this is no variance: and if it was, could only be taken advantage of at the trial by a motion to exclude the evidence, or to instruct the jury to disregard it.

9. **Instructions—Weight of Evidence—Case at Bar.**††—Where the plaintiff's case is clearly made out, and the only question is whether the defendant has made out a good defence; it is not deciding upon the weight of evidence to instruct the jury upon the assumption of the facts as true, which the evidence tended to prove if they believe it, that the defence is not sufficient; if the instruction itself is correct.

This was an action of debt in the Circuit court of Essex county, brought by Miller & Mayhew against R. M. Davis, to recover the amount of a note for six hundred and ninety-four dollars and seventy-five cents, payable six months after date, at the Exchange Bank at Richmond. The declaration was in the common form. The note was executed by Davis to Edward L. Fant & Co., and was endorsed by them to the plaintiffs after it fell due.

The defendant pleaded nil debet; and payment before notice of assignment: on which issue was joined. On the trial it was proved that the note was regularly protested for non-payment, on the 31st of July 1850, at the Exchange Bank in Richmond, and was returned to the Merchants Bank of Baltimore, where it was
3 *taken up by Fant & Co. on the 6th of August, with money advanced to them by the plaintiffs; and when Fant & Co. had thus gotten possession of the note, they assigned it to the plaintiffs as a security for a large debt which they then owed and still owe to the plaintiffs. Of this assignment Miller & Mayhew sent the defendant a notice; but he did not receive it until after the 9th of August; on which day he paid the amount of the note to Fant & Co. and took their receipt.

When all the evidence had been introduced, the plaintiffs moved the court to instruct the jury, that upon the facts which the evidence tended to prove, if they believed it, the receipt from E. L. Fant & Co. to the defendant, constituted no sufficient defence against the action of the plaintiffs in this cause. Which instruction the court gave. There was a verdict and judgment for the plaintiffs; and the defendant applied to this court for a supersedeas, which was allowed.

Morson, for the appellant, insisted:

1st. That the declaration being in the common form of an endorsee against the maker, upon an endorsement before the note was due, it was not sustained by the evidence, which showed the transfer to the plaintiffs after it was due, and had been taken up by Fant & Co. And he insisted that the plaintiffs should have stated their case specially. He referred to Bank of U. States v. Jackson's adm'x, 9 Leigh 221.

2d. That the plaintiffs having taken the note after it was due, and after it had been retired by the parties who held it at the time it was dishonored, it was open to all the defences to which paper not negotiable was open. 2 Rob. Pr. 251; 1 Parsons on Cont. 213, 216, 217, and note. That the note having been taken as a collateral security, the plaintiffs were not holders for value. Prentice & Weissenger v. Zane,
4 2 Gratt. 262; and therefore *on both grounds the defendant having paid the note without notice of its transfer, the payment was valid, and protected him.

Griswold, for the appellees, insisted:

1st. That after a general verdict, the objection taken to the form of the declaration cannot be sustained. 2 Tucker's Com., book 3, p. 304-310; Chitty on Bills 360; Young v. Wright, 1 Camp. R. 139; Gould v. Eddy, 1 Mass. R. 1; Little v. O'Brien, 9 Id. 423; Wardell v. Pinney, 1 Wend. R. 217; Lawson v. Townes, 2 Alab. R. 373; Carruthers v. West, 63 Eng. C. L. R. 143.

2d. That although the endorsee of a note past due when taken, takes it subject to the equities of the maker, yet the equities of which the maker may avail himself are only equities inherent in the note at the time of the transfer. 1 Parsons on Cont. 214, 215, 216, and the cases in the notes; Whitehead v. Walker, 10 Mees. & Welsb. 696; Bronaugh v. Moss, 10 Barn. & Cress. 558, 21 Eng. C. L. R. 128; Carruthers v. West, 63 Eng. C. L. R. 143; Robinson v. Lyman, 10 Conn. R. 30; Perry v. Mays, 2 Bailey's S. C. R. 354; Cain v. Spann, 1 McMul. R. 258; Hughes v. Large, 2 Barr's R. 103; Havens

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of.—See the principal case in Smith v. Lawson, 18 W. Va. 244; Long v. Campbell, 37 W. Va. 671, 17 S. E. Rep. 199.

On all points relating to negotiable instruments, see monographic *note* on "Bills, Notes, and Checks."

††**Instructions—Weight of Evidence.**—In R. & D. R. Co. v. Noell, 86 Va. 24, 9 S. E. Rep. 473, the court said: "It is a fundamental maxim that the court responds to questions of law, and the jury to questions of fact. The court must decide on the admissibility of evidence, that being a question of law; but not as to its weight after it is admitted, that being a question of fact; and the decided cases, says Mr. Conway Robinson, evince a zealous care to watch over and protect the legitimate powers of a jury. They show that the court must be very careful not to overstep the line which separates law from fact. They establish the doctrine that when the evidence is parol any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proved, will be an invasion of the province of the jury. 1 Rob. Pr. 338; Cornett v. Rhudy, 80 Va. 710; McDowell v. Crawford, 11 Gratt. 402; Bart. Law Pr. 214; Baring v. Reeder, 1 Hen. & M. 174; Moore v. Chapman, 3 Hen. & M. 266; Whitacre v. M'Ilhaney, 4 Munf. 310; M'Rae v. Scott, 4 Rand. (Va.) 463; *Davis v. Miller, 14 Gratt. 1;* Hopkins v. Richardson, 9 Gratt. 485." See also, Fisher v. Duncan, 1 H. & M. 563, 3 Am. Dec. 605; Tyler v. C. & O. R. Co., 88 Va. 394, 13 S. E. Rep. 975; Burke v. Lee, 76 Va. 391; *foot-note* to Ward v. Churn, 18 Gratt. 801; monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

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v. Huntington, 1 Cow. R. 387; Johnson v. Bloodgood, 1 John. Cas. 51; O'Callaghan v. Sawyer, 5 John. R. 118; Losee v. Dunkin, 7 Id. 70; Baxter v. Little, &c., 6 Metc. 7; Burnham v. Wood, 8 N. Hamp. R. 334; Annan v. Houck, 4 Gill's R. 325.

MONCURE, J. Several questions arise in this case. I will consider in the first place the main one, which is:

Whether payment made by the maker to the payee or endorser of a negotiable note, after it has been protested for non-payment, taken up by the latter, and transferred by him to a creditor as collateral security of a larger debt, such payment being made without knowledge of the transfer, is
5 a good defence to an action *brought on the note by the transferee and holder against the maker?

A negotiable note may be transferred at any time while it remains a good, subsisting, unpaid note, whether before or after it has arrived at maturity; Story on Prom. Notes, § 178; and in the latter case, even though it be protested for non-payment and bear upon its face the marks of its dishonor. Payment of a dishonored note by an endorser does not extinguish its negotiability as to him and all parties liable thereon to him; though it discharges the liability of subsequent endorsers, whose liability will not be revived by his putting the note again in circulation. Beck v. Robley, reported in a note to 1 H. Bl. 89, is perfectly consistent with this. Blake v. Sewall, 3 Mass. R. 556; and Boylston v. Greene, 8 Id. 465, in which it was held that a note once paid by a party to it, ceases to be negotiable, were founded on a misapprehension of what was decided in Beck v. Robley; and were overruled in Guild v. Eager, &c., 17 Id. 615, which conforms to Gomez Serra v. Berkeley, 1 Wils. R. 46, and Callow v. Lawrence, 3 Maule & Sel. 95; as indeed do all the cases on the subject which I have seen, except the two cited supra from 3 and 8 Mass. See 2 Rob. Pr. new ed. 235–6.

But though a negotiable note may be transferred as well after as before it becomes due, the rights of the endorsee are very different in the two cases. 2 Rob. Pr. new ed. 252. In the case of a transfer of a note before it becomes due to a bona fide holder for value, he takes it free of all equities between the antecedent parties of which he has no notice: and it has been held that even gross negligence would not alone deprive him of his right. He thus often acquires a better right than that of the endorser under whom he claims. In the case of a transfer of an over-due note, the holder takes it as a dishonored
6 note, subject to all *the defences and equities to which it was subject in the hands of his immediate endorser, whether he has any notice thereof or not: He receives nothing but the title and rights of such endorser. An exception exists in the case of an accommodation note, which is said, in general, to be governed by the same rules as negotiable paper for consideration. So that a bona fide endorsee of such a note, whether before or after maturity, and though knowing it to be an accommodation note, may enforce it against the prior parties. In that case an endorsee of an over-due note acquires a right, though the endorser under whom he claims has none. Sturtevant v. Ford, 43 Eng. C. L. R. 61; Carruthers v. West, 63 Id. 143; Story on Prom. Notes, § 178; 1 Parsons on Contracts 213–217.

But what is the nature of the equities subject to which an endorsee of an over-due note takes it? Are they only such equities as attach to the note itself; as illegality or want or failure of consideration, or a release or payment, or a counter claim agreed to be set off (which is equivalent to a payment)? Or do they embrace also claims arising out of collateral matters, such as a general set-off? On this subject there is much contrariety of decision. In England it was decided in Bronaugh v. Moss, 10 Barn. & Cress. 558, 21 Eng. C. L. R. 128, that the endorsee of an over-due bill or note is liable to such equities only as attach on the bill or note itself; and not to claims arising out of collateral matters, such as a general set-off is. This is a leading case, and has since been uniformly followed in that country. Stein, &c. v. Yglesias, &c., 1 Cromp. Mees. & Ros. 565; Whitehead v. Walker, 10 Mees. & Welsb. 696. In the latter case it was averred in the plea that the endorsee received the bill with notice of the set-off; and yet it was held to be no defence. Parke, B., said, "If the note be released or discharged, the plaintiff, under such circumstances, cannot make a
7 *title to it. But a set-off is not an equity; it is a mere collateral matter; it is a right to set off a cross demand against the plaintiffs' cause of action, which was introduced to prevent a multiplicity of actions." Alderson, B., said, "If the doctrine advanced on the defendant's part were correct, no one would be able to tell whether certain instruments were negotiable or not; for their negotiability would depend on the will of a third person. No one could tell whether the maker would set off his claim against the prior party or not: if he will not, the bill is negotiable, otherwise it is not." In a very recent case decided by the Court of exchequer, Oulds v. Harrison, 28 Eng. L. & E. R. 524, it was held that the right of an endorsee of an over-due bill of exchange to sue the acceptor, is not defeated by the existence of a debt due from the drawer to the acceptor, and notice by the latter to the drawer before endorsement, of his election to set off the amount against the bill; nor is the endorsee affected by the existence of a right of set-off as between the acceptor and the drawer, although the bill was endorsed without value and for the purpose of defeating the set-off. Parke, B., delivering the judgment of the court, said, "although the plaintiff gave no value, the bill is transferred to him by endorsement, and he has a right to sue upon it as much

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as any endorsee who is the holder for value. There is, therefore, no defect in his title on that account. The only question then is, Does the supposed fraud vitiate the title, and in what way?" "We think it is no fraud. The holder is under no legal obligation to allow the debt to be set off against the claim on the bill, unless he has entered into a contract to that effect with the defendant. We think this contract would create an equity in favor of the defendant, or attach to an over-due bill." "It is wholly contingent whether the defendant will have a debt due to him from the plaintiff when the bill is sued on; and
8 *if there be, whether the defendant will choose to plead a set-off."

The doctrine of Bronaugh v. Moss has been recognized and followed, I believe, in most of the states of the Union in which the question has come up for adjudication. See the cases cited in note (c), 1 Parsons on Contracts 215; and in 2 Rob. Pr. new ed. 253. In Massachusetts and South Carolina all set-offs between the original parties existing at the time of the transfer of the title, are allowed: So in Maine; and so also in North Carolina. Id. In New York the course of decision has fluctuated; and the point was considered doubtful in Miner v. Hoyt, 4 Hill's R. 193, 197. In this state there has been no decision on the subject.

But whatever conflict of authority there may be upon the question, whether the equities, subject to which an endorsee takes an over-due negotiable note, embrace set-offs in favor of the maker against the payee, existing at the time of the endorsement, I have been able to find no case in which it was held, or even said, that set-offs between those parties, arising or acquired after the endorsement, even though without notice thereof, are good against the endorsee. On the contrary, it was expressly decided in Baxter v. Little, &c., 6 Metc. R. 7, that they are not. Shaw, C. J., in his able opinion, said, "A note does not cease to be negotiable, because it is over due. The promisee by his endorsement may still give a good title to the endorsee. Notes or other matters of set-off acquired by the defendant against the promisee after such transfer, cannot be given in evidence in defence to such note, although the maker had no notice of such transfer at the time of acquiring his demand against the promisee." The endorsee of a note over due takes a legal title; but he takes it with notice on its face that it is discredited, and therefore subject to all payments, and offsets in the nature of payment. The ground is, that
9 *by this fact he is put upon enquiry, and therefore he shall be bound by all existing facts, of which enquiry and true information would apprise him; but these could only apprise him of demands then acquired by the maker against the payee." These views, I think, are sound; and conclusively show that if set-offs between the prior parties are admissible defences at all against the endorsee of an over-due negotiable note; only such are admissible as existed at the time of the endorsement.

Then, are payments made to the endorser after the endorsement of an over-due negotiable note, but without notice thereof, good defences to an action brought on the note by the endorsee? They seem to stand on the same footing with after-acquired set-offs, if set-offs between the original parties be admissible defences at all against the endorser; and Shaw, C. J., treats them as standing upon the same footing, in his opinion in the case last cited. Speaking of the maker of the note, he says "Having made his promise negotiable, he is liable to any bona fide holder and actual endorsee; and therefore even after the note has become due, in making payments to the original promisee, or in further dealings by which he gives him a credit, he has no right to presume, without proof, that the promisee is still the holder of the note. Besides, in case of payment of a negotiable note, or of a credit which the maker intends shall operate by way of payment, he has a right to have his note given up, if paid in full, or to see the payment endorsed if partial. Should he insist on this right, in the case proposed, he would at once perceive that the person to whom he is making payment or giving credit, is no longer the holder of the note."

It was said by the counsel for the plaintiff in error, that no case can be found in which it has been decided that payment to the endorser of an over-due negotiable
10 *note without notice of the endorsement, is not a good defence to an action brought by the endorsee against the maker. This I believe to be true: At least I have been able to find no such case; and the court has been referred to none by the counsel for the defendants in error. The case cited from 6 Metc. R. 7, was referred to by him. But what is said on the subject in that case by Shaw, C. J., though I think very sound, is yet obiter dictum, and not a judicial decision of the question. On the other hand, however, it may be answered, that no case can be found in which it has been decided, or even said, that payment to an endorser after the endorsement is a good defence against the endorsee. That no decision can be found the other way, may well be accounted for by the fact that payment of a negotiable note is very rarely made without taking in the note, or having the payment, if partial, endorsed thereon; and no occasion has therefore occurred for a decision of the question. That no such occasion has occurred, is itself an argument in favor of the defendants in error.

But in the absence of express authority, I think the question, upon principle, is quite a plain one. The law merchant, which is a part of our law, has made certain paper negotiable. The payee or person legally entitled to it may pass the legal title to another: and the title of that other is just as perfect as if he had been the original payee; or just as perfect as would be his title to any other kind of property legally

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transferred to him. It follows, that after the transfer, payment can only be made to him; and if made to another, would be a payment in the payer's own wrong or at his own risk. To say that a payment made to the endorser without notice of the transfer is a good payment, is to beg the question. It is in effect to say that such notice is necessary to pass the legal title. If it were necessary to pass the legal title,
11 then it would *follow that payment to the endorser before notice of the endorsement, would be a good defence against the endorsee. But if it be not necessary to pass the legal title, then it follows, I think as clearly, that such a payment is not a good defence against the endorsee. Payment can only be made to the person who is invested with the legal title; and the common law rule of caveat emptor by analogy applies to the case. For though a maker of a negotiable note in making a payment cannot be said to be a purchaser, yet there is at least as much reason for holding him responsible for want of caution in making a payment, as for holding a purchaser responsible for want of caution in making a purchase. Indeed there is more. For due caution will always protect the former against an improper payment; while the greatest caution may not protect the latter against an improper purchase. The former is always safe in making payment to the legal holder of the note, which he may thereupon require to be produced and surrendered to him; while the latter is often deceived by a false possession, and must at his peril look to the title, which may be separate from the possession. See Wheeler v. Guild, 20 Pick. R. 545, 553.

Let us now enquire what is necessary to a transfer of the legal title to a negotiable note, and whether notice to the maker or any other party is required. On this subject the authorities speak plainly and uniformly. A negotiable note is made payable to the payee or order. If no such order be made, payment must of course be made to the payee. If such order be made, payment must be made accordingly, by the very terms of the note. It then stands as a note payable to the person to whom it is ordered to be paid by the payee. How is the order to be made? By the practice of merchants it is made by endorsement on the note; which may be either in full or in blank: and when made, the note must be delivered to the endorsee;
12 *such delivery being necessary to a valid endorsement. 1 Parsons on Contracts 205; Emmet v. Tottenham, 20 Eng. L. & E. 348; Sairsbury v. Parkinson, Id. 351. Endorsement and delivery with intent to pass the property, is a complete transfer of the legal title. Lloyd v. Howard, 69 Eng. C. L. R. 995. If the payee endorse the note in blank, that is, merely endorse his name upon it, the legal title may be transferred from one to another, ad infinitum, by mere delivery with intent to pass the title. Thus it is seen that notice of the endorsement to the maker, is not a necessary ingredient in a valid transfer of title to a negotiable note. The maker, in contemplation of law, is supposed already to have notice. When a negotiable note is endorsed by the payee, it assumes the nature of an accepted bill of exchange; the endorser being the drawer, the maker the acceptor, and the endorsee the payee of the bill. The maker, having made the note payable to order, has accepted this bill in advance. And to require notice to the maker in order to a valid endorsement of a negotiable note, would be like requiring notice to the acceptor in order to a valid drawing of a bill of exchange. Reynolds v. Davies, 1 Bos. & Pul. 625.

There is a material distinction in regard to notice, between a negotiable note, and choses in action not negotiable. "In the latter case (says Shaw, C. J., in the case before cited from 6 Metc. R. 7), notice of the assignment must be given by the assignee to the debtor to prevent him from making payment to the assignor. Without such notice, he has no reason to presume that the original creditor is not still his creditor; and payment to him is according to his contract, and in the due and ordinary course of business. The assignee takes an equitable interest only, which must be enforced in the name of the assignor; and until notice, he has no equity against
13 the debtor which can be *recognized and protected by a court of law or equity." A negotiable note, by its very nature and terms, is designed for circulation in the mercantile world. Its negotiation by mere endorsement and delivery, or by delivery only, is in the usual course of business. Choses in action not negotiable, are not designed for circulation. They may be assigned in equity; but not so as to prejudice the debtor; who until he receives notice of the assignment, may safely make payments to the original creditor.

The Code, ch. 144, § 14, 583, declares that "the assignee of any bond, note or writing not negotiable, may mantain thereupon any action in his own name, which the original obligee or payee might have brought; but shall allow all just discounts not only against himself, but against the assignor before the defendant had notice of the assignment." This section is the same in effect with 1 Rev. Code, ch. 126, § 5, p. 484. It applies only to writings not negotiable; and its only effect is to authorize the assignee of such writings to sue at law in his own name. The legal title still remains in the assignor, in whose name the suit at law may be brought. This section can, by no just rule of construction, be extended to negotiable notes, whether before or after maturity; for in either case they are negotiable. They are not only not embraced, but are expressly excluded by the words of the section. "It were better, perhaps (as was said by Parker, C. J., in Sargent v. Southgate, 5 Pick. R. 312, 319), that dishonored notes should not be negotiable, but assignable only." It has been long settled, however, that they are nego-

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tiable; and it belongs to the legislature alone to make them assignable only, if it be better that they should be so. That has not yet been done.

There is no necessity for notice to the maker, of an endorsement of a negotiable note, in order to protect him against loss occasioned by making payment to a
14 *person not entitled to the note. If he sustain such loss, it can only be the result of his own gross laches. He may discharge himself by payment to any person, who is in possession of the note with an apparent lawful right of ownership, unless he has notice that such person is not actually entitled. Though if an endorsement be necessary to give that person a title, the maker, before he can safely pay it, is bound to ascertain if the endorsement is genuine; and, if the endorsement be to a particular person, that the person producing it is the identical person. Story on Prom. Notes, § 113. He is not bound to pay the note, unless it be produced and surrendered to him on payment. It is not sufficient to show that the note has been lost or even destroyed, or that it has become over due; for he has a right to it as his voucher of payment and as his security against any future claim or demand thereof. Id. § 107. If it be lost or destroyed, whether at the time of the loss or destruction it was over due or not, he is not liable to be sued at law, but only in equity, which, in granting relief, can at the same time require ample indemnity. Id. § 108. These doctrines seem to be well settled in England, and have not been questioned in this state. 2 Rob. Pr. new ed. 219-222.

Then the remaining enquiry upon this branch of the subject is, Whether the defendants in error, to whom the note was delivered by the payees as collateral security of a larger debt, are such bona fide holders as are entitled to enforce the note against the maker notwithstanding its payment by him to the payees after such delivery, though without actual knowledge thereof?

There is perhaps no question connected with the mercantile law which is of more importance, and upon which, at the same time, there is a more distressing conflict of authority than the question, whether a holder of a negotiable note received as
15 collateral security *of a pre-existing debt, is such a bona fide holder as to be free of all equities existing against the note in the hands of the person from whom he received it. The affirmative of the proposition, it seems, is maintained by the decisions in England, of the Supreme court of the United States, in Massachusetts, and in some other states; also by Judge Story in his Treatise on Promissory Notes, § 195. While the negative is maintained in New York, Pennsylvania, and other states. See the cases, or most of them, collected in 2 Rob. Pr. new ed. 249-251. In this state, Prentice, &c. v. Zane, 2 Gratt. 262, is the only case which bears upon the subject, and seems to have been based upon the supposed correctness of the negative side of the proposition; though the case is not referred to in the work last cited. The note in that case was made in Philadelphia; and the decision conformed to the well settled law of the place of the contract. Whether the case would have been decided in the same way if the note had been a Virginia contract, is uncertain. The question may therefore be considered as still unsettled in this state.

But I deem it unnecessary to express any opinion upon the vexed question in this case; in which it may be conceded, pro hac vice, that the negative side of the proposition is correct, and that a holder of a negotiable note as collateral security, holds it subject to the equities existing against it at the time it was received by him. The holders in this case stand in that plight, because the note was over due and dishonored when it came to their hands. That it came to their hands as collateral security of a debt, can place them on no lower ground: though it would have placed them on that ground (on the concession above made), if they had received it before its maturity. The negative of the proposition is based upon this; not that the holder of a note as collateral security is not a holder for
16 value, *in the common law meaning of the word, but that he did not take it "in the usual course of trade," according to the language of the mercantile law; and the only consequence is, that he takes it as the person from whom he received held it. He takes the legal title, if that person held the legal title. It will be conceded on all hands, I presume, that a pre-existing debt is a valid consideration for the pledge of a negotiable note as of any other property. The endorsee of a note so received can maintain an action upon it, not only against the maker but the endorser. He could not maintain an action against the endorser, if he were not an endorsee for value. A mortgagee of property as collateral security of a pre-existing debt, is a purchaser for value, in the meaning of the registry laws. I am of opinion, therefore, that the defendants in error are bona fide holders for value of the negotiable note in question, and that payment by the maker to the endorser after he had transferred the title to the holders, is not a good defence to the action of the latter against the maker.

Indeed, it might perhaps be maintained that valuable consideration is not necessary to protect a bona fide endorsee of a negotiable note against a subsequent payment by the maker to the endorser. Valuable consideration is not necessary to a valid transfer of a negotiable note; which may be the subject of a gift, either inter vivos, or mortis causa. In Milnes v. Dawson, 5 Welsb. Hurl. & Gord. 948, it was held that payment by the acceptor to the drawer of a bill of exchange, after the latter had endorsed it without value to the endorsee, was not a good defence to an action by the endorsee against the acceptor of the bill. "It would be altogether inconsistent with the

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negotiability of these instruments (said Parke, B.), to hold, that after the endorser has transferred the property in the instrument, he may, by receiving the
17 amount of it, affect *the right of his endorsee." "A bill of exchange is a chattel, and the gift is complete by delivery coupled with the intention to give." It did not appear in that case that the endorsement took place after the bill had become due and payable; and Baron Parke said it was not to be so inferred, though the counsel for the defendant contended that it was. But I do not see that the question was at all material. The legal title to negotiable paper may be transferred without value, whether before or after maturity; and in either case, the endorsee takes it subject to all equities then existing, but not to matters of defence accruing afterwards between the prior parties. The endorsee may sue in his own name as in other cases; but he cannot sue the donor, though he be an endorser, there being no consideration to support the action, which is founded on privity of contract. As to the donor, the endorsement, if it be a contract, is an executory contract, and requires a valuable consideration to support it. As to the prior parties, it is an executed contract, and valid without consideration. More properly speaking, it is no contract at all, but an executed gift. If the transfer be merely colorable, of course any defence may be made to the suit which could be made to it, if it were in the name of the party really entitled. I deem it unnecessary, however, to decide in this case, whether the defence set up would have been a good one if the transfer of the note to the defendants in error had not been for valuable consideration; being of opinion that it was.

It will be observed, that in the foregoing views I have not adverted to the fact that the defendants in error had an interest in the payment of the note to the Merchants Bank, in Baltimore, and therefore furnished the payees with the money for that purpose, by discounting another note for them, nor to the fact that a day or two after the note was taken up and transferred
18 *by the payees to the defendants in error, to wit, on the 7th of August 1850, the latter wrote to the plaintiff in error informing him of the transfer, and requesting payment to be made to them or their order; which letter, however, in consequence of his absence from home, was not received before the latter part of that month. I have not adverted to these facts, because I considered that without them the case is in favor of the defendants in error, and I did not wish to encumber it unnecessarily. I have viewed it in the aspect most favorable to the plaintiff in error.

Before I leave this branch of the subject, it is proper to advert to the manner in which the note in this case is made negotiable. Promissory notes, though payable to order, were not, it seems, negotiable at common law, but were made negotiable in England by statute 3 and 4 Ann, c. 9. That statute was never in force in Virginia. But statutes have from time to time been passed, some of which were in force when the note in this case was executed, placing notes negotiable at a bank, or office of discount and deposit of a bank, in the state, on the same footing as foreign bills of exchange; and now by the Code, c. 144, § 7, p. 581 (which, however, though enacted before, did not go into effect until after the execution of the said note), it is declared that every promissory note for money payable in this state at a particular bank, &c. shall be deemed negotiable. See 2 Rob. Pr. new ed. 172. The note in this case was made "negotiable and payable at the Exchange Bank at Richmond, Virginia," and so was a negotiable note by the operation of a statute then in force. Sess. Acts 1836-7, p. 66, § 6. Being a negotiable note, it is subject to all the rules of the mercantile law in regard to negotiable paper.

Having disposed of the main question in the case, it is now necessary to notice the remaining questions, which I will do very briefly.

19 *The first of these is, Whether there is a fatal variance between the allegations and the proofs, in this, that the declaration avers that the note was endorsed to the defendants in error on the day of its execution, while the evidence shows that it was transferred to them after it was dishonored? I do not see how this question can be raised in this case. It might have been raised in the Circuit court by a motion to exclude the evidence. No such motion was made. The only question which can now be raised is as to the correctness of the instruction given by the Circuit court, that upon the facts which the evidence tended to prove, if believed by the jury, the receipt constituted no sufficient defence to the action. The truth of that proposition is unaffected by the question of variance. But if the question could now be raised, I am of opinion that there is no such variance. While a declaration must, in general, state a time when every material fact happened (at least that was the rule before the Code took effect), it is not generally necessary that the time should be stated truly, unless it constitute a material part of the contract declared upon, or unless the date of a written instrument is professed to be described. 1 Chitt. Pl. 257. The general if not the universal practice is to state endorsements of a negotiable note as having been made at the time of its execution. After setting out the execution of the note, the endorsements are concisely stated as follows: "And the said B then and there endorsed and delivered the said note to the said C; and the said C then and there endorsed and delivered the said note to D." But it is argued, that where the note is transferred to the plaintiff after its maturity, that fact constitutes a material part of the contract under which he claims, and should therefore be stated in the declaration. It has never been decided that there is any difference in the

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mode of stating endorsements made
20 before and after *maturity; or that in the latter case the endorsements should be stated as having been made after maturity. On the contrary, where an endorsement of a bill was stated in the declaration to have been made before the bill became due, but appeared in evidence to have been made afterwards, this was held not to be a material variance. Young v. Wright, 1 Camp. R. 139. In a suit against the maker of a negotiable note, the endorsements are merely stated, not as parts of the defendant's contract, but to show the plaintiff's title to sue upon that contract. The note being negotiable until paid, that title is complete, whether the endorsements be before or after maturity. If the endorsements be not made in the usual course of business—as for example if they be made after the note is dishonored—the defendant is thereby let in to certain defences which he would not otherwise be allowed to make. But all this is matter of defence, and must come from the defendant. The law presumes, in the absence of proof, that endorsements are made before maturity; because that is the usual course of business. But the presumption may be repelled by proof. The holder of a note which comes to him after it is dishonored, may, like any other holder, sue as endorsee of any person who may have endorsed the note in blank, whether immediately or remotely; in the latter case, striking out the intermediate endorsements, whether special or in blank. If he sue as endorsee of one who endorsed it before maturity, the endorsement would be truly stated as made before maturity. And yet the defendant would be entitled to show in his defence that the note came to the plaintiff after it was due, and subject to certain equities which attached to it in the hands of the person from whom he received it.

The case of Bank U. States v. Jackson's adm'x, 9 Leigh 221, was cited and much relied upon by the counsel for the plaintiffs in error to show that the variance
21 *in question is fatal. But I do not think that it can have that effect. That was a suit by endorsees, not against the maker, but the endorser, not of a negotiable note, but a note not negotiable by the law of Virginia. The contract of the endorser was special and peculiar, and could only be declared on specially. There was a demurrer to the declaration and a special verdict. The court held the special counts to be bad on demurrer, or unsupported by the facts found by the verdict. The difference between that case and this is, I think, sufficiently obvious, without further remark.

The next question is, Whether the court instructed the jury as to the weight of the evidence? The plaintiffs, to sustain their action, offered in evidence the note in the declaration mentioned, and there rested. This evidence, standing alone, would have been sufficient for the purpose. Thereupon the defendant offered in evidence a receipt of the payees, dated August 9, 1850, for the amount of the note. This receipt, standing alone, was not a sufficient defence to the action. The legal presumption in that state of the case was, that the note had been endorsed to the plaintiffs for value before it was dishonored. To counteract this presumption and complete the defence, the deposition of Hawkins was introduced by the defendant, to prove that the note was transferred to the plaintiffs after it was dishonored, though before the date of the receipt, to wit, on or before the 7th of August 1850, and as collateral security of a debt, instead of for value received at the time of the transfer. The evidence tends to prove no other facts, favorable to the defendant, than these. The question then arose, whether the receipt, taken in connection with these facts, if the jury believed them to be proved, constituted a sufficient defence to the action; and the court instructed the jury that it did not. I see no error in this instruction. It expressly refers the weight of the evidence offered to
22 *prove the facts to the determination of the jury. The instruction was not as to the sufficiency of the evidence to prove the facts, but as to the sufficiency of the facts (if believed by the jury to be proved) to constitute a defence to the action. It was the province of the jury to decide as to the former; but of the court, if invoked for the purpose, to decide as to the latter. It would have been more regular perhaps if the court had instructed the jury that if they believed from the evidence that the note was transferred to the plaintiffs before the date of the receipt, though after the note was dishonored, and as collateral security of a pre-existing debt, then the receipt constituted no sufficient defence to the action. But as there is no conflict in the evidence and no uncertainty as to the facts which it tended to prove; and as upon those facts, viewing the evidence most favorably for the defendant, the receipt is no sufficient defence to the action, I think the instruction is substantially unobjectionable. It is certainly more so than was the instruction in Pleasants v. Pendleton, 6 Rand. 473; which, however, was sustained by this court.

The remaining question is, Whether "there is error in the verdict and judgment, because the costs of protest are found against the defendant, while there was no sufficient legal evidence of the fact of protest before the jury?" This question might have been raised in the Circuit court by a motion for an instruction framed for the purpose; or by a motion for a new trial. But it was not: and it cannot be now raised in this court. If it had been raised in the Circuit court by a motion for an instruction, the evidence of protest might have been thereupon supplied. Non constat that such was not the case. The evidence was not in when the exception was taken to the instruction given in regard to the receipt; but it might have been offered afterwards.

The receipt itself shows that the note

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23 was *protested. If the question had been raised by a motion for a new trial, the error in the verdict, if any, could and would have been cured by a release. It is a general rule, that questions not raised in the court below, cannot for the first time be raised in this court. That rule emphatically applies to a question of this kind.

I think there is no error in the judgment, and that it ought to be affirmed.

DANIEL and LEE, Js., concurred in the opinion of Moncure, J.

ALLEN, P., and SAMUELS, J., dissented.

Judgment affirmed.

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24 *Duval, Adm'r &c. v. Malone & al.

April Term, 1857, Richmond.

1. **Pleading and Practice—Variance between Declaration and Bond Declared on—Demurrer without Craving Oyer—Effect.**—A declaration on an indemnifying bond in the name of the administrator *de bonis non* of the high sheriff, sets out the bond as made to himself: and without craving oyer of the bond, the defendants demur. As there is enough in the declaration to enable the court to proceed to judgment according to law and the very right of the cause, the demurrer should be overruled.
2. **Same—Same—How Advantage Taken.***—To take advantage by demurrer of a variance between the declaration and the bond declared on, the defendant should crave oyer of the bond.
3. **Indemnifying Bonds—Statute Limiting Actions on—Prospective.**†—The proviso in the act of February 28, 1828, Sup. Rev. Code 272, § 1, limiting actions on indemnifying bonds to seven years, does not apply to an action on a bond executed prior to the passage of the act.‡
4. **Pleading and Practice—Immaterial Issues—Judgment Non Obstante Veredicto.**—The court may refuse to receive a plea which presents an immaterial issue, or may strike it out if it has been filed, or may either during the progress of the trial or after verdict, set aside the issue, or in a proper case render judgment notwithstanding the verdict.
5. **Statutes—Prospective.**§—Though the legislature may have authority to make a law to operate retroactively, yet it must clearly appear that such was the intention.

This was an action of debt on an indemnifying bond in the Circuit court of Henrico county, instituted in July 1847 by Benjamin J. Duval, adm'r de bonis non, &c. of Mosby Sheppard deceased, who sued for the benefit of John and Benjamin Sheppard, against James Malone and Richard H. Whitlock, the obligors in the bond. This bond 25 was taken in December 1827, to *indemnify Mosby Sheppard, the high sheriff of the county, for any injury or loss he might sustain by the levy of an execution then in his hands, sued out by James Malone against the goods and chattels of Benjamin Haley, upon four slaves as the property of Haley, which were claimed by John and Benjamin Sheppard. The proceedings in the suit, and the questions arising in it, are stated by Judge Samuels in his opinion. There was a judgment for the defendants: and the plaintiff applied to this court for a supersedeas, which was allowed.

Lyons and C. Robinson, for the appellant.

R. T. Daniel and Patton, for the appellees.

SAMUELS, J. The printed record of this case, although of small volume, is taken up, in a great degree, with extraneous matter. The portions properly belonging to the record are very confusedly copied; the proper order of their sequence inverted; and we are left to ascertain what is the true record, by searching through the mass of extraneous matter for its detached parts, and putting them in their proper order.

By subjecting the record to this process, it appears, that on the 3d day of December 1827, Mosby Sheppard, sheriff of Henrico county, acting under the statute 1 Rev. ch. 134, § 25, p. 533, took from the defendants an indemnifying bond in conformity with the provisions of that statute. That suit was brought on this bond July 21st, 1847, in the name of Benjamin J. Duval, adminfstrator de bonis non of Mosby Sheppard, at the relation of John Sheppard and Benjamin Sheppard. That the defendants demurred to the declaration. That they at different times filed pleas, that they had performed the conditions of the bond, and the plea of non damnificatus; and they also tendered a plea that the cause of ac- 26 tion did not accrue *within seven years before the institution of the suit. The plaintiff objected to the reception

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*Pleading and Practice—Variance between Declaration and Bond Declared on—How Advantage Taken.—See, in accord, Sterrett v. Teaford, 4 Gratt. 84.

†Indemnifying Bonds.—See generally, monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

‡The act, after directing that an addition shall be made to the condition of an indemnifying bond, says: "Provided, that no suit shall be maintained upon an indemnifying bond taken in pursuance of this or the before-recited act, unless the same be commenced within seven years after the date of such bond; saving to infants, *femes covert* and persons *non compos mentis*, three years after their respective disabilities shall have ceased."

§Statutes—Prospective.—It is a cardinal rule in the interpretation of statutes that, though the legislature may have the power to make a law operate retrospectively, yet it must clearly appear that such was the intention, for the presumption is that it was intended to operate only on future transactions. See Price v. Harrison, 31 Gratt. 114, and *foot-note*; Philips v. Com., 19 Gratt. 485, and *foot-note*.

And even remedial statutes are to be deemed *prospective* in their operation, and not to be applied to proceedings pending at the time of their enactment, unless a contrary intention appears. City of Richmond v. Supervisors, 83 Va. 204, 213, 2 S. E. Rep. 26; Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. Rep. 736, 739; Fowler v. Lewis, 36 W. Va. 112, 14 S. E. Rep. 447, 454.

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of this plea; but the court overruled the objection and received the plea: thereupon the plaintiff filed a replication, alleging that suit had been brought on this bond on the 4th of February 1828, which suit had been revived in the several names of the several successive representatives of Mosby Sheppard's estate named in the replication; that the suit was dismissed by the court on the 19th of May 1846, in the absence of the plaintiff, and without his knowledge or consent, and without any reasonable or sufficient cause; and further, that this (the second) suit on the bond was brought 21st July 1847, as soon as the plaintiff was apprised that said first suit was dismissed. The defendants filed a rejoinder to this plea, denying the existence of the record of the first suit in the replication alleged. The Circuit court decided that there was no such record, and gave judgment for the defendants. Thus the case was decided for the defendants, on the plea of the statute limiting actions on indemnifying bonds to seven years. It is unnecessary in this case to decide whether the court without a jury could properly try the issue as upon a rejoinder of nul tiel record; or whether the replication was or was not immaterial and naught; for however these questions may be decided, in my judgment the case before us presents but two material questions: 1st, as to the sufficiency of the declaration upon general demurrer; 2d, as to the validity of the plea of the statute of limitations.

The declaration on its face shows an inaccuracy in reciting the bond as having been executed to the plaintiff, who is Benjamin J. Duval, administrator de bonis non of Mosby Sheppard deceased; yet there is enough to show that the bond was in fact executed to Mosby Sheppard, the plaintiff's intestate; and the declaration sets forth sufficient matter of substance for the
27 *court to proceed to judgment according to law and the very right of the cause. 1 Rev. Code, p. 511, § 101. If the defendants desired to take advantage of a variance between the bond declared on, and that of which profert was made, they should have taken oyer of the bond. This was not done; and the demurrer was properly overruled. The second question is as to the validity of the plea of the statute of limitations. This plea does not conform to the statute, Sup. Rev. Code, p. 272, although it was obviously founded thereon; but it was so regarded in the argument here, and I shall so consider it.

If the plea presented no bar to the cause of action alleged, the court should have sustained the plaintiff's objection to its reception. It would be an idle waste of time, labor and expense, to engage in the trial of a fact, or series of facts, alleged in pleadings, upon which, if found to be true, no judgment could be rendered. The court of its own motion, even after verdict, may disregard the finding of immaterial facts; and in a proper case judgment may be rendered non obstante veredicto; or if the case be not in a condition to warrant a judgment, a repleader may be awarded. 1 Rob. Prac. (old ed.) 222; Beale's adm'r v. Botetourt Justices, 10 Gratt. 278; Boyle's adm'r v. Overby, 11 Gratt. 202, and the cases there cited. If a court shall improvidently receive a plea tendering an immaterial issue, it may retrieve its error either after verdict, or during the progress of the trial. And it follows, for a stronger reason, that the court may and ought, of its own motion, or on motion made, to refuse to try an immaterial issue.

The statute of February 28th, 1828, Sup. Rev. Code, p. 272, is directory merely and not mandatory; and it contains no clause repealing the statute, 1 Rev. Code, ch. 134, § 25, p. 533. This court decided in the case of Dabney v. Catlett, 12 Leigh 383;
28 same case, 12 Leigh *634; and in the case of Aylett v. Roane, 1 Gratt. 282, that an indemnifying bond taken after May 1, 1828, but of the form and substance prescribed by the stat. 1 Rev. Code, § 25, p. 533, above referred to, was valid and binding. The limitation prescribed by the act of 28th February 1828, is fully satisfied by applying it to either class of bonds taken after the 1st May 1828, when the act took effect; though it was earnestly insisted by the defendants' counsel in the argument here, that the statute applies in this case, although the bond was taken before May 1, 1828; that the statute has a retroactive operation.

It may be conceded for the purposes of this case, that a statute of limitations is to be regarded as affecting the remedy; and that the legislature has authority to vary the remedy, by enlarging or restricting the time within which it may be pursued. Obvious considerations of justice require that in the exercise of their power a reasonable remedy should be saved to any party having a right. It would be harsh legislation to deprive him of his right, under color of modifying and limiting his remedy, either by reserving to him no remedy at all or one that is merely illusory and likely to be of no value. In the case before us, however, I deem it unnecessary, and therefore improper to express any opinion in the question whether the sufficiency of the remedy is to be decided by legislative discretion, or by judicial determination. In our case, the well settled principles of this court require that we shall construe the statute before us as operating prospectively only, although the legislature may have authority to make a law to operate retroactively, yet it must clearly appear that such was the intention.

We have seen that there are two well defined classes of indemnifying bonds taken after May 1st, 1828, under the former and latter statute, respectively, to which the limitation applies: thus full effect may
29 be given *to the later statute, by applying it prospectively only. See Turner v. Turner, 1 Wash. 139; Elliott's ex'ors v. Lyell, 3 Call 234; Williams v. Lewis, 5 Leigh 686; McCance v. Taylor, 10 Gratt. 580.

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The limitation insisted on is found in a proviso; and the proper function of a proviso is to modify or restrain in some degree the body of the enactment. It would be perverting its use to apply it to a class of subjects not affected by the body of the enactment.

For these reasons, I am of opinion that the act prescribing a limitation of seven years to actions on indemnifying bonds, is no bar to the case alleged in the declaration.

The decision of the Circuit court overruling the demurrer to the declaration should be affirmed; but the judgment for the defendants upon the plea of the statute of limitations, should be reversed, with costs; the plea of the statute of limitations stricken from the record; and the cause remanded for trial upon the other issues therein; and for further proceedings.

The other judges concurred.

Judgment reversed.

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30 *Atkins & als. v. Lewis & als.

July Term, 1857, Lewisburg.

(Absent LEE, J.)

1. **Appellate Practice—Evidence—Abstract of Patent—No Objection in Lower Court.***—Defendants in ejectment rely upon an outstanding title in a third person, and offer in evidence an abstract of the patent certified by the register, which is received without objection. This is to be regarded in the appellate court as *prima facie* evidence that such a grant was issued, though the case came up on a demurrer to evidence.

2. **Patents—Land Forfeited for Delinquent Taxes.**†—A patent for land forfeited for non-payment of taxes, was unauthorized by any law prior to the Code of 1849; and therefore the entry and survey of the land gave the patentee no equity therein.

3. **Taxation—Sale of Land—Purchase by Owner—Effect of Patent Granted after Sale.**—Though the entry and survey of land were made prior to a sale thereof as forfeited land under a decree of the court, yet the sale having been made prior to the issuing of the patent, and the land having been purchased by the original owner, who paid as the cash payment thereof, more than sufficient to satisfy all taxes, damages and costs due to the commonwealth; and the court having, after the issuing of the patent, directed the balance of the purchase money to be released to the purchaser, and the commissioner of delinquent lands having conveyed the land to him; his title is good against the patentee, who never was in possession, and who claimed the commonwealth's title under the act of March 22, 1842.

4. **Ejectment—Outstanding Title in Another—Right of Defendant to Set up.**‡—Defendants in possession of land, as against a plaintiff in ejectment who never has been in possession, but claims the commonwealth's title under the act of March 22, 1842, may set up an outstanding title in another, to protect their possession.

This was an action of ejectment instituted in November 1849, in the Circuit court of Kanawha county, by James A. Lewis and two others, against Davidson D. Atkins and four others, each claiming separate parcels of the land embraced within the patent of the plaintiffs. On the trial the defendants demurred to the evidence; and upon that demurrer the court rendered a judgment for the plaintiffs. Where-
31 upon the *tenants applied to this court for a supersedeas; which was allowed. The facts are stated in the opinion of Judge Allen.

McComas, for the appellants.
B. H. Smith, for the appellees.

ALLEN, P. This was an action of ejectment instituted before the present Code took effect. On the trial, the lessors of the plaintiff, to make out their title, read to the jury a grant from the commonwealth to them, for six hundred and thirty acres, dated the 30th of December 1842; and offered evidence to show the identity of the land claimed with that described in their patent, and that the defendants were in the possession of it. There was no proof that the lessors of the plaintiff had ever taken possession of the land granted to them. On the contrary, their own evidence tended to show, that the defendants, and those under whom they claimed, had been in the actual possession of the land in controversy, or the portions held by them respectively, anterior to and at the date of the said grant.

***Appellate Practice—Secondary Evidence—No Objection in Lower Court.**—In B. & O. R. Co. v. Skeels, 3 W. Va. 560, it was said: "This evidence, although secondary, certainly tended directly to prove the contract supposed in the instruction, and the doctrine is too well settled to be called in question that if secondary evidence is introduced without objection in the court below, an objection to it in the appellate court comes too late and will not be considered. Shue v. Turk, 15 Gratt. 256; *Atkins v. Lewis, 14 Gratt. 34;* Buchanan v. Clark, 10 Gratt. 172; Taylor v. Smith, 10 *Id.* 558; Roberts v. Graham. 6 Wallace 578; Hummel v. The State, 17 Ohio Law State Rep. 628."

†**Patents—Land Forfeited for Delinquent Taxes.**—In Morrill v. Scott, 61 Fed. Rep. 770, the principal case was cited as authorizing the proposition that a grant for land forfeited for non-payment of taxes was unauthorized by any law prior to the Code of 1849.

‡**Ejectment—Right of Defendant to Set up Outstanding Title in Another.**—The general rule, as recognized by the principal case, that in an ejectment suit a defendant in possession may defeat a recovery by showing an older title than that of the plaintiff, in a third party under whom the defendant does not claim, was approved in Usher v. Pride, 15 Gratt. 201. This rule was also recognized in Moody v. McKim, 5 Munf. 374. This rule is based on the principle (subject to exceptions) that the plaintiff's right to recover in an action of ejectment rests upon the strength of his own title and not upon the imperfections and weakness of his adversary's. pp. 39, 40 of principal case. For further authorities in point, see monographic *note* on "Ejectment."

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The lessors of the plaintiff having closed their testimony in chief, the defendants thereupon offered in evidence the record and proceedings, showing the forfeiture and sale of sixteen thousand eight hundred acres of land which had been granted by the state to Albert Gallatin and Savary De Valcoulon, by grant bearing date the 17th of March 1788. From the commissioners' report, being part of said proceedings, it appeared that the tract of sixteen thousand eight hundred acres of land was conveyed by the patentees to Robert Morris, by deed dated the 7th of May 1794, who conveyed the same by deed dated the 5th of March 1795, to Thomas Willing, John Nixon and John Barclay, in trust for an association of
32 individuals styled *The North American Land Company; and that the land was forfeited to the commonwealth for the failure to have the same properly entered on the revenue books, and charged with taxes.

This report of the commissioners of delinquent and forfeited lands was dated on the 29th of September 1842. On the 13th of October 1842 the same was approved and confirmed; and a decree entered by the judge ordering the land to be sold. In pursuance of the decree the land was sold by the commissioners on the first day of the November County court for Kanawha county for the year 1842, and purchased by Josiah M. Steed, as agent of the North American land company. The sale being reported to the Circuit court of Kanawha county, was confirmed by a final decree of that court entered on the 3d day of June 1843, and the commissioners were directed to convey the land to the purchaser on the payment of the deferred installments.

The defendants also read in evidence the record of a proceeding in the names of persons alleging themselves to be surviving trustees of the North American land company, the object of which was to be relieved from the payment of so much of the purchase money bid by their agent Steed, as might remain after discharging the taxes and damages thereon and the costs of the sale. On the 5th of June 1845, a decree was entered in this proceeding, which recited that the first installment of the purchase money paid to the commissioners on the 14th of November 1842, the day of sale, exceeded the amount of taxes and damages and the costs of the sale, by the sum of seven dollars and fifty-seven cents; that the land was sold as the property of the petitioners as trustees of said company, and that the bond for the deferred installments was executed by Steed and his sureties on behalf of said trustees; and there-
33 upon it was ordered and decreed *that Steed's bond should be canceled; that the commissioners should pay to the petitioners the said sum of seven dollars and fifty-seven cents, and that the commissioners should be credited in their settlement with the commonwealth for the amount of the bond and the sum of seven dollars and fifty-seven cents.

The defendants also offered in evidence a deed dated the 25th of October 1851, executed by James M. Laidley the surviving commissioner of delinquent and forfeited lands in Kanawha county, to the North American land company, by that name and description, for the tract of sixteen thousand eight hundred acres.

The evidence of the defendants being closed, the lessors of the plaintiff offered in evidence the books of the commissioners of the revenue, and the delinquent lists of said county, to show that the said tract of six hundred and thirty acres granted to them had been duly entered on said books, charged with taxes, and had not been returned as delinquent.

They also introduced a witness, who deposed, that he was present at the sale of the sixteen thousand eight hundred acres of land before mentioned, by the commissioners of delinquent and forfeited lands; and at the instance of the patentee Lewis (one of the lessors of the plaintiff), gave public notice on the day of the sale, which was heard by the commissioners and J. M. Steed, who purchased the whole of the said sixteen thousand eight hundred acres of land as the agent of the North American land company; that the said Lewis and others had made a location and survey of six hundred and thirty acres of said land previous to that time; the same six hundred and thirty acres in controversy.

This being all the testimony, the defendants tendered a demurrer thereto, in which there was a joinder; and a verdict being rendered subject to the demurrer, judgment was rendered for the plaintiffs.
34 *Some objections were raised in the argument here, which appear not to have been anticipated in the preparation of the case in the court below. It is insisted that as the defendants relied upon an outstanding title in third persons to defeat a recovery, they should have exhibited the patent or copy thereof to Gallatin and Savary De Valcoulon. In the report of the commissioners of delinquent and forfeited lands, being the commencement of the proceeding resulting in the sale aforesaid, the patent to Gallatin and S. De Valcoulon is referred to and recited, and a certified abstract thereof furnished to them by the register of the land office, in pursuance of law, is incorporated with and made part of the report. This being read without objection, should be regarded as prima facie evidence that such a grant had issued. If a more complete copy had been required, the matter should have been brought to the notice of the party in the court below by a motion for an instruction as to the effect of the abstract as evidence. It would work a surprise to permit the objection made for the first time in argument here, to avail the party.

It is further maintained that there was no sufficient evidence to prove the identity of the land described in the patent for the sixteen thousand eight hundred acres. This objection is obviated by the proof adduced

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by the plaintiff, as to what occurred at the time of the sale by the commissioners of delinquent and forfeited lands. The proof showed that the lessors of the plaintiff knew the boundaries of the tract of sixteen thousand eight hundred acres, and gave notice to those present at the sale, that they had made a location and survey of six hundred and thirty acres thereof; thus conceding that their patent of six hundred and thirty acres was included within the boundaries of the elder grant.

This brings us to the question
35 really intended to be *presented by the record in this case; that is, whether under the evidence demurred to, taking it most strongly against the parties demurring, the patentees of the six hundred and thirty acres come within the provisions, or are entitled to the benefits of the 3d section of the act of March 22d, 1842. The tract of sixteen thousand eight hundred acres having been forfeited for the failure to enter the same in the books of the commissioner of the revenue, the forfeiture became complete, and the title absolutely vested in the commonwealth on the 1st of November 1836. Staats v. Board, 10 Gratt. 400. Of this forfeiture the grantees of the six hundred and thirty acres can claim no benefit under any law passed prior to the 22d of March 1842. All previous acts provided for bona fide grantees and actual occupants, a class within which the grantees of the tract of six hundred and thirty acres do not fall. See the provisions of the previous laws cited and commented on in Wild v. Serpel, 10 Gratt. 405. The 3d section of the act of March 1842 transfers the title of forfeited lands to such persons (other than those for whose default the title may have been forfeited) as had title or claim, legal or equitable, derived under a patent bearing date prior to the 1st of January 1843, dispensing with actual occupancy, and omitting the qualification of a bona fide claim of title in the junior patentee. In the case of Wild v. Serpel, the junior patent issued in 1836, and there was nothing to prevent the transfer of the forfeited title to the subsisting patentee, the instant the act of March 22d, 1842, took effect, unless in that case such a transfer was intercepted by the institution of proceedings and the decree for the sale of the land in controversy before the passage of the act aforesaid. A majority of the court held that this did not prevent the operation of the act. "No sale (the judge observed)
had yet taken place under the order; no
36 right had been acquired by any *other person, and the title still was in the commonwealth, and fully within the control of the legislature." And again, that it was competent to transfer the title "as well after an order of sale as before, provided it were done before any new right was acquired by an actual sale being made under it." In the case under consideration, the report of the commissioners of delinquent and forfeited lands is dated 29th of September 1842, which being approved, the decree for sale was entered on the 13th of October 1842; and the sale was made on the 14th of November 1842, at which time so much of the purchase money as satisfied the taxes and damages and costs of sale was paid down, being all that the commonwealth exacted when the original owner became the purchaser of the land. These proceedings all took place before the 30th of December 1842, the date of the patent for the six hundred and thirty acres. The order confirming the sale, and directing the commissioners to make a deed to the purchaser, though dated on the 3d of June 1843, would relate back to the time of the sale.

The 3d section of the act of March 22d, 1842, transferred the forfeited title vested in the commonwealth to a person who had a title or claim, legal or equitable, held or derived from a grant from the commonwealth. By the policy of the various acts, but two modes seem to have been contemplated for the disposition of these forfeited lands after the time allowed for redeeming them had expired. The title vested in the commonwealth by forfeiture could only be divested by a sale made under a decree of the judge or court, or by a transfer under the operation of law to a party who could deduce his title or claim from another patent. The act made the transfer to another patentee or one claiming under him, and not
to a claimant of a mere equity under
37 the commonwealth. *The original owner himself, if he desired to retain his land, was constrained to become a purchaser, and to obtain a deed of conveyance from the commissioners of delinquent and forfeited lands. The law contained a provision by which under a proper proceeding he could be relieved from the payment of so much of the purchase money as was not required to pay the taxes and damages and costs of sale.

The patent for the six hundred and thirty acres recites that it was founded on a survey made on the 21st of June 1842, by virtue of land office treasury warrants. This was prior to the report of the commissioners of delinquent and forfeited lands of the 29th of September 1842. And it has been argued that the entry and survey conferred an equitable title prior to the report and sale of the commissioners; and as it was carried into grant before the first of January 1843, the patentees, under an equitable construction of the statute, should be preferred to the purchaser at the commissioners' sale. This argument would have no ground to rest on unless forfeited lands could be located under a treasury warrant. The counsel therefore has found himself under the necessity of assailing the remark of the judge in his opinion delivered in Levasser v. Washburn, 11 Gratt. 572, "that there was no act then in force authorizing forfeited lands to be entered as waste and unappropriated." It will appear, however, from reference to the laws on the subject, that the observation of the judge was strictly correct. In 2 Rev. Code 528, will be found an act passed January 29th, 1803, which

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forfeited lands upon which the taxes should have remained unpaid for two years, and subjected them to location. But an act passed January 20th, 1807, 2 Rev. Code 530, declared that such forfeited lands should not be subject to location: and another act passed February 14th, 1811, 2 Rev. Code 536, provided that such lands should
38 remain the property *of the commonwealth, and be subject to such future disposition as might thereafter by law be directed. An act of January 23d, 1812, 2 Rev. Code 536, provided that the taxes due or chargeable, or thereafter to become due or chargeable on lands, should remain a lien upon said lands until discharged; and allowed further time for the redemption of all lands which had become or should become forfeited for the non-payment of taxes, and directed the lands to be sold after the time for redemption had expired. The time for redemption was subsequently enlarged, until by the act of February 9th, 1814, 2 Rev. Code 542, sales were again authorized. The act of February 20th, 1817, 2 Rev. Code 558, arrested the sales, and declared that the arrears of taxes and damages should continue a lien on the lands on which they were chargeable. Such lands were again made liable to entry, survey and grant as waste and unappropriated land, by the Code, ch. 114, § 3, p. 495; but it is believed there was no law in existence in 1842 which authorized the location of forfeited lands by virtue of a land office treasury warrant. By such a warrant the adventurer was authorized to locate waste and unappropriated lands only. An entry on lands previously granted was a void act and conferred no equity.

As was remarked by the judge in the case of Levasser v. Washburn, "In the absence of a statutory provision authorizing the location of forfeited lands, no title could be acquired to such lands by entry and survey, and a patent obtained for them would be merely void." The lessors of the plaintiff must therefore rest on their grant alone. Before it issued such proceedings were had under the act of March 30th, 1837, providing for the appointment of commissioners of delinquent and forfeited lands, and other subsequent acts in amendment thereof, as to confer rights which were not divested by
the 3d section of the act of March
39 22d, *1842. Those laws were all in force at the same time. Up to the passage of the act of March 5th, 1846, Sess. Acts, p. 13, prohibiting further sales, the commissioners continued to make reports, and the courts and judges to enter decrees for sale. The laws being in pari materia, such construction is to be given to them as may reconcile and give effect to the various enactments they may contain. By some of these laws the agents of the commonwealth were required to make report, &c. and the judges and courts to order sales. The law of March 22d, 1842, transferred the forfeited titles under certain circumstances to subsequent grantees who should obtain a grant previous to the first of January 1843. Although such agents may have commenced a proceeding to sell under one set of laws, yet if no right had been acquired in virtue thereof, there was nothing to obstruct the transfer under the operation of the act of March 22d, 1842, to a subsequent patentee. But when, as in the present case, an actual sale had been made and the price paid, the purchaser has acquired rights of which the commonwealth could not deprive him without the imputation of bad faith. By virtue of the proceedings commenced and carried on by the agents of the commonwealth in pursuance of law, the beneficial ownership was transferred to him who had purchased and paid the price, provided the sale was not set aside. The acts making a transfer contemplated a transfer of the whole of the forfeited title. It could not have been intended to transfer the mere shell of the legal title forfeited to the commonwealth and remaining until conveyed to the purchaser. Until so conveyed, it must be held in subordination to his rights. I think, therefore, no beneficial interest continued in the commonwealth which was transferred to the patentees of the six hundred and thirty acre tract.

The only remaining question is, Whether
the defendants in the court below
40 could avail themselves of the *outstanding title forfeited and sold as aforesaid, to defeat a recovery in this action? This suit was instituted before the present Code went into operation, and it is therefore not necessary to enquire what may be the effect of abolishing writs of right and substituting the action of ejectment in place of it in all cases. As a general rule, under the law when this suit was commenced, the plaintiff in ejectment must recover on the strength of his own title, and possession gives the defendant a right against every man who cannot show a good title. This general rule is subject to exceptions; thus it was decided in Middleton v. Johns, 4 Gratt. 129, that a person having held actual possession of land for more than fifteen years under color of title, and being then ousted by a mere trespasser without pretence of title, might recover in ejectment against the trespasser, although it did not appear that the land had ever been granted by the commonwealth. In Tapscott v. Cobbs, 11 Gratt. 172, the court held that where a party in peaceable possession of land is entered upon and ousted by one not having title to or authority to enter upon the land, the party ousted may recover in ejectment upon his possession merely: And his right to recover cannot be defeated by the defendant by showing an outstanding title in another with which the defendant had no connection. In the case under consideration, there was no evidence tending to prove that the lessors of the plaintiff were ever in the actual possession of the land, or any part thereof. Their grant did not even confer upon them constructive seizin. The commonwealth's title to the land as part of her waste and unappropriated domain, had passed to the first

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grantees: And as the law did not authorize the location of forfeited lands, nothing passed to the junior grantee. The evidence introduced by the lessors of the plaintiff tended to prove that the defendants were in actual occupation of portions of the
41 land, and that their possession *and the possession of those under whom they entered, commenced long anterior to the date of the patent for six hundred and thirty acres. They had that peaceable possession which the law protects against all except him who has the actual right to the possession, and it was competent for them to show a subsisting outstanding title in a third party, to defeat a recovery and protect such possession. This they have done by showing the grant to Gallatin and Savary De Valcoulon and the exhibition of the proceedings; showing that title is claimed thereunder, by parties asserting a beneficial interest in the land.

I think on the demurrer to evidence the law was for the plaintiffs in error, the defendants in the court below, that the judgment should be reversed with costs, and judgment entered in their favor on the demurrer.

The other judges concurred in the opinion of Allen, P.

Judgment reversed, and entered for the appellants.

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42 *Clarksons v. Doddridge & al.

July Term, 1857, Lewisburg.

(Absent LEE, J.)

1. **Bonds—Payable to Commissioners—New Commissioners Substituted—Who May Maintain Suit.***—Commissioners appointed by a court of equity to sell lands, make the sale and take bonds for the purchase money, made payable to themselves; and before the money is paid the commissioners are removed and others are appointed. The last commissioners are entitled to sue at law on the bonds, in the names of the first to whom the bonds were made payable.

2. **Pleading and Practice—Action for Benefit of Another—Declaration.**†—Though it is usual to state in the declaration or by endorsement thereon, or on the writ, that the action is brought for the benefit of the parties entitled, yet this is not essential. And if the defendants have any doubt whether the suit is brought for the benefit of the last commissioners, they can by motion have a rule upon them to avow and prosecute or disavow and dismiss the action.

This was an action of debt in the Circuit court of Kanawha county, brought in the name of C. E. Doddridge and S. A. Miller against D. J. W. and John N. Clarksons, on three bonds. There was a verdict and judgment for the plaintiffs; whereupon the Clarksons applied to this court for a supersedeas, which was allowed. The case is stated by Judge Moncure in his opinion.

Price and McComas, for the appellants.
Fitzhugh, for the appellees.

MONCURE, J. This is an action of debt brought in the name of Doddridge and Miller against D. J. W. and John N. Clarkson, on three bonds for the sum of four thousand seven hundred and twenty dollars and sixty-six and two-thirds cents each, dated December 25th, 1851, and payable nine, eighteen and twenty-four
43 *months after date. The obligees in whose names the action is brought, are styled "commissioners" in the bonds; and the said sum of money is therein described, respectively, as the " 'first,' 'second' and

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decree in the cause, took bonds payable to himself for the money. The court said (at page 710): "Nor are the powers of the receiver at all varied or increased by the fact, that he is the obligee in the bond. The legal title and right of action are thereby vested in him; but he cannot sue except by the direction of the court which appointed him, and whose agent he is. He may any time be superseded and another appointed in his place to collect the money. *Clarksons v. Doddridge, 14 Gratt. 42.*"

Where the right to receive the money due on a claim is in the assignee, without the corresponding right to bring an action for it in his own name, he has a right to bring an action at law in the name of the assignor; and he will be regarded, even by a court of law, as the substantial plaintiff in the action. Cox v. Crockett, 92 Va. 56, 22 S. E. Rep. 840, citing the principal case.

Same—Assignment of—Effect of Statute.—See principal case cited in *foot-note* to Davis v. Miller, 14 Gratt. 1.

The principal case was distinguished in Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

†**Pleading and Practice—Action for Benefit of Another—Declaration.**—The proposition of the principal case that, though it is usual to state in the declaration, or by endorsement thereon, or on the writ, that the action is brought for the benefit of the parties entitled, yet this is not essential, has been approved in Hayes v. Va. Mut., etc., Asso., 76 Va. 228; Triplett v. Goff, 83 Va. 785, 3 S. E. Rep. 525; Bentley v. Standard Fire Ins. Co., 40 W. Va. 739, 23 S. E. Rep. 586.

See also, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801; monographic *note* on "Assignments."

*Non-Negotiable Paper—Legal Title to—Who May Maintain Suit.—In Sangston v. Gordon, 22 Gratt. 755, the suit had relation to bonds made payable to "L. Sangston, secretary of the Baltimore Agricultural Aid Society." At page 764, the court said: "This form of security was no doubt adopted to enable him (Sangston) to sue for and collect the debts due the society, without the expense and inconvenience of his bringing before the courts the numerous parties interested in the proceeds of sale. It is clear that the legal interest in these bonds is vested in Sangston alone. Upon well settled principles the descriptive words used in the instruments may be rejected, and suits at law or in equity may be maintained thereon in his name, without the addition of other parties. Porter v. Nekervis, 4 Rand. 359; *Clarksons v. Doddridge, 14 Gratt. 42;* Sangston v. Coffman, 21 Gratt. 263."

In Davis v. Snead, 33 Gratt. 705, a receiver, appointed by the court to receive purchase money for land sold by him as commissioner under a previous

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'third' payment on salt property of the late Charles G. Reynolds, sold to D. J. W. Clarkson this day." The declaration is in the ordinary form. There was a general demurrer to the declaration; in which the plaintiffs joined. The defendants also tendered a special plea in bar, averring, in effect, therein, that the said bonds were executed to the plaintiffs as commissioners appointed in a chancery suit to sell certain lands; that before the said action was commenced, the said plaintiffs were substituted by the appointment of other commissioners in the said suit, to wit, Quarrier and Gillison; and that thereby the right of action on the said bonds was taken from the said plaintiffs, and vested and now remains in said Quarrier and Gillison. To this plea the plaintiffs objected; and the objection was sustained by the court; "being of opinion that the plea aforesaid does not present a good and sufficient bar to the action brought in this case in the name of Doddridge and Miller, to recover the sums secured to be paid by the several writings obligatory upon which it is founded; and that the present commissioners have a right to sue upon said bonds in the name of said Miller and Doddridge." To this opinion the defendants excepted: and showing no ground in support of their demurrer to the declaration, it was overruled; and judgment was rendered for the plaintiffs for debt, interest and costs. That judgment is now before this court for revision on a writ of supersedeas.

The only error assigned in the judgment is in the rejection of the special plea. Did the court err in rejecting it? Was the action properly brought in the names of the commissioners to whom the bonds were
44 *payable? Or ought it to have been brought in the names of the new and substituted commissioners?

It is a general rule, that an action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. The legislature alone has power to make an exception to this rule. An exception is made by the Code, ch. 144, § 14, p. 583; which authorizes the assignee of any bond, note or writing not negotiable, to maintain thereupon any action in his own name which the original obligee or payee might have brought. The assignee acquires only an equitable right with a capacity, expressly given him by statute, to assert it at law in his own name. But the legal title still remaining in the obligee or payee, a right of action is incident thereto; and the assignee may, at his election, sue at law in his own name, or in that of the obligee or payee for his benefit. Garland v. Richeson, 4 Rand. 266. Another exception seems to be made by the Code, ch. 116, § 2, p. 500.

It is also a general rule, that the legal interest in an obligation for the payment of money is vested in the obligee or his personal representative. The exceptions to this rule also must be derived from the statute law; and are few in number. An exception arises in England under the statute of bankruptcy, which expressly vests the bankrupt's right of property and of action in his assignees; who may therefore maintain in their own name an action on a bond payable to the bankrupt. A bond payable to a corporation aggregate, is not an exception to the rule; though an action thereon must be brought in the name of the corporation, and not of the persons composing it when the bond is executed, or their personal representatives. The corporation itself, and not the persons composing it, is the obligee; and the case there-
45 fore falls within *the rule and not the exceptions. A different rule is said to be applicable to a bond payable to a person who is a corporation sole; in which case, an action at law upon the bond must, after his death, be brought in the name of his personal representative, and not of his successor. There is a strong instance of this kind in a case very recently decided by the Court of queen's bench, in which it was held that a bond given to the ordinary by an administrator, under the statute of distributions, passes, on the ordinary's death, to his personal representative, and not to his successor. Howley v. Knight, 14 Ad. & El. 240, 68 Eng. C. L. R. 238.

In the case under consideration, the bonds are payable to Miller and Doddridge, the old commissioners, in whom, therefore, by the very terms of the bonds, and according to the general rule of law before stated, the legal interest in, and right of action on, the bonds were vested. There is no law in existence which divests this legal interest and right of action. The court of chancery, it is true, was authorized by law to substitute new, in place of the old, commissioners. But the effect of such substitution was not to transfer the legal interest in the bonds from the old to the new commissioners. It only authorized the new commissioners, upon giving the security required by law, to collect the bonds; and to bring suit, if necessary for the recovery thereof, in the names of the old commissioners. The right of the new commissioners to receive the money, does not imply a right to bring an action therefore in their own names. A person may have a right to receive money, without any corresponding right to bring an action for it in his own name. This happens whenever a chose in action, not negotiable by the law merchant, and not coming under the provisions in the Code, ch. 144, § 14, is assigned. The assignee has a right to receive the money, but not to bring an action therefor in his own name. He has,
46 *however, an ample remedy. He has a right to bring an action at law in the name of his assignor; and he will be regarded, even by a court of law, as the substantial plaintiff in the action. The court will protect his rights, and will not permit the nominal plaintiff to receive the money, nor to release the debt, nor to dismiss the action. The same principle applies to this case. The Circuit court was

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therefore right in saying that the present commissioners have a right to sue upon the bonds in the name of Miller and Doddridge, the obligees.

But it was argued, that even if they had a right to bring such a suit, it ought to appear that the suit was brought by them or for their use; and that as the declaration does not show that the suit was so brought, the fact, if it had been so, should have been replied to the plea. It is usual, when an action is brought in the name of one person for the use of another, to state the fact in the body of the declaration, or by an endorsement thereon or on the writ. And it is useful and convenient to do so, to give notice to the defendant of the rights of the substantial plaintiff, and to enable the court to protect them by its orders. But this is not necessary. The statement is no material part of the pleadings. The cause of action is complete without it. It was, therefore, no bar to the action in this case that new commissioners had been substituted to the place of the plaintiffs, notwithstanding it may not appear on the record that the suit was brought by the former, or for their use. The defendants are in no danger of being compelled to pay the money into the wrong hands. They have an ample remedy to prevent that; but not by a plea in bar of the action. Their remedy is by motion. If they really apprehend that the action was not brought by or for the use of the new commissioners, and that the old commissioners are fraudulently at-
47 tempting to recover *and collect the money for their own use, they can, by motion, obtain a rule requiring the new commissioners to avow and prosecute, or to disavow and dismiss the action. And the court, if it have cause to suspect any such thing, may and ought, ex mero motu, to award such a rule. The action was no doubt brought by and for the use of, the new commissioners. The fact is plainly inferable from the opinion of the court expressed in the bill of exceptions. It also appears, from an exhibit produced and read by the defendants in connection with their plea, that the new commissioners were appointed for the very purpose of bringing an action on the bonds. The action was in fact brought shortly thereafter. The attorneys who brought it, and the new commissioners, bear the same surnames (Quarrier and Gillison), and may be the same persons.

I am of opinion that there is no error in the judgment, and that it be affirmed.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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48 *Quarles & als. v. Kerr & als.

July Term, 1857, Lewisburg.

(Absent LEE, J.)

1. **Chancery Practice—Decree—Case at Bar.**—Trustee files a bill to enforce the trust deed, and in this case the court decrees the sale and distribution of the trust subject among the creditors provided for, except one, who is excluded under the provisions of the deed, because he sued out execution on his judgment. This creditor then files a bill to set aside the trust deed, on the ground that it is fraudulent on its face. HELD:
   1. **Same—Same—Effect on Suit as to Matters Not Previously in Issue.**—That the question whether the deed was fraudulent was not put in issue in the first case, and therefore could not be decided: And the decree in that case cannot be a bar to the second.
   2. **Same—Interlocutory Decree—Effect on Second Suit.**—The decree in the first case being interlocutory merely, it cannot be a bar to the second suit.
2. **Assignments—To Secure Creditors—Whole Property Must Be Conveyed.***—A debtor cannot divide his property into two parcels, and protect himself in the enjoyment of one parcel by giving up the other; he cannot require his creditors to accept a part and release the residue: And when he attempts it, the deed is fraudulent and void.
3. **Same—Same—Postponement of Sale—When Fraudulent.**†—Though a deed is not fraudulent by reason of a postponement of the time of sale, and the reserving the property to the grantor in the meantime, yet where the time of sale may be postponed or hastened by the grantor, so as to enable him to defeat any creditor who should attempt to subject the interest in the property reserved to the grantor, to the payment of his debt, the deed is fraudulent.
4. **Same—Same—Facts Indicative of Fraudulent Intent—Case at Bar.**‡—The including in such a deed per-

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***Assignments—To Secure Creditors—Whole Property Must Be Conveyed.**—See Gordon v. Cannon, 18 Gratt. 387, and *foot-note*, where the principal case is cited.

†**Same—Same—Postponement of Sale.**—Landeman v. Wilson, 29 W. Va. 707, 2 S. E. Rep. 205, said: "The owner of property may do as he pleases with it, so long as no other person has any interest therein. He may, when out of debt, convey it to whom he pleases, although he receives no consideration therefor. If he owes no one he can do absolutely as he pleases with his own, unless restrained by statute. He may in good faith convey his property, or a part of it, to secure the payment of his debts, or a part thereof. He may designate the beneficiaries by name, or by any other mode designate them. He may prefer his creditors; and may, for a reasonable time, postpone the execution of the conveyance which is to strip him of his property. In such conveyance he can reserve to himself no benefit at the expense of his creditors. In cases where he postpones for a definite time the final consummation of the security he has created, and reserves to himself the use of the property during such time, it has been held that that is not to be regarded as delaying or hindering his creditors, within the meaning of the law, because the interest so reserved is liable to creditors acquiring liens by judgment or executions. Cochran v. Paris, 11 Gratt. 318; Dance v. Seaman, *Id.* 778; *Quarles v. Kerr, 14 Gratt. 48.*"

The principal case is also cited in Harvey v. Anderson (Va.), 24 S. E. Rep. 915, on this point.

See also, Gordon v. Cannon, 18 Gratt. 387, and *foot-note*.

‡**Same—Same—Reservations Indicating Fraudulent Intent.**—In Brockenbrough v. Brockenbrough, 31

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ishable property which must be consumed or become worthless before the time fixed for the sale, though it may not of itself be sufficient to set aside the deed as fraudulent, yet it is a fact indicative of a fraudulent intent.

David Kerr owned a valuable tract of land in the county of Augusta, which he cultivated; and he also owned real estate in the town of Staunton, where he carried on the business of a merchant. In 1842 and in May and July 1846, Kerr executed three deeds, by which he conveyed his tract
49 of land to trustees to *secure certain debts and indemnify certain sureties therein mentioned. On the 30th of October 1846 he executed a fourth deed, which in the proceedings in this case was marked D. By this deed, after reciting a great many of his creditors, he provided that the creditors mentioned in the three previous deeds, and a few named, should be first paid, and then all the others should share pro rata: Among these last was Henry W. Quarles, for the use of Kent, Kendall & Atwater. He then conveyed the tract of land aforesaid, his lots in Staunton, with the buildings thereon, certain slaves, his horses, cattle, sheep and hogs, by number, and their increase, all his farming machinery and utensils, specifying them particularly, about fifteen hundred bushels of corn, yet on the stalk, three hundred bushels of rye (supposed to be) not threshed, about five hundred bushels of oats, about one hundred bushels of wheat, about seventy acres of wheat in the ground, about sixty acres of rye in the ground, about ten tons of hay, stills and stilling utensils, five riding saddles, &c., &c., household and kitchen furniture, specifying the articles, books, glasses, clock, watch, gun, pistols, six or seven barrels of apple cider, and all the personal property of every kind whatsoever, belonging to him; and also if there was any furniture or fixture in the merchant mill on the land conveyed, that might be considered not a part of the property that was thereby conveyed. The trusts of the deed were: 1. That Kerr should be permitted to remain in possession of the property until the trustee was required to execute the trust. 2. That if he paid the debts secured by the deed, on or before the 30th of October 1848, it should be void. 3. If he did not pay them all by that day, then it should be the duty of the trustee, if required in writing by a majority in amount of debts of the creditors therein before mentioned, or if Kerr or his legal representatives should request
50 it, to *sell the property, real and personal, or so much as might be necessary, at public auction, for cash, after advertising the same for three weeks; and out of the moneys arising from the sale, he should pay first the expenses attending the execution of the trust; and then the debts before described, or such of them as should then be due, in the order before directed; and the remainder of the purchase money he should pay to Kerr, his heirs, &c. And it was provided that Kerr might, if he conceived it to be the interest of the parties connected with the conveyance, at any time before the 30th of October 1848, direct the trustee to carry the trust into execution in the manner provided in the deed. And further, if any one or more of the creditors thereby intended to be secured, should at any time before the deed was carried into effect, sue out and have executed either on the body or the property of the said Kerr, an execution for his claim, he or they should thereby forfeit all right under the deed, and all claim to participate in the security intended to be provided by it.

On the 10th of November 1846, Kerr executed another deed, whereby he conveyed to Nicholas K. Trout all his goods in his store, and all other personal property in the possession of Kerr, and belonging to him, at his store-house and lumber-house in Staunton, upon trust to pay certain debts therein described. The goods were to be retailed in the store-house for three months for cash; and if the debts secured were not then paid, the goods might be sold by the trustee at auction. This trust seems to have been executed, at the time prescribed.

In November 1846, Thomas D. Quarles, who sued for the benefit of Kent, Kendall & Atwater, recovered a judgment against David Kerr; and an execution against his body having been sued out thereon, he in January 1847 took the benefit of the
51 act for the relief *of insolvent debtors, surrendering nothing but his equity of redemption in the deeds before mentioned.

In March 1848 Kerr and the trustee Trout filed a bill in the Circuit court of Staunton, by which they convened the trustees and creditors in the first four deeds; and in that suit the trust property was sold; an account of the debts taken; and in June 1851 there was a decree for the payment of the debts in the first, second and third deeds, and of

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Gratt. 590, the court said: "There is no doubt that the provisions of a mortgage or deed of trust may be of such a character as of themselves to furnish evidence sufficient to justify the inference of a fraudulent intent. Such is the case where the grantor reserves a power over the property conveyed incompatible with the avowed purposes of the trust and adequate to the defeat thereof. This principle was enunciated in Lang v. Lee and others, 3 Rand. 410, and has been repeatedly recognized by this court in subsequent decisions. Sheppards v. Turpin, 3 Gratt. 373, 397, 398 *et seq.*; Spence v. Bagwell, 6 Gratt. 444; Addington v. Etheridge, 12 Gratt. 436; *Quarles & others v. Kerr, 14 Gratt. 48;* Perry & Co. v. Shenandoah Nat. Bank & others, 27 Gratt. 755."

In Landeman v. Wilson, 29 W. Va. 722, 2 S. E. Rep. 313, SNYDER, J., in a dissenting opinion uses the same language as that just quoted, and cites, in addition to the Virginia cases cited above, Kuhn v. Mack, 4 W. Va. 186; Claflin v. Foley, 22 W. Va. 434; Shattuck v. Knight, 25 W. Va. 590. See principal case cited on this point in Livesay v. Beard, 22 W. Va. 591, and Conaway v. Stealey, 44 W. Va. 168, 28 S. E. Rep. 795.

See also, monographic *note* on "Fraudulent and Voluntary Conveyances"; monographic *note* on "Assignments for the Benefit of Creditors."

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the debts in the first class of the fourth deed; and for the payment pro rata of the second class, except the debt due to Quarles for the benefit of Kent, Kendall & Atwater: this debt the court excluded from participation in the trust fund, on the ground that execution had issued thereon against Kerr, and he had been compelled to take the benefit of the act for the relief of insolvent debtors.

In July 1852 Quarles, and Kent, Kendall & Atwater filed their bill in the Circuit court of Augusta county, in which they set out the recovery of their judgment, the execution of the four deeds above mentioned, and the proceedings in the suit instituted by Kerr and Trout. They say that the debts secured by the first three deeds and the preferred debts in the fourth, have been paid, and that there is still a balance of the trust fund in the hands of the commissioners appointed in that case to distribute it. They charge that the fourth deed, bearing date the 30th of October 1846, is fraudulent, and intended to hinder and delay the plaintiffs. That these plaintiffs had instituted suit against Kerr as early as August 1845; that he had delayed a trial for several terms by sham pleas, and that on the very day before the commencement of the term at which it was expected the plaintiffs would obtain their judgment, this deed was made. They charge that the deed is fraudulent on its face; and they refer to its provisions as evidence of the fraudulent purpose of the grantor.

52 *The unsatisfied creditors secured by the deed, and the trustee and commissioners in the first case, are made parties defendants; and the prayer is for an injunction to restrain the commissioners from paying over the money in their hands; that the deed may be set aside as fraudulent; and that so much of the money in the hands of the commissioners as may be necessary to pay their debt, may be applied to that purpose.

David Kerr and one or two of the creditors answered the bill. He denied the fraud, and endeavored to explain the different provisions of the deed. The bill was taken for confessed as to the other defendants. There was no parol evidence taken by either party; but all the deeds before mentioned and a transcript of the record in the first cause were filed: and the cause came on to be heard upon this evidence, in July 1854, when the court below dissolved the injunction, and dismissed the bill. Whereupon the plaintiffs applied to this court for an appeal, which was allowed.

Fultz and Breeze Johnson, for the appellants.

Michie and Baldwin, for the appellees.

SAMUELS, J. We are met at the threshold of this case by the objection that the questions involved therein have been adjudged by the Circuit court of Augusta county in the case of Kerr v. Kinney, &c., and that the decree therein remains in force, not having been superseded or reversed on appeal, nor set aside by the Circuit court itself. The record in the case of Kerr v. Kinney, &c., is made part of this record; and upon inspection of the bills in the cases respectively, it appears at once that they are founded, in a great degree, on different facts, and seek different relief. The bill in Kerr, &c., v. Kinney, &c., is based upon the hypothesis that the deed, exhibit D, the chief subject of contro-

53 versy *is a valid security, and prays relief by having the debts and liabilities secured by that and other deeds ascertained and enforced. The trustee, who is a party plaintiff, prays the judgment of the court on the validity of so much of the deed D as excludes from its benefits such of the cestuis que trust as should sue out process of execution against the person or property of Kerr the grantor before the trusts were fully executed. In the case before us, Quarles, &c., v. Kerr, &c., the bill is founded upon the alleged fact that the deed D is fraudulent; and prays relief by having it set aside so far as it interfered with the judgment and execution for complainant's debt. Facts so widely different required different decrees. It cannot be said that the facts and relief appropriate to them in the case before us, have been passed on, when the Circuit court passed on the facts and relief in the other case.

The Circuit court in Kerr, &c., v. Kinney, &c., could not have set aside the deed D, for fraud, as it was not alleged in that case; so that court could not acquit Kerr of fraud in making the deed, in advance of the charge of fraud.

Waiving any enquiry as to the mode and form of the plea, still the decree of the Circuit court is no bar, for the further reason, that it is merely interlocutory and not final. Story's Equ. Pl. § 791, 2 Daniel's Ch. Pr. p. 756.

The case before us grows out of a conflict between the general dominion of Kerr the grantor over his property, and the limited dominion of Quarles, &c., over the same property, acquired by judgment and process of execution. The question to be decided is, Under which of these conflicting claims the property shall be held liable?

It will aid us in the investigation of our case, to trace the outlines of the dominion held by the owner, and that held by his creditors, over the owner's property,

54 *so far as they are involved in this case. The owner, if he have no creditors, has power to dispose of his property in any way whatever. If, however, he has creditors, his power is subject to the qualification that it be not exercised so as to delay, hinder or defraud creditors. Stat. 13 Eliz. ch. 5; 1 Rev. Code, ch. 101, § 2, p. 372.

Many cases are to be found in the reports of the English courts, and of the states in which the statute 13 Eliz. ch. 5, has been adopted. Whilst all these courts have endeavored to give effect to the statute, it is still manifest that there is an irreconcilable conflict in their decisions. An act, or com-

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bination of acts, done in one jurisdiction, might have the effect to hinder, delay or defraud creditors, although if done in another jurisdiction, no such effect would follow: and this, because of a difference in the laws for the collection of debts in the several jurisdictions.

In Virginia, our courts have gone as far, or farther, than any other, to sustain the owner's dominion; and enough may be found in the decisions of this court to indicate the proper rule in this case.

The owner may in good faith convey his property, or a part of it, to secure the payment of his debts, or some of them, or some part or parts of them. He may designate the beneficiaries by name, or in any mode by which their identity may be ascertained. He may postpone for a reasonable time (to be judged of in each case) the period for executing the provisions of the conveyance; and he may prescribe the order in which the creditors are to be paid.

The owner cannot divide his property into two parcels, and protect himself in the enjoyment of the one by giving up the other; he cannot require his creditors to accept part and release for the residue. He may, however, surrender all his property to such creditors as will receive it in sat-
55 isfaction of their debts, and *release the owner. Skipwith's ex'or v. Cunningham, 8 Leigh 271; Phippen v. Durham, 8 Gratt. 457. The reason for the distinction between a partial and a total surrender, grows out of the statute which forbids only fraudulent conveyances of present property, but is silent as to property to be acquired in future. See Thomas v. Jenks, 5 Rawles' R. 221; 1 American Leading Cases 69.

The owner can reserve no benefit to himself, at the expense of his creditors. In case he shall postpone for a definite time, the final consummation of the security he creates, and shall either expressly, or by operation of law, reserve to himself the use of the property during that time, he is not regarded as delaying or hindering his creditors, with the meaning of the law, because the interest so reserved is liable to creditors acquiring liens by judgments or executions. Nor is it material that a creditor may be compelled to resort to a court of equity for aid to subject the reserved interest. Cochran v. Paris, 11 Gratt. 348; Dance v. Seaman et als., 11 Gratt. 778. The authority of courts of equity when in session, and of the judges thereof in vacation, is ample by injunction and by appointment of receivers with adequate powers, to preserve the rights of creditors having liens. The difference in the degrees of promptitude with which common law process and equitable process respectively afford relief, is not to be regarded as such delay as brings a case within the statute.

The value of property as the means of paying debts, is made up of several elements; to wit, the nature, amount and certainty of the subject itself, and the time at which it may be made available. In the case before us, the property of the grantor Kerr is divided into parcels; that embraced by the deed D, and that omitted therefrom. It was said in the argument here, that the deed D includes all Kerr's property,
56 as well *that specifically and minutely described, as that contained in the subsequent deed of the date November 10th, 1846. This I hold is not the proper construction of the deed D. The minute specification of numerous articles of small separate values, shows that it was intended to name every piece of property; and that the terms "all the personal property," &c., were not intended to embrace the stock of merchandise worth thousands of dollars. This is the cotemporaneous construction of the deed by Kerr the grantor, by Trout the trustee, and by the cestuis que trust, the creditors. Eleven days after the execution of that deed, another deed dated November 10th, 1846, was executed by the same grantor, conveying the stock of merchandise to the same trustee, in part for the benefit of some of the same cestuis que trust. These deeds have been treated and enforced as separate and independent securities, without opposition or complaint from any party; and it cannot be insisted, now for the first time, in this court, that the deed of November 10th, 1846, is subordinate to the deed D. It is therefore manifest, as already said, that Kerr divided his property into two parcels; one embraced, the other omitted, in the deed D. The parcel embraced by the deed is vaguely and uncertainly subdivided as to the time when it may be made available by creditors: two years are named as the period for consummating the trust, but this period may be shortened at Kerr's pleasure; or it may be prolonged by the difficult, if not impracticable, process of executing the trust. Kerr was to retain the property until a sale should be made under the deed. This reserved interest and Kerr's equity of redemption were liable to creditors not claiming under the deed; and thus, so far as time entered into the value of the security, the omitted creditors were at Kerr's mercy. If the reserved interest should be separately sold, it would produce but little, because of its un-
57 certain duration; *or if the whole subject be sold, out and out, still the difficulty recurs in appropriating the proceeds: the omitted creditors, to the extent of their demands, would have title to the avails of the reserved interest; the favored creditors, to the extent of their demands, would have title to all other avails of the property. After they should be satisfied, the residue, if any, representing the equity of redemption, would be applied to the debts of the omitted creditors, if not satisfied by the avails of the reserved interest. It would be impracticable to make an apportionment between parties whose claims are so uncertain.

The division made by Kerr the grantor in the deed D, between the interest reserved to himself and that granted for the benefit of the cestuis que trust, is uncertain, for another reason: the reserved interest was to

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continue until the trust was consummated; this could not be done until the expiration of two years, unless directed by Kerr; nor after, unless by his direction, or by direction in writing by creditors holding what is called a majority in amount of debts. The amounts of the debts are vaguely stated. The trustee has power, after a sale, to adjust the amounts; but he has no power to fix the amounts preliminarily to making a sale at all. The face of the deed shows that the creditors reside at different places, widely separated, and thus a suit in chancery would be indispensable to ascertain who might direct a sale; whilst such a proceeding, of uncertain duration, should be pending, the grantor was to enjoy the property.

The deed D omits the grantor's stock of merchandise, which is shown to be of great value. It seeks to impose on his creditors secured in the deed, the alternatives of looking to the deed only for security, and giving up for an indefinite time the right to pursue the debtor's other property
58 by legal process, or of forfeiting *any claim under the deed. This is a palpable attempt to use one portion of the debtor's present property to protect another portion from his creditors. We have seen that this cannot be done when the protection sought is for all time; and the principle is the same when it is sought for a limited time; the difference is in degree only. The hindrance or delay of creditors is reprobated by the statute without regard to the duration of the hindrance or delay. Under the circumstances of this case, a delay of two years in the pursuit of Kerr's property, was equivalent to giving up all claim upon it.

If any thing more were needed to condemn the deed D as fraudulent, it would, in my judgment, be found in the fact that it was executed on the last judicial day preceding the commencement of the term at which the appellants obtained their judgment; and in the fact that it embraces large quantities of property consumable in the use, and which must be used within the two years, to be of any value. It was merely illusory as a security for debts to be paid two years or more thereafter. I am aware of the cases in this court, in which conveyances of property of like nature have been held good. Recognizing the binding authority of those cases, as establishing that such conveyances of such property are not necessarily fraudulent and void, still I am of opinion that this court has not, and could not in advance declare that no weight as evidence shall be allowed in any case to the fact, that the conveyance is illusory for the purpose of securing debts.

I am of opinion to reverse the decree of the Circuit court, and to render a decree subjecting the avails of property, embraced by the deed D, now under the control of the court, to the satisfaction of the appellants' judgment; and applying the residue thereof, if any, to the trusts declared by that deed.

59 *DANIEL and MONCURE, Js., concurred in the opinion of Samuels, J.

Allen, P., dissented.

Decree reversed.

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60 *Erskine's Ex'ors v. North & als.

July Term, 1857, Lewisburg.

(Absent LEE, J.)

1. **Adversary Possession—Acknowledgment of Claimant's Title by Possessor—Effect.***—When the possessor of land has acknowledged a title in the claimant, then the possession will not be deemed adverse; and whenever the act of the possessor acknowledges a right in the claimant, the statute of limitations will not operate, because such acknowledgment deduced from circumstances negatives the idea of adverse possession.

2. **Case at Bar.**—In 1825 N bought land of M, and received possession and a bond for the title. In 1826 N contracted with B to convey him the land upon his doing certain work and paying certain debts for which N was bound as his surety. B did the work but did not pay the debts, but they were paid by N, and they had a settlement in November 1831, when B owed N one hundred and eleven dollars, with interest. In 1827 B conveyed the land to secure a debt he owed B & Co., and in 1830 B conveyed the land to secure a debt to E; and in April 1835 E purchased the land of B, and was to pay him when B removed the incumbrances upon it, and B executed to him a title bond. E was put into possession, and he and his widow have retained the land ever since, claiming, as is stated by his executors in their answer, under B's title bond. In 1853 N files a bill against M, B, B & Co. and E's executors, to have the land subjected to pay his debt; charges notice on the part of B & Co. and E; and the notice is admitted by E's executors. HELD:

   1. **Bonds—Presumption of Payment—When it Begins to Arise—Case at Bar.**—The presumption of satisfaction of N's debt as against E, can only begin to arise from 1835, when he had notice of it; and twenty years not having since elapsed, the legal presumption has not arisen.
   2. **Presumption of Grant—Case at Bar.†**—The executors of E having in their answer stated that E has always claimed under B's title bond, a conveyance cannot be presumed.
   3. **Statute of Limitations—Adversary Possession.**—E recognizing by his acts the title in N, his is not a possession adversary to N, and the statute of limitations cannot operate to protect his possession.
   4. **Bonds—Presumption of Payment—Repellable.‡**—Even if the time had elapsed from which the legal presumption of payment might arise,

*Adversary Possession.—See monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

†Presumption of Grant.—See Roberts v. King, 10 Gratt. 184, and *foot-note*.

‡Bond—Presumption of Payment—Repellable.—In Updike v. Lane, 78 Va. 136, the court, citing among others the principal case, said: "The presumption (of payment) may be repelled by satisfactory evidence of any kind whatever to the contrary. For exam-

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61 yet the circumstances may *repel that presumption. And the circumstances of this case do repel that presumption in favor of N against both B & Co. and E, and in favor of B & Co. against E.

This was a suit instituted in 1853, in the Circuit court of Greenbrier county, by John A. North against Henry Erskine's executors, Patrick Beirne, Elisha Buckingham and others. The case made by the plaintiff in his bill is as follows: On the 3d of October 1825 John A. North purchased of George W. L. McClenachan a tract of land near Lewisburg, containing thirty-four and one-quarter acres, known in the division of McClenachan's land, as lot No. 15; and he received the bond of McClenachan, binding himself to make North a title to the land. In February 1826 North made a contract with Elisha Buckingham, by which Buckingham bound himself to build certain parts of a house for North; and among other things, North bound himself to assign to Buckingham the said title bond of McClenachan, upon the completion of the work and the payment by Buckingham of two notes due to Parris for which North was surety, amounting to about two hundred and thirty dollars. Buckingham completed the work, but did not pay the notes, which were paid by North; and upon a settlement between them in November 1831, Buckingham acknowledged himself indebted to North in the sum of one hundred and eleven dollars and sixty-nine cents, with interest from the 25th of December 1827: And he having failed to pay this sum, North did not assign to him the title bond. The foregoing was the case of the plaintiff, and was fully sustained by the written evidence.

The plaintiff further stated, that in August 1827 Buckingham, to secure a debt he owed to P. Beirne & Co., conveyed to Marcus H. Goshen, with other property real and personal, including his wagons and teams and household furniture, the parcel of
62 land *aforesaid of thirty-four and a quarter acres; and in September 1830 he made another deed, by which he conveyed the same property to secure a debt due to Henry Erskine. He charged that both Beirne & Co. and Erskine & Co. had full notice of his prior equity; and that Buckingham had no title to said land, nor could he procure a title until he had fully paid off the debt due to the plaintiff, and for the payment of which he had retained the said title bond.

The plaintiff further charged that Buckingham had left the state in the year 1838 or 1839, and had remained abroad. And making the executors of Erskine, Beirne, the heirs of McClenachan, Buckingham, and Goshen the trustee, parties, he asked, that McClenachan's heirs might be required to convey the title to the said land; that his lien thereon might be enforced, and that it might be sold for the payment of his debt; and for general relief.

Erskine's executors answered the bill. They said, it was true Buckingham had conveyed the land in trust to secure a debt due to Henry Erskine & Co., amounting to one thousand and forty-three dollars. That in April 1835 Buckingham had sold the land to Henry Erskine, and given him a title bond for it, and had put him in possession, a possession which he retained until his death, and which had since been retained by his widow, claiming it under the said title bond. That Erskine was to give seven hundred dollars for the land, to be paid in the debts of said Buckingham, and the land was to be cleared of all incumbrances. That the debt secured by the deed of trust had never been paid, except as it was reduced by the price of the land.

They say they suppose that at the time of the purchase of said land Erskine had notice that a balance of purchase money was due to the plaintiff, which operated as

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ple: By the obligor's express admissions, within the twenty years, that the debt was unpaid; by his implied admissions to that effect, from paying interest, or part of the principal, which fact is provable by extrinsic evidence, or even by cotemporaneous endorsement by the obligee himself; or by showing the obligor's inability to pay during that period; or by suspension of power of collection by stay-law, or by war; or even by the near relationship of the parties."

Again, in 2 Min. Inst. (4th Ed.) p. 838, it is said: "It has long been established that, at common law, after the lapse of twenty years from the time when it became payable, a bond should be presumed to have been paid; so that, in the absence of any proof to repel the presumption, the lapse of that time would sustain a plea of 'payment at the day.' It is, however, only a presumption, which may be disproved by any satisfactory evidence that it is not true, as, (1), By express acknowledgment of the obligor within the twenty years that the debt was still due; (2), By his implied acknowledgment, derived from his having within that time paid interest on it, or, it is said, a part of the principal, which may be proved by extrinsic evidence, or by an endorsement of a credit for the payment made on the bond by the obligee himself, while the obligation was in full force, and before the presumption attached; (3), By showing the debtor's inability to pay during the period; (4), By the long continued absence abroad of the debtor, or, it is said, of the creditor; (5), By showing that the collection of the debt had been long suspended by injunction, or by a state of war; and (6), By the near relationship of the parties. (Bac. Abr. Oblig. (F.); 1 Th. Co. Lit. 13, n. (E.); 1 Rob. Pr. (2d Ed.) 461; Wells v. Washington's Adm'r, 6 Munf. 532; Dabney v. Dabney, 2 Rob. 622; Mulliday v. Machir, 4 Gratt. 1; Perkins v. Hawkins, 9 Gratt. 649; Hutsonpiller v. Stover, 12 Gratt. 579; *Erskine v. North, 14 Gratt. 60.*)"

See also, Norvell v. Little, 79 Va. 141; Brewis v. Lawson, 76 Va. 36.

Same—Same—Effect of Statute of Limitations.—The common-law rule of presumption of payment of bonds arising from the lapse of time has not been affected by the statutory provisions adopted at the revisal of 1849, prescribing the limitations of such instruments. Booker v. Booker, 29 Gratt. 605, and *foot-note.* See Brewis v. Lawson, 76 Va. 36.

See also, monographic *note* on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

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an incumbrance upon the land, as no
63 title had *been made. But they do not admit that Erskine had either actual or constructive notice of the debt due to Beirne & Co. They had been informed that the debt of Beirne & Co. had been paid by Buckingham in work; and they furthermore rely upon the lapse of time and the presumption of payment arising therefrom, as a protection against the debt.

Beirne also answered the bill. After referring to the deed of trust to secure his debt, he denied that his debt had been paid; the only payments made upon it being endorsed upon the bond, and a considerable balance remaining due. To repel the presumption of payment from lapse of time, he exhibited two papers, by which his debt was recognized by Buckingham, as a subsisting debt, in July 1838; and he alleged that Buckingham absconded from the county in 1839 or 1840, and was then regarded as insolvent; and the removal of the trustee Goshen from Virginia interposed serious obstacles to a sale by the trustee.

He stated further, that in January 1827 Buckingham executed and delivered to him an order to North the plaintiff, requesting him to deliver to P. Beirne & Co. the title bond for the thirty-four acres of land which North had agreed to let him have for building his house, as soon as said Buckingham had finished the same according to contract. That this order was presented to North, who by an endorsement thereon accepted the same, and agreed to assign to P. Beirne & Co. the said title bond, as soon as said Buckingham completed the work on plaintiff's house agreeably to his contract with him. That nothing was said at the time of the acceptance by the plaintiff, of any right he had to retain the title bond as an indemnity against his liability to Parris as surety of Buckingham; and that he took the acceptance as security for the debt to Beirne & Co., supposing that as soon as the
64 work on the house was *completed according to contract, North would assign the title bond to him. That in August following he took the deed of trust to secure his debt; at which time he had no notice of the equity asserted in the plaintiff's bill.

The documents set out in the bill and answers are correctly described. The deed to secure the debt due to Beirne & Co. describes the land in controversy as one lot or parcel of land lying in the county of Greenbrier, adjacent to the town of Lewisburg, containing thirty-four acres and some odd poles, more or less, it being the same land which John A. North purchased of George W. McClenachan, which lot or parcel of land was designated as lot No. 15, and which the said Buckingham purchased of the said John A. North. In the deed to secure the debt due to Erskine & Co. this land is described as a parcel of land containing thirty-four acres, lying near the town of Lewisburg, it being the lot of ground that said Buckingham purchased from John A. North, and North purchased the said thirty-four acres from Washington McClenachan. The title bond executed by Buckingham to Henry Erskine in April 1835, describes the land sold as a lot of ground near Lewisburg, containing thirty-four acres; and the condition is, that so soon as the said Buckingham clears the said lot of all incumbrances which are now on it, and makes unto the said Erskine a good title to said lot, that said Erskine is to pay Buckingham, in his debts, the sum of seven hundred dollars for said lot.

In the progress of the cause the court directed an account of the debts of the plaintiff and defendants; and the commissioner made a report showing that there was due to the plaintiff two hundred and ninety-five dollars and seventeen cents; that there was due to P. Beirne & Co. seven hundred and eleven dollars and
65 *twenty-six cents; and that there was due to Henry Erskine & Co. three thousand one hundred and thirty-one dollars and thirty-five cents.

The executors of Erskine excepted to the report of the commissioner as to the debt due to Beirne & Co. on the ground, 1st. That the lapse of time raised the presumption of payment. 2d. That there had been an adversary possession in Erskine for more than fifteen years. 3d. That the circumstances strengthen the presumption of payment from lapse of time. And they relied on the two papers filed by Beirne with his answer. They also objected that there should have been an additional credit upon the debt. Upon the last two points the facts are stated by Judge Daniel, as they are upon the question of the solvency of Buckingham at the time he left the country.

When the cause came on to be finally heard, the court held that North was to be first paid out of the proceedings of the land; that the debt of Beirne & Co. was to be next satisfied; and then that of Erskine & Co. And it was decreed that unless Buckingham or some one for him should, within one month from the date of the decree, pay the plaintiff his debt and the costs of suit, and should also pay to Beirne his debt, that certain commissioners named, should proceed to sell, &c. And a commissioner was appointed to convey the title from the heirs of McClenachan to Buckingham before the sale of the land by the commissioners. From this decree the executors of Erskine applied to this court for an appeal; which was allowed.

Price, for the appellants.

Dennis and Wm. Smith, for the appellees.

DANIEL, J. In the view which I take of this case, it is not necessary to consider the general proposition in respect to the right of a party, who has been in the
66 *possession of land, for a sufficient length of time to bar an entry, under an executory agreement for its purchase made with one who had himself acquired the possession under a like agreement with a third party, to set up his possession as

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adverse to the rights of the latter, and to resist by the plea of the statute of limitations the claim of the latter to execute his lien for an unpaid balance of purchase money due by his immediate vendee.

The state of the facts admit, in my opinion, of the application of a well-established and indeed undisputed principle, under the operation of which the defence of Erskine's representatives and heirs, so far as it is rested on the pretension of a possession adverse to the lien of North, must fail. The principle to which I advert is the one stated by Judge Lomax in his Digest, as regulating the fourth class of cases in which an adversary possession will be negatived. The terms in which he announces the principle are, that when the possessor has acknowledged a title in the claimant, then the possession will not be deemed adverse; and wherever the act of the possessor acknowledges a right in the claimant, the statute will not operate, because such an acknowledgment deduced from circumstances, negatives the idea of adverse possession. 1 Lomax's Digest, 2d ed. p. 625.

It is admitted that Erskine acquired possession under the title bond of Buckingham executed in 1835; and in the condition of said bond it is stipulated that so soon as Buckingham clears the lot of all incumbrances which are now on it, and makes unto Erskine a good title to said lot, Erskine is to pay Buckingham, in his debts, the sum of seven hundred dollars for said lot.

Here was an acknowledgment by Erskine that there were incumbrances on the land, and the payment by him of the purchase money (by giving Buckingham a
67 *discharge of his indebtedness to Erskine to the extent of seven hundred dollars) was made dependent on Buckingham's clearing off the incumbrances and making a good title. Erskine must be held to have known what those incumbrances were. It is a familiar rule that a purchaser stands affected with notice of all that is apparent on the face of the instruments under which he claims, and of such other facts as those already known put him on enquiry for, and as such enquiry, pursued with ordinary diligence and prudence, would bring to his knowledge. 2 Rob. Pr. 29, and cases there cited.

We must presume that, if not otherwise informed of the character and extent of the incumbrances mentioned in the title bond, he enquired for and obtained the information from Buckingham before or when he became a party to it, and accepted the stipulations contained in the condition.

Indeed, it is not denied in the answer of Erskine's executors, that Erskine bought with such knowledge. On the contrary, they say "they suppose that at the time of the purchase of said lot the said Erskine had notice that a balance of purchase money was due to the plaintiff, which operated as an incumbrance on the land, as no title had been made." It further appears that in the deed of trust, executed by Buckingham in September 1830, for the security of Erskine, the lot in controversy is conveyed and is there described and identified as "the lot of ground that said Buckingham purchased from John A. North, and North purchased the said thirty-four acres from Washington McClenachan, agreeably to the plat and survey of the said Washington McClenachan." And in the title bond of McClenachan to North we see that the lot is designated "as lot No. 15 in the division of his (McClenachan's) land into lots as laid down in the plat and survey thereof, made by Josiah Shanklin."
68 *From these facts and considerations we can draw no other conclusion than that Erskine had full and accurate information as to the state of the title, and as to all liens and incumbrances on the property; and as there is no satisfactory proof that there were, at the date of Buckingham's title bond to Erskine, any other incumbrances on the lot than North's lien for the balance of the purchase money, and the deed of trust to Goshen for the benefit of Beirne (with the exception of the deed of trust before mentioned, made for the benefit of Erskine), the further conclusion is equally clear, that North's lien was one of the incumbrances intended to be embraced by the term "all incumbrances," used in the condition of said bond: and hence there arises necessarily the implication of an acknowledgment by Erskine of the validity and subsistence of the lien aforesaid. The case thus falls obviously within the influence of the rule already stated, and there is nothing in a possession acquired under such circumstances on which to found the statutory bar, or the analogous defence in a court of equity.

The presumption of a grant contended for by the appellants' counsel in his argument, is, it seems to me, equally groundless. For whether it is sought to presume such a grant to Erskine or to Buckingham, it is obvious that the lapse of time from which to make the presumption cannot have its commencement at any point anterior to the date of the acknowledgment by Erskine of North's lien; and the interval between that date and the date of the institution of the suit, is something short of eighteen years. From the period of Erskine's acknowledgment of North's lien, the latter stood, obviously, on the same ground, in equity, in respect to said lien, that he would have occupied had he been the immediate vendor of Erskine; and it is well settled by the decisions of this court
69 in Hanna *v. Wilson, 3 Gratt. 243, and other cases, that in a suit brought by a vendor against his vendee to subject the land sold to sale for the purchase money in arrear, the lien of the vendor is not affected by any lapse of time short of the period sufficient to raise the presumption of payment.

The argument in favor of presuming a grant to Erskine, labors under another insuperable difficulty: For the appellants, so far from relying on such a presumption in their answer, set up their claim in terms

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which exclude all idea of a grant to Erskine. They say in their answer, that Erskine was put in possession of the lot at the time of the execution of the title bond in 1835; and that this possession "was held by him the said Erskine from that time down to the time of his death, and has been held by his widow ever since, claiming it under the title bond aforesaid. Here is an admission that from the commencement of Erskine's possession down to the date of the answer, there had been no change in the character of the possession or in the title to which it should be referred. And I apprehend that it is a well established principle that a grant will never be presumed in favor of a party who by his answer expressly or impliedly admits that no grant has been made. Roberts v. King, 10 Gratt. 184.

The only question between North and the appellants, remaining to be considered, is, Whether or not we should presume a payment of North's debt?

And here again it seems to me obvious that we cannot look beyond the date of Buckingham's title bond to Erskine for the period from whence to reckon the lapse of time whereon to found the presumption. The subsistence of the debt at that date is a fact which we must take to be established by the implied acknowledgment of Erskine, contained in the condition of the bond.

The presumption having been repelled
70 by an *acknowledgment within twenty years, the general rule would require the lapse of twenty years from the date of the acknowledgment in order to establish the presumption. And the circumstances of the case, so far from being of a character to justify us in departing from the general rule, and receiving a shorter period than twenty years as the basis of the presumption, favor, in my opinion, the opposite conclusion.

North had no lien for the payment of his debt on any property of Buckingham, other than the land in question. There is no pretence that the debt has been paid either by Beirne or Erskine in ease of their subsequent incumbrances. Unless, then, North has received payment from Buckingham, the inference is that the debt is yet unpaid. That he did thus obtain or could thus have obtained satisfaction of his debt, is rendered extremely improbable by the testimony in respect to Buckingham's pecuniary condition. The testimony of McPherson, taken alone, is sufficient to show that he was insolvent in a month or two after the date of his title bond to Erskine; for it appears thereby that an execution against him, which issued from the clerk's office of the Superior court of the county in May 1835, returnable to the July rules, was returned "No property found liable to distress." The testimony of the other witnesses does not, I think, conflict with this conclusion. Frazer evidently regards him as an insolvent man for many years before he left the state. Though he succeeded in making out of his effects two several sums of money (both of which it is to be inferred from his testimony were inconsiderable in amount), the one under a distress warrant, and the other under an old execution, his testimony yet tends strongly to prove that he was not in possession of a sufficiency of unencumbered property to have satisfied North's debt. The articles of furniture and other personal property mentioned in the
71 deposition *of Dunn as being in the possession of Buckingham in 1833 and in 1834, and which the witness thinks continued in his possession in 1840, are of the same character and description with those conveyed in the deeds to Erskine and Beirne; and there is no evidence to show that they were not in fact the same. This evidence is not inconsistent with that of McPherson and Frazer. Indeed, Dunn says he was much involved, and that he contracted a debt with him in part for necessary supplies, amounting to seventy dollars, which he "could not get pay for."

The inability of Buckingham to pay North's debt out of any other property than the lot in question, is thus, I think, satisfactorily established. He appears to have been unable to pay, and the presumption is, he did not pay. Not only so, but it is shown that he moved from the state, and permanently abandoned it as a residence as early as in the winter of 1841-2, only seven years after the date of this acknowledgment of the debt by Erskine. If, therefore, there had been a lapse of twenty years instead of something less than eighteen from the date of such acknowledgment to that of the institution of the suit, the rules of law applicable to the case would declare the presumption of payment to be clearly rebutted: Wood v. Deen, 1 Ired. R. 230; Daggett v. Tallman, 8 Conn. R. 168; Mann v. Manning, 12 Smeedes & Marsh. 615.

The rights of Erskine, therefore, so far as they depend on his contract with Buckingham in 1835, and possession under it, are subordinate to North's lien.

His claim under his deed of trust of 1830 stands upon no better footing. The deed is the conveyance of a mere equity by a party, out of possession, who had never had the possession, and who had as yet neither a right to the possession of the land nor a right to the possession of the evidences of the equitable title under which he
72 claimed. There is no testimony *in the cause which tends to prove a possession by Buckingham at a period earlier than at some date in 1832. Were it necessary, to the establishment of North's right to take precedence of the deed of trust, to prove that Erskine had notice of North's lien at the time of the execution of the deed, all the elements of the proof are to be found in the transaction itself. Erskine is presumed to have known that Buckingham had no other than an equitable title, and the deed itself refers to North as the source from which it was acquired.

Nor do I think that any sufficient reason is shown why North should not also take precedence of Beirne. Beirne's incumbrance, like Erskine's, is taken on a mere

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equity, from a party who had not yet acquired the possession or even a right to the transfer of the evidences of the equitable title of the party from whom he had purchased. Not only so; but Beirne took this deed of trust with full notice and a clear acknowledgment of North's title. The paper of the 9th January 1827 refers to the contract between North and Buckingham; and is an order by the latter on the former for a delivery of the title bond for the land, to Beirne, on the completion of the performance of the contract by Buckingham. In a few months thereafter, to wit, on the 24th of August 1827, Beirne obtains his deed on this same lot, and on other property, real and personal. In the deed the lot is described as "one lot or parcel of land lying and being in the county of Greenbrier, adjacent to the town of Lewisburg, containing thirty-four acres and some odd poles, more or less, it being the same land which John A. North purchased of George W. McClenachan, which lot or parcel of land is designated as lot No. 15, adjoining lot No. 16, which John Mays and William Smith purchased of the aforesaid G. W. McClenachan, and which lot or parcel
73 of land, as above described, *the said Buckingham purchased of the said John A. North." Here is a plain and minute reference to the several links in the title to the land. There is no intimation in the answer of Beirne of any change in the title or in the evidences of the title between the date of the order and that of the deed. He knew, therefore, that Buckingham had not in the meantime acquired the legal title. He knew that he was obtaining a lien on a mere equity; and he stands charged with full notice and with a plain recognition of North's prior lien.

It is insisted, however, by the counsel of Beirne, in his argument here, that the order of the 9th of January 1827, and the qualified acceptance thereof, endorsed thereon by North, when taken together, amount to an admission by North, that all which Buckingham had then to do, in order to entitle him to a delivery of the title bond, was to complete the building of the house, and to an agreement on the part of North that he would deliver over the bond to Beirne on such completion. It cannot be denied that the papers, read without a reference to the state of things existing at the time, are susceptible of such a construction. And if it appeared that Beirne did in fact so understand the papers, and acted on that understanding, and thereby sustained loss, the argument of an estoppel on North to deny the construction contended for, would be one of great force.

Against the claim of Beirne so to construe the papers it may be fairly argued, that they referred to the contract between Buckingham and North; that on looking to that contract Beirne must have seen that Buckingham's right to the assignment of the title bond depended not merely on his completing the building of the house, but also on his paying the two notes to Parris, in which North was the security of Buckingham; that he must have further
74 seen that one of those *notes was not in fact payable till March 1827, and that he could hardly have supposed that Buckingham, in his embarrassed condition, had anticipated the payment, or that North would surrender the title bond till it was paid; that the language used by North in his acceptance, "As soon as Elisha Buckingham completes the work of my house agreeably to his contract with me, I will assign the within specified title bond agreeably to my contract, to P. Beirne & Co." was in some respects equivocal: And that fair dealing to North no less than a prudent regard to his own interests, required of Beirne that he should have enquired of North whether the notes to Parris were paid, and if not, whether it was the purpose of North to bind himself by the acceptance aforesaid to deliver over the title bond before they were paid.

On the other hand, however, it is to be observed that North, as the writer of the acceptance, and as the party undertaking to be bound by it, was especially called upon to be clear and explicit. He saw that by the terms of Buckingham's order he was required to let Beirne & Co. have the title bond as soon as Buckingham should finish the house according to the contract. If by the acceptance he did not mean to deliver the bond on the happening of that event, but only on the complete performance of the entire contract between him and Buckingham, by the payment of the notes aforesaid by the latter, it was his duty to have so qualified his acceptance, and in terms not liable to be misunderstood. According to the construction which he places on his own language, it was well calculated to mislead. And if Beirne had shown that he had been misled by it to his injury, it seems to me that equity would have required us to visit the loss on North as the party most in fault, rather than on Beirne. But in fact, there is nothing to show, and Beirne no where asserts, that relying on the
75 title bond as a security, *freed from North's debt, he had been for a moment stayed in his pursuit of other means of Buckingham to satisfy or secure his debt. His deed of trust seems to contain a sweeping conveyance of all the property then owned by Buckingham, down to the most minute articles of household and kitchen furniture. It is not pretended that he paid any thing for the order. It was taken to secure an existing debt. There is no proof that North received or was to receive any thing for the supposed surrender of his lien, or that Beirne came to any loss by supposing it to be surrendered. There is, therefore, no consideration for the agreement, on the part of North, which it is sought to construe out of the language of his acceptance.

There are, too, strong circumstances to show that, if Beirne ever understood North as intending such an admission or agreement as is now supposed by his counsel, he

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soon came to view the subject in a different light. For in his answer he admits that North more than once, perhaps several times told him that he held a lien on the lot for about one hundred dollars, though he does not doubt that these communications were made after the date of the deed of trust from Buckingham for his (Beirne's) benefit, as it appears that it was not ascertained till November 1831, by the settlement between North and Buckingham, what the balance due by the latter was. Now, what is more unnatural and improbable, than that Beirne should have refrained, on these occasions (if he really then understood North's acceptance in the light now insisted on by his counsel), from referring North to his acceptance, and insisting that it was not admissible for him then to set up such a lien in the face of his own agreement and admission: Yet, he does not aver that he denied on any one of these occasions, the justice of North's pretension. And so far from relying in his answer on such
76 *supposed agreement and admission as an estoppel, he in another part of his answer expresses a perfect willingness that an account should be taken by a commissioner of the court, to ascertain what may be still due on the several incumbrances. It is true he submits to the court whether the endorsement on the written contract of February 1826, made in the handwriting of North, and signed and sealed by Buckingham, does not operate a release and discharge of whatever lien North may have had by virtue of the said contract. The said endorsement admits, it seems to me, of no such construction as that suggested. On the contrary, whilst it ascertains the balance due by Buckingham on the settlement of the Parris notes, which North surrenders to Buckingham, it contains no intimation of a purpose on the part of North to surrender his lien on the land for such balance. The legal effect of the transaction, as between North and Buckingham, was to substitute the sealed acknowledgment by Buckingham of the amount due North on account of his having paid the notes, in place of the notes. North, instead of holding a lien on the land for the amount appearing to be due by the notes, was thenceforward to hold his lien only for the smaller and true amount, found due on the settlement, of which the sealed acknowledgment of Buckingham was the evidence. And as the said acknowledgment (if it might have been) has not been excepted to as evidence either by Beirne or Erskine, it may be properly referred to as proof of the true balance of debt for which North had a right, as against both of them, to execute his lien on the 17th of November 1831, the date of the acknowledgment.

It is further to be observed, that there is no evidence of any demand ever having been made by Beirne on North for the delivery of the title bond. If he really considered that he was entitled to the
77 possession of it, *it is difficult to conjecture why there is an entire absence of proof, as well as of averment, on his part, of his having called for it.

The question as to any presumption, in Beirne's favor, of a payment or satisfaction of North's debt, or of a release of his lien, arising from lapse of time, seems to me to have been already satisfactorily answered, in effect, by what I have said in respect to the like presumption set up by Erskine. For though more than twenty years have elapsed between the date of Buckingham's sealed acknowledgment just spoken of, and the institution of the suit, the facts of Buckingham's insolvency and removal from the state long before any such presumption could attach, and of the absence of any other source than the land, from which North could have procured payment, are, under the influence of the authorities which I have cited, amply sufficient to repel the presumption.

The questions remaining to be disposed of are those between the appellants and Beirne.

And in comparing, in the first place, the rights of Erskine and Beirne under their respective deeds of trust, I throw out of view, as unnecessary, any enquiry as to whether Erskine, at the time of obtaining his deed, is to be held as having had notice, either actual or constructive, of Beirne's deed. The two incumbrances are both upon a mere equity given by a party not in possession. And as to any benefit which Erskine's representatives can claim from the fact that his deed was duly recorded, the same benefit is enjoyed by Beirne, as his deed was also duly recorded. If, therefore, we throw out of consideration all question of notice, the equities of the respective claimants under the two deeds would appear to be exactly equal, with the exception that Beirne's deed was the first executed and the first recorded. This exception is, however, all sufficient to
78 turn the scales in favor of Beirne, *as priority, in time, is, in such cases, according to a familiar rule, equivalent in equity to superiority of right.

And as to any questions between these two parties, growing out of the contract between Buckingham and Erskine in 1835, and the possession of the latter under it, they seem to me to have been mainly anticipated in considering the like questions between North and Erskine. And I do not think that the considerations which have been urged by the counsel of the appellants, as growing out of the transactions evidenced by the exhibits Nos. 2 and 3, filed with Beirne's answer, can affect the result. The first of these two exhibits is a statement, under the seal of Buckingham, made the first day of July 1830, showing how the proceeds of a tract of land sold, under the deed of trust to Beirne, in November 1828, were to be applied. The transaction, from the history given of it in the statement, appears to have been in all respects fair and reasonable. Certainly there is nothing on the face of it whereon to found any suspicion of fraud on the part of Beirne. He was to

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apply to the credit of the debt secured by the deed of trust, the whole of the price bid for the land at the sale. Whether Buckingham would go on to complete his contract with Mays, and thus place it in his power to perfect the title, on which event the finality of the sale and the payment of the additional sum of three hundred and seven dollars by Miller, the highest bidder at the sale, depended, was a matter which Beirne could not control. Under this state of things, I know of no rule forbidding Beirne from agreeing with Buckingham that the latter should go on and finish his contract with Mays, and thus perfect the title; and that out of the whole price which Miller would then pay for the land, the one hundred and eighty-eight dollars bid by Miller at the sale, and which was all that could be obtained for the land in
79 *the then condition of the title, should be credited on the bond secured by the deed; whilst the three hundred and seven dollars, the residue of the whole purchase money to be paid by Miller for an unencumbered title, should go as a credit to the other debts of Buckingham due to Beirne, and not secured by the deed.

And in any conceivable aspect of the transaction, I am wholly at a loss to conceive how Erskine or his representatives can have any grounds to complain of it, seeing that neither his deed of trust nor his contract with Buckingham was then in existence.

The other exhibit, No. 3, seems to be a statement under the seal of Buckingham, of a settlement of all matters of account between him and Beirne, subsequent to the deed of trust, and not connected with it. It is true, that on the settlement there is an item of debit of five dollars and twenty-five cents, "amount for drawing and recording deed;" and as the deed provides for the payment of the expense attending the drawing, recording and certifying the deed out of the moneys arising from a sale under the deed, it is argued that if the bond secured by the deed had not been paid by the one hundred and eighty-eight dollars, it is fair to presume that it too would have been brought into the settlement. For why (it is asked) bring the trifling debt of five dollars and twenty-five cents, secured by the deed, into the settlement, and omit the six hundred and sixty-four dollars, also secured by the deed. The sum of three hundred and seven dollars, "the amount received of Miller, after deducting one hundred and eighty-eight dollars, credited on bond secured by deed," is the main item of credit to Buckingham; and as by the agreement evidenced by the sealed paper of the 1st July 1830, the three hundred and seven dollars were to be applied to the discharge of the debts not secured by the deed, the fair explanation, I think, is, that the true object of the settlement was
80 *to show how Beirne had disposed of the three hundred and seven dollars. After charging Buckingham with the debts ot secured by the deed, there would have been a small balance of five dollars and ninety-nine cents due to him. The expenses of drawing and recording the deed were in all probability not paid by Beirne till after the deed was recorded; and when he paid them, he no doubt charged them to Buckingham as an item of debit against the three hundred and seven dollars. Having paid them, there was no legal necessity for his waiting till a sale should take place under the deed. Buckingham, if he could have objected, did not object to Beirne's retaining them out of the small balance in his hands. By retaining them, the trifling balance of seventy-four cents was left due to Buckingham on the settlement.

To bring the bond into the settlement, and to go into a calculation of interest, apply the credits, &c., was a matter foreign to the main object of the settlement. Besides, the language used both in the sealed instrument and in the settlement, in respect to the one hundred and eighty-eight dollars, repels the idea that the bond would be or had been paid in full, by the one hundred and eighty-eight dollars. In the former, it is required that it should be "placed as a credit" on the debt secured by the deed; and in the latter, it is stated that it was so applied.

And again: the argument, of a payment in full of the bond, is strongly repelled by the consideration that if such had been the fact, the bond ought to have been in the possession of Buckingham. Yet Beirne continues to hold it, and files it and its endorsements, with his answer, as an exhibit in the cause.

Upon the whole, I see nothing in the papers referred to, to weaken the implication of an acknowledgment by Erskine, in his contract of 1835 with Buckingham, that Beirne's debt was one of the in-
81 cumbrances *to be cleared off by Buckingham, or to affect the bearing and influence of such acknowledgment on the rights of Erskine sought to be founded on his possession under said contract. The defences which Erskine seeks to raise out of his possession, as against Beirne, are the same with those relied on in his controversy with North. And I am of the opinion that the facts and course of reasoning which led to the conclusion that those defences could not prevail against North, apply sufficiently to the case as between Erskine and Beirne, to show that they ought not to prevail against Beirne.

And, on the question of a presumption of payment, it is to be observed that Beirne has the advantage of the additional fact that the trustee (Goshen) in the deed of trust for Beirne's benefit, moved from the state as early as in the fall of 1842.

The only proof of any sale under the deed, is that furnished by Beirne in the exhibits Nos. 2 and 3, and in his endorsement on the bond of a credit of the net proceeds of such sale. And the only proof of any further payment on the bond, is also furnished by Beirne, in a further endorsement on the bond. To these proofs, the commissioner,

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I think, properly referred as the basis of his statement of the balance due to Beirne.

It seems to me that the decree is right in all respects, and ought to be affirmed.

The other judges concurred in the opinion of Daniel, J.

Decree affirmed.

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82 *Cox & als. v. McMullin.

July Term, 1857, Lewisburg.

(Absent LEE, J.*)

1. **Tenants in Common—Equitable Title—Appropriation of Specific Portion.**†—There are two tenants in common of land having but an equitable title. One of them cannot appropriate to himself any specific portion thereof, or do any other act whatever in derogation of the right of the other to enjoy equally with himself the common property and every parcel of it.

2. **Same—Legal Title Held by One Joint Owner—Conveyance by Him to Stranger—Effect.**‡—The legal title to the land held in common being conveyed to one of the joint owners, he reciting that he owns the whole, conveys one-half of it to a third person, and purports to convey the upper moiety. But it will be held that the deed passed only an equal undivided moiety of the common subject: and that the other joint owner and the grantee held in common the whole subject, and every part thereof.

3. **Same—Conveyance of Specific Portion by One Tenant—Effect upon Partition.**§—Although a party holding in common with others, can do nothing to impair or vary in the slightest decree the rights of his cotenants; yet if he execute a deed for a specific portion of the common subject, or make a contract in regard to it; and upon partition such portion falls in severalty to the party so making the deed or contract, he will be bound by his act.

4. **Partition—How Made—Under Statute.**|—In the partition of real estate, each part owner is entitled to have in severalty a part equal to his interest in the whole subject, if this is practicable, with a due regard to the interests of all concerned. But if such partition cannot be made without imparing the portions of some others, the property may be divided into shares of unequal values, and the inequality may be corrected by a charge of money on the more valuable in favor of the less valuable portion, or by other means recognized in the law of partition. Code, ch. 124, § 2, p. 526.

5. **Same — Allotment — Assignment.**¶—The general rule of partition requires an allotment of the several parcels to the part owners: yet it may benefit both classes of owners to assign the parcels; or it may benefit one class without injury to the other, to assign rather than to allot. And in either case, the commissioners may avoid the risk of an unfortunate allotment, by resorting to an assignment.

83 *This was a bill in the Circuit court of Kanawha county, filed by William A. McMullin against Charles A. Cox and others, for the partition of a tract of eighty acres of land bounded on the Kanawha river, and which constituted what was called a salt property. The plaintiff and James M. Laidley and two infant children of Grant, owned one moiety of the property, and Charles A. Cox and his brothers and sisters, children of William A. Cox deceased, owned the other moiety. The case, as made out by the pleadings and evidence, is substantially as follows:

In 1815 a patent issued to John Wilson for two hundred acres of land bounded on the Kanawha river. On the tenth May 1816 Wilson conveyed to James E. Harris one-fifth part in quantity of this tract, which was to be laid off at the upper end of the survey: This land was afterwards conveyed to John J. Cabell and Walter Trimble, and they took possession thereof. On the 2d of

*He had decided the case.

†**Tenants in Common—Appropriation of Specific Portion of Property by One Tenant—Effect.**—See Robinett v. Preston, 2 Rob. 277; Worthington v. Staunton, 16 W. Va. 208, 240.

‡**Same—Deed from One Tenant—Effect.**—In Woods v. Early, 95 Va. 313, 28 S. E. Rep. 374, the principal case is cited as authority for the proposition that the conveyance from a tenant in common carries to the grantee or grantees only an undivided interest in the property, it matters not by what description the interest in the property is conveyed.

In Buchanan v. King, 22 Gratt. 422, it was said: "It is well settled that a conveyance by metes and bounds of part of an estate held in common, though valid against the grantor, cannot prejudice the rights of the co-tenant, unless followed by entry and adversary possession. The grantee becomes thereby merely a tenant in common with the co-tenants of his grantor; his possession is in presumption of law, the possession of all, and is to be deemed in support and not in derogation of the common title. Robinett v. Preston, 2 Rob. 273; Hannon v. Hannah, 9 Gratt. 146."

§**Same—Conveyance of Specific Portion of Property by One Tenant—Effect upon Partition.**—In accord with the proposition succinctly and clearly laid down in the third headnote, see McKee v. Barley, 11 Gratt. 346; Robinett v. Preston, 2 Rob. 277. See also, principal case cited as to this point in Worthington v. Staunton, 16 W. Va. 208, 240.

|**Partition—How Made.**—On this subject, see Howery v. Helms, 20 Gratt. 1, and *foot-note*; in which note it is shown that, while at common law partition must be in kind, yet, by statute (Code of 1849, ch. 124, § 2, p. 526, Code 1887, § 2564). *when necessary for the best interest of all concerned*, a sale may be decreed.

In Roberts v. Coleman, 37 W. Va. 158, 16 S. E. Rep. 487, it was said: "Notwithstanding this statute, *prima facie* partition must be in kind; each parcener being allotted his several share. Custis v. Snead, 12 Gratt. 260; *Cox v. McMullen, 14 Gratt. 82.*"

¶**Same — Allotment — Assignment.** — In Henrie v. Johnson, 28 W. Va. 194, it was said: "The court has no right to make an arbitrary allotment. It should, so far as it can do so without injustice to others, assign each co-tenant that part most valuable to him. If there are several parcels, it need not divide each parcel, but may assign one parcel to each co-tenant. (Freem. on Co-tenancy and Partition, § 522; Smith v. Barber, 7 Ohio, part 2, 118; Hill v. Dey, 14 Wend. 204; *Cox v. McMullen, 14 Gratt. 82.*)"

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January 1819 John Wilson executed two deeds, by one of which he conveyed to Joseph Lovell one undivided fourth part of the remaining one hundred and sixty acres; and by the other he conveyed a like undivided fourth part to Alexander Grant. The land conveyed to Joseph Lovell came by intermediate conveyances to Frederick Brooks; and he held the lower part of the tract on the river, whereon are salt wells, &c. The part conveyed to Alexander Grant he conveyed to James Bream; and he dying, it was conveyed by Mrs. Bream to Mrs. Betty W. Lovell for life, with remainder to her children. The part held by Bream, and after him by the Lovells, lay on the river next above that held by Brooks.

Although the patent for this land was issued to John Wilson, Andrew Donnally seems to have had some equitable claim to it; and he seems to have been in possession of the eighty acres not conveyed away by Wilson, prior to 1821. On the 16th of
84 August of that *year he entered into a covenant with James Wilson, by which he bound himself to Wilson that he would proceed to bore for salt water on this eighty acres of land, owned as he says, by the said Donnally, lying on the Kanawha river between the furnaces of Cabell and Trimble and those of Lovell. And if the said Donnally shall obtain good salt water for one furnace of the usual size, he shall proceed to erect one good furnace, &c. And then the said James Wilson is to be entitled and Donnally covenants to convey to him, one equal undivided moiety of the said eighty acres of land; so that the said Donnally and Wilson shall be joint and equal owners and proprietors of the said eighty acres, as tenants in common. And the said Donnally covenants that he has full right, lawful power and authority to convey the said land, and that his title thereto is full, complete and indefeasible, and that he will convey to the said Wilson a moiety of the said land as aforesaid, clear of all incumbrances; and will warrant the same to the said Wilson and his heirs against the claims of all persons whatsoever. Wilson then covenants to convey to Donnally certain lands, and to build certain machinery for the manufacture of salt; and the parties then declare, that the salt well, furnace or furnaces, and the lands therein before covenanted to be bored, constructed or conveyed, are to be held, used, enjoyed and worked, at the joint expense of the said Donnally and Wilson, to be a joint and equal property between them; they equally sustaining the losses and receiving the rents and profits thereon. In January 1829 James Wilson assigned his interest in this agreement to Peter Grant.

In August 1822 an article of agreement was entered into between Donnally, James Wilson, Bream, Lovell and Ruffner, which recited that they were the joint owners of a tract of one hundred and sixty acres of land, in the following proportions,
85 viz: Donnally and *Wilson one-half, James Bream one-fourth, and Lovell and Ruffner one-fourth; that upon said land coal had been discovered near the furnaces; that the front or bottom land upon the river had been divided; and for the purpose of settling their rights to the hill land and coal, it is agreed, that Donnally shall be at liberty to take coal for two furnaces, Wilson for one* furnance; Bream for two furnaces; Lovell for one furnace, and Ruffner for one, and no more. That the parties may take coal to burn in their own families, and also any small quantity which they may find it convenient to haul to town or in the neighborhood, but not for the purpose of making salt. This arrangement was to be taken for a division of the hill land, which from its situation was incapable of a convenient division by boundaries. In April 1844 William R. Cox, who had purchased out John Ruffner's interest, covenanted to abide by the terms of the foregoing agreement.

On the 1st of February 1830 John Wilson conveyed to Donnally the eighty acres of land before mentioned; and on the next day Donnally conveyed one moiety thereof and of a salt well thereon, to John J. Cabell. The deed recited the fact that Donnally owned eighty acres of the land patented to John Wilson, on which tract there was a salt well, one-half of which eighty acres and of the salt well it was his purpose to convey to Cabell; and then proceeded to grant, bargain and sell to Cabell the said forty acres of land above described, being one-half of the said eighty acres; which said forty acres so conveyed, with half the salt well thereon, lies next below and adjoining another forty acres owned and occupied by the said John J. Cabell and Walter Trimble. And he conveys to Cabell, subject to the agreement aforesaid, in relation to the coal on the two hundred acre tract.

86 *In July 1832 John J. Cabell conveyed to James Hewitt, who had married a daughter of Peter Grant, all his interest in and title to (it being one equal half thereof) a certain salt gum or well on the land owned equally by said Cabell and the heirs of Peter Grant, with every right and privilege necessary to the full and complete enjoyment thereof. And in October 1833 Andrew Donnally, by deed reciting his agreement with James Wilson, the assignment of his interest in that agreement by Wilson to Peter Grant, and the death of Grant, conveyed to the children of Peter Grant, one of whom was Mrs. Hewitt, the undivided moiety of the said eighty acres of land. And about the year 1845 seven of these children conveyed their interest in said tract of land to the plaintiff, William A. McMullin, who afterwards conveyed a moiety of his interest to James M. Laidley.

In October 1833 John J. Cabell conveyed to William R. Cox and Samuel Hannah all his right, title and interest in and to forty acres of land, with a salt well thereon, adjoining the lands owned and occupied by

*So in the record; but obviously it should be "two."

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Walter Trimble, it being the land conveyed to him by Andrew Donnally. The said land and the salt well thereon to be held subject to the agreement with Lovell, Bream and others. And Cabell covenanted to complete the boring of a well then in progress, or at least go to four hundred feet if the requisite quantity of salt water should not be sooner found. Hannah afterwards sold his interest in this property to the defendant Charles A. Cox; and William R. Cox died, having bequeathed his interest to his children, of whom Charles A. Cox was one.

It appears from the evidence that the eighty acres embraced in the agreement between Donnally and James Wilson, fronted about sixty-eight poles on the Kanawha river, and that the land between the river and the bluff was a narrow
87 strip through which the *public road ran; and there was little room in this space which was not occupied either by McMullin and Laidley or the Coxes. It appeared further, from the report of the surveyor made in the cause, that Cox occupied the part of the lot next to Trimble, and McMullin occupied the part next to Lovell: but McMullin obtained the salt water he used from the well bored by Donnally under his agreement with James Wilson, which is on the upper part of the tract; and Cox procured the water used by him, from two wells on the lower half of the tract, one of which was bored by Cabell, and deepened by Cox, and the other was bored by Cox. The land above the bluff seems to have been principally valuable for coal.

In the progress of the cause commissioners were appointed to divide the land, between the river and bluff, between McMullin and Laidley on the one part, and Charles A. Cox and the devisees of his father on the other; and to divide the surface of the hill land between these and also Brooks and the Lovells. These commissioners made a report, by which it appeared that they had divided the land between the river and the bluff into two equal parts as to quantity; and they had assigned the lower part containing the wells bored by Cabell and Cox, to McMullin and Laidley, and had assigned the upper part to Cox, reserving to McMullin and Laidley all the right, title and interest they might have in and to the salt well on that moiety: and they made no allowance to Cox for the wells which had been bored by Cabell under whom he claimed, or by himself, nor for the buildings he had put upon the land assigned to McMullin and Laidley. The hill land was divided into lots, and assigned by the commissioners to the different parties; and as to that there was no complaint; but Cox excepted to the report of the division of the land between the river and the bluff,
on the ground, 1st. That it made no
88 division of the salt *wells, except to give the entire well on the part allotted to Cox and the heirs of Wm. R. Cox, to the other party. 2d. That it gave the lower half of the front on the river to McMullin and Laidley, with its two salt wells, engines and fixtures, the wells having been bored by Cabell and Cox, at their own expense. 3d. Because it assigns to McMullin and Laidley the water cistern built by Cox, at his own expense.

When the cause came on to be heard, the court overruled the exceptions, and confirmed the report; and made a decree directing that Cox should surrender to the complainant and Laidley the moiety of the lot assigned to them, with the tenements and two salt wells thereon; and that complainant and Laidley should surrender the other moiety to Cox, except the salt well, and sufficient space for all necessary fixtures to work the same, and a right of way thereto and therefrom, and for pipes and conduits to conduct the salt water therefrom; but they were to surrender to the Coxes the use of one-half of said salt well, to be used and enjoyed by them until the further order of the court; the question as to the right of the Coxes to one moiety of the well being reserved for future consideration.

And on the motion of the Coxes, it was ordered that a commissioner of the court should take an account of rents and profits and of permanent improvements put upon the lot assigned to McMullin and Laidley by the Coxes, and those under whom they claim; and also an account of the rents and profits of the salt well on the lot assigned to them. And accounts were also directed at the instance of the plaintiff, of the rents and profits of the lot assigned to him and Laidley, so far as the same was in the possession of the defendants, or those under whom they claim, and also an account of the value of the salt well on the lot assigned to the defendants, and of the buildings and other permanent improvements thereon.

89 *The defendants afterwards filed a petition for a review of the decree, which was allowed; and when it came on to be heard, the court held, that the defendants were entitled to one moiety of the salt well on the lot assigned to them; that it was error to decree the whole moiety to McMullin and Laidley, they being entitled to but six-ninths; and that it was also error to decree the surrender of possession of the property by the defendants before the account of rents and profits and improvements, without requiring good and adequate security to be given by the complainant for any sum that might be due the defendants upon such settlement. And correcting the decree in these respects, and also in some matters of form, the court made a decree similar in all other respects to that which had been made. And from this decree Charles A. Cox and the devisees of William R. Cox applied to this court for an appeal, which was allowed.

B. H. Smith, for the appellants.
Fry, for the appellees.

SAMUELS, J. At the date of the covenant between Donnally and James Wilson,

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August 16, 1821, Donnally had but an equitable title to the fee simple in the land, the subject of that covenant; and although his covenant, if he had the legal title, might have operated under the statute of uses as a covenant to stand seized to the use of James Wilson of one undivided moiety thereof, with warranty, yet having but an equitable title, this result could not at that time follow. See 1 Rev. Code, p. 370, § 29. Whether the fact that Donnally afterwards, on the 1st day of February 1830, acquired the legal title from John Wilson, could retroact on his covenant with warranty to stand seized to the use, and by estoppel or rebutter be held to pass the legal title to James Wilson, it is not
90 material *in this case to enquire. See Doswell v. Buchanan's ex'ors, 3 Leigh 365. Whether the estate was legal or merely equitable, the interests of Donnally and James Wilson were the same; that is, an equal undivided moiety to each. These part owners obviously regarded themselves as having a merely equitable title on the 16th August 1821, the date of their covenant, and on the 1st January 1829, when James Wilson assigned his interest to Peter Grant. After this assignment Peter Grant in his lifetime, and his heirs after his death, held in common with Donnally. In this state of the subject Donnally, one of the part owners, could not appropriate to himself any specific portion thereof, or do any other act whatever in derogation of the right vested in Grant's heirs, to enjoy equally with himself the common property, and every parcel of it. Robinett v. Preston's heirs, 2 Rob. R. 273; Varnum v. Abbott, 12 Mass. R. 474. Whether Donnally did by his deed of February 2d, 1830, attempt to convey to John J. Cabell the upper portion of the upper half of the common subject, or only an undivided moiety thereof, is not very clear, as the terms of the deed are somewhat ambiguous and repugnant in themselves. Construing the deed, however, in reference to the rights of the parties, and the condition of the property, it must be held that the deed passed only an equal undivided moiety of the common subject; and that Cabell and Grant's heirs thereafter held in common the whole subject, and every part thereof.

Although a party holding in common with others can do nothing to impair or vary in the slightest degree the rights of his cotenants, yet if he execute a deed for a specific portion of the common subject, or make a contract in regard to it, if upon partition such portion shall fall in severalty to the party so making the deed or contract, he will be bound by his act. McKee v. Barley, 11 Gratt. 340.

91 *The interest of one undivided moiety held originally by Donnally, and transmitted by successive conveyances to the appellants, and the like interest held by James Wilson, and transmitted by like conveyances to the appellees, remain a common subject, except in so far as they have been varied by the agreement of August 8th, 1822, between Donnally, Wilson, Lovell and Bream, ratified by Cox April 1st, 1844, in regard to the use of the coal lands, a portion of the common subject.

The law of partition of real estate requires that each part owner shall have in severalty a part equal to his interest in the whole subject, if practicable, having a due regard to the interest of all concerned. Yet it frequently occurs, that because of the limited extent or the nature of the property, it is impossible to make partition as above indicated, without impairing the value of all the portions, or of some of them. In such cases the law affords other means for doing exact justice to each and all: instead of dividing the property into shares of equal values, it may be divided into shares of unequal values; and when so divided the law as it originally stood, and as amended by the statute, Code, ch. 124, § 2, p. 526, will correct the inequality by means of a charge of money on the more valuable in favor of the less valuable portion, or by other means recognized in the law of partition.

There is enough in the record to show that the common property is of little value for any purpose other than the manufacture of salt; that the coal lands, a portion of the subject, was partially severed by Donnally and Wilson from the land lying between the hill and the river, by their contract with Lovell and Bream, dated August 8th, 1822, and ratified by Cox 1st April 1844. There is, moreover, enough to show that the space lying between the hill and the river is only sufficient for the salt furnaces,
92 and their necessary buildings *and fixtures, as contemplated by Donnally and Wilson, in their contract of August 8th, 1822, with Lovell and Bream; that is to say, two salt furnaces to Donnally, and the same number to Wilson. To give to each class of part owners the full enjoyment of their interests under the contract about the coal lands, and of their right to have two salt furnaces and the means of working them, it seems inevitably necessary to divide the land lying between the hill and the river into two parcels of equal quantity. The general rule of partition requires an allotment of those parcels to the part owners; yet it may benefit both classes of owners to assign the parcels; or it may benefit one class without injury to the other, to assign rather than to allot; in either case the commissioners might avoid the risk of an unfortunate allotment, by resorting to an assignment. The commissioners to make partition are vested with ample powers to give to each part owner a several proportion of the subject equal to his relative proportion in the whole subject. Before a final decree of partition can be made, commissioners should be appointed to ascertain and report to the court whether there be any inequality in the values of the parcels of land, of equal quantity, lying between the river and the hill, and the extent thereof; and further to ascertain and report the best mode of correcting the inequality, if any; whether by a charge of a

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gross sum of money payable at once; or of an annual sum of money payable for a definite time or for all time; or if these means be found impracticable or inconvenient, then by what other means provided by the law of partition.

Although it is said that some of the tenants in common have held portions of the common subject for their separate use, yet the fact is not so alleged in pleading and shown by proof as to justify the court, in the present state of the record, in
93 making a decision *how the fact is, nor in a decision whether such separate use was or was not had under circumstances requiring an account of rents and profits between the two classes of tenants in common. It is also said that permanent improvements adding to the present value of the common subject, have been made by some of the parties now before the court, or those under whom they claim, and to whose rights for compensation for improvements they succeed; but there is not enough in the pleadings and proof in the cause on which to found a decree. To avoid the danger of doing injustice, it will be best to leave the subject of accounts for rents and profits and of permanent improvements to be disposed of by the Circuit court, with the aid of such lights as the parties in interest may shed thereon.

I am of opinion to reverse so much of the decree as is in conflict with the principles here declared, and to affirm it as to the residue.

The other judges concurred in the opinion of Samuels, J.

The decree was as follows:

The court is of opinion, that William A. McMullin, James M. Laidley, Rachel Grant and Ann R. Spalding have title in fee simple to one equal undivided moiety of the tract of land in the bill and proceedings mentioned as containing eighty acres; and that Charles A. Cox, William Cox, Cornelius Cox, Mary Jane Cox, George M. Cox and Francis Cox have title in fee simple to the other equal undivided moiety thereof; and that the land is held by these two classes of part owners as tenants in common.

The court is further of opinion, that in the case as it now stands, partition can be made only between the two classes, without going into a partition between the members of the same class.

The court is further of opinion,
94 that the contract *between Andrew Donnally, James Wilson, Joseph Lovell and J. M. Bream, dated August 8th, 1822, and ratified by William R. Cox, April 1st, 1844, in regard to the coal land, a part of the common subject, is binding upon the parties before the court; and that it has been properly carried into effect by the decree of the Circuit court.

The court is further of opinion, that inasmuch as the property held in common is valuable only for the purposes of manufacturing salt; that as the coal lands have been appropriated by valid contract (almost exclusively) to the purpose of furnishing fuel for salt furnaces limited in number, and divided in proportion to the interests of the part owners; that as the space between the Kanawha river and the hill is the only portion of the common subject suitable for wells, furnaces and other structures necessary in the manufacture of salt; that as the limited extent of this space will afford room only for the two furnaces and other necessary buildings which Donnally and Wilson respectively were allowed to have and supply with fuel under the contract with Lovell and Bream: that therefore the land lying between the hill and the river should be divided equally in quantity by a line running from the river to the hill.

The court is further of opinion, that before partition can be made, commissioners should be appointed to ascertain the line of partition between the parcels of equal quantity; and further to ascertain whether these parcels be of equal or unequal values. If of unequal values, then to report the best mode of correcting the inequality; whether by a charge of a gross sum of money, or of an annual sum payable for a definite time, or for all time; or if these modes be impracticable or inconvenient, then by such other means as are provided by the law of partition.

The court is further of opinion, that the commissioners appointed to make par-
95 tition may allot each of the *classes of part owners one of the equal quantities into which the common subject shall be divided. If, however, the interests of both classes will be promoted, or if the interests of one class will be promoted, without injury to the other class, in such case the commissioners may assign the parcels without putting the owners to the risk of an allotment; these parcels with the improvements thereon, annexed to the freehold, to be held in severalty.

The court is further of opinion, that although it is said that some of the tenants in common have held portions of the common subject for their separate use, yet it is not so alleged in the pleadings or shown by the proof in the record as it now stands, as to justify the court in deciding whether such separate use was had, or if had, whether it was under circumstances to require an account of rents and profits. That although it is also said that permanent improvements adding to the present value of the common subject, have been made by some of the parties now before the court, or those under whom they claim, and to whose rights to compensation they succeed, yet there is not enough in the pleadings and proof on which to found a decree; that this court cannot at this time give any directions for an account of rents and profits, or of improvements, but must leave these subjects to be acted on by the Circuit court hereafter, if the parties in interest shall bring them or either of them to the notice of the court in a manner for judicial action.

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The court is further of opinion, that the decree of the Circuit court, so far as it is in conflict with the principles herein declared, is erroneous, and that there is no other error therein. It is therefore adjudged, ordered and decreed, that so much of said decree as is declared to be erroneous, be reversed and annulled, and the residue thereof affirmed; and that the appellants recover of the appellees their costs expended in the prosecution of their appeal in this court.

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96 *Shearman's Adm'r & al. v. Hicks & als.

October Term, 1857, Richmond.

Conveyance of Land—Power of Appointment—Case at Bar.*—T conveys land to S and C his wife, to have and to hold the same to S for his life, with reversion to C and her heirs. And S covenants with T and C that she shall have the privilege during coverture to nominate "by last will and testament or power of appointment," in the presence of two witnesses, such person or persons as she might designate for her heir or heirs to the property aforesaid after the death of S. C died in the lifetime of S, having made an olograph will, by which she devised the property. HELD:

1. **Same—Same.**—The deed to S and C his wife conferred on her the power of disposing of the land in the lifetime of S.
2. **Same—Same—Execution of.**—The power of disposition was properly executed by an olograph will; the provision for two witnesses applying not to the disposition by will; but to other modes of executing the power.

***Conveyance in Fee—Superadded Power of Appointment.**—In Thorndike v. Reynolds, 22 Gratt. 34, it was said: "Mr. Spence says, in his work on Equitable Estates and Interests,—If an estate be conveyed to a married woman in fee, with a superadded power of appointment, though it was formerly held that the power was merged in the fee, it is now settled that the wife has the power to appoint the fee. 2 Spence Eq. Ju. of the court of chancery. The question arose in this court in the case of *Shearman's Adm'r v. Hicks & als.*, and was decided in the same way. 14 Gratt. 99." See also, Ocheltree v. McClung, 7 W. Va. 245.

Trustees—How Discretionary Power Conferred on.—In Whelan v. Reilly, 3 W. Va. 611, it is said: "It is well settled that a discretionary power may be conferred on trustees either by the express terms of the trust or by implication from the nature of the duty imposed on them whenever the object of the trust is certain. Hill on Trustees, 485; Frazier v. Frazier, 2 Leigh 642; Cochran v. Paris, etc., 11 Gratt. 348; Steele v. Levisay, *Ib.* 454; Robinsons v. Allen and others, *Ib.* 785; Harrisons v. Harrison's Adm'x, 2 Gratt. 1; *Shearman v. Hicks, 14 Gratt. 96;* Huntington v. Winchell, 8 Conn. Rep. 45; Hill's Ex'or v. Bowman, 7 Leigh 650; Cowles, etc., v. Brown, etc., 4 Call 477; McGaughey's Adm'r v. Henry, etc., 15 B. Monroe 383; Leavitt v. Beirns *et al.*, 21 Conn. Rep. 1."

See the sequel to this case in Byrne v. Edmonds, 23 Gratt. 202 *et seq.*, where the case again appears before the court of appeals because, on account of some accidental mistake in printing the record, the true will was not presented to the court on the first appeal.

In October 1833 Kimble Hicks conveyed to his daughter Celia Shearman certain slaves and a tract of land. At that time Celia Shearman was married to Thomas Shearman; and they, being childless, by deed bearing date the 16th of March 1835, conveyed this land to John Timberlake. This deed is upon the consideration of one dollar, but it is absolute upon its face; and is with general warranty. By deed bearing date the 18th of March 1835, Timberlake conveyed this same land, on the same consideration, to Thomas Shearman and Celia his wife; to have and to hold the same to Thomas Shearman during his natural life, with reversion in fee to the said Celia Shearman and her heirs. And Thomas Shearman covenanted with Timberlake and the said Celia Shearman, that she should have the privilege, whether she should choose to execute it during the coverture or not, to nominate, by last will and testament, or power of appointment, in the presence of two witnesses, such person or
97 persons *as she might designate for her heir or heirs to the property aforesaid after the death of the said Thomas Shearman. These two last deeds were recorded on the same day. Mrs. Shearman died in 1851, during the lifetime of her husband, having made a will in May of that year, which was duly admitted to probate in the Circuit court of Fauquier county. This was an olograph will; and by it she gave the aforementioned tract of land, after the death of her husband Thomas Shearman, to Kimble G. Hicks, jr., and directed that he should pay to her niece Celia Edmunds one hundred and fifty dollars annually, during her life.

In January 1854 Thomas K. Hicks and others, the heirs at law of Celia Shearman, filed their bill in the Circuit court of Fauquier county, against Thomas Shearman in his own right, and as executor of Celia Shearman, Kimble G. Hicks, jr. and Celia Edmunds, in which they insisted that the deed from Timberlake to Shearman and wife did not vest Mrs. Shearman with the power to dispose of the land in the lifetime of her husband; and further, that if she did have the power, it was not properly executed by an olograph will: And they claimed the land as her heirs at law. Shearman answered the bill, stating that the object of the conveyance to Timberlake and from him to himself and wife, was to secure to him a life estate in the land, and to authorize Mrs. Shearman to dispose of it in the lifetime of her husband.

In the progress of the cause an issue was directed to ascertain if any, and if any, how much of the paper admitted to probate as the will of Celia Shearman, was her will. The jury found a special verdict setting out the facts herein before stated; and referred the question of law to the court. And the court at its April term 1855, made a decree setting aside the paper as not the true last will of Celia Shearman.

Shearman having died before the
98 final decree, and *the suit having

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been revived against the administrator de bonis non with the will annexed of Mrs. Shearman, he and Kimble G. Hicks, jr. applied to this court for an appeal; which was allowed.

Morson, for the appellant, insisted:

1st. That the covenant by Thomas Shearman the husband, with Timberlake, was effectual to give to Mrs. Shearman the power to make a will disposing of the land conveyed in the deed from Timberlake to Shearman and wife. That no form of words was necessary, but any provision which expressed the intention of the parties would have the effect to give the wife the power. 1 Sugd. Powers 116, 257, 15 Law Libr.; Hunt v. Rousmainere's adm'r, 1 Peters' R. 1, 13 to 17; 2 Story's Equ. Jur. § 1388, 1389, 1390, 1392.

2d. That the power was duly executed by an olograph will. He insisted that that deed provided two modes by which Mrs. Shearman might dispose of the property; one by will, the other by power of appointment in the presence of two witnesses. He referred to Sugd. on Powers 287, 288, and the cases cited there; Dormer v. Thurland, 2 P. Wms. 506; Earl of Darlington v. Pultney, 1 Cowp. R. 260; Ross v. Ewer, 3 Atk. R. 156; Doe v. Morgan, 7 T. R. 103; Dunn v. Amey, 1 Leigh 465; Phoebe v. Boggess, 1 Gratt. 129. He also referred to 3 Lomax's Dig. 11, note 1, to show that since the Code of 1849 a married woman may devise her separate real estate, without any express authority to do so in the instrument giving the estate to her. See Code, ch. 122, § 3, p. 516.

R. T. Daniel, for the appellee, insisted:

1st. That the Code of 1849 did not change the law as to the execution of a power by a married woman, as was evident from the fifth section of ch. 122, in which married women are expressly excepted out of
99 *the provision dispensing with any peculiar modes of executing wills required in the instruments giving the power of appointment.

2d. That the covenant in the deed from Timberlake did not give to Mrs. Shearman authority to make a will. He referred to West v. West's ex'ors, 3 Rand. 373; Roper on Husband and Wife, ch. 18, 19, 32 Law Libr.; 2 Thomas' Coke 586, marg. note a, p. 124; note q, p. 578; 2 Sugd. Powers, ch. 8, § 3; 1 Sugd. Powers, ch. 3, § 1.

3d. That the power, if it existed, was not properly executed by an olograph will. He referred to 2 Thomas' Coke 587, marg. note; 1 Sugd. Powers, ch. 6, § 3; Doe v. Thorley, 10 East's R. 442; Williamson v. Beckam, 8 Leigh 20.

SAMUELS, J. Two questions are presented by the record of this case, both of which must be decided in favor of the appellants before the sentence of the Circuit court can be reversed.

First. Did the deed of March 18th, 1835, executed by John Timberlake to Shearman and wife, confer on the wife a valid power of appointment?

Second. If it did, was the power well executed by her olograph will?

It must be conceded that Timberlake had the right (if he had chosen to exercise it) to convey the estate by deed of bargain and sale to Shearman for life, remainder to Mrs. Shearman in fee, determinable upon an event occurring at her death or before, and if so determined, then over to another in fee. See 1 Rev. Code, p. 369, 370. This right results from the power of the bargainor either to declare the use at once and finally; or to reserve to himself a power to revoke the use and to declare other and different uses; so he may confer on another the power possessed by him. In either case, the law against perpetuities must be
100 respected. *The appointee would take under the grantor of the power. 2 Sugd. Pow. 25; 2 Lomax's Dig. 237, § 23, new edition.

The counsel for the appellees conceded that it was manifest that Timberlake intended to confer on Mrs. Shearman a power to appoint her fee simple estate to a person or persons other than herself or her heirs at law; yet he insisted that the power was merged or extinguished in her estate in fee simple. This position is not well taken; for it seems to be settled that a title in fee simple (acquired as in this case) may coexist with a power of appointment in the same person; and when the power is executed the fee simple may be divested thereby. 2 Lomax's Dig. 207 of new, 149 of old edition; 1 Sugd. Pow. 105; Clere's Case, 6 Coke's Reports, 17 b, and note b.

I am of opinion that a valid power was conferred on Mrs. Shearman, notwithstanding her estate in fee.

This brings up the second question. Was the power well executed by the olograph will of Mrs. Shearman? The grantor of a power may prescribe any form or mode for its execution, and his directions must be complied with, or the execution will be invalid. It is said that the power in this case to "nominate by last will and testament or power of appointment in presence of two witnesses," required that two witnesses should be present, whether the appointment be by will or by other writing. This, in my judgment, is not the proper construction of the grant. A last will and testament is an assurance accurately defined and carefully guarded by law; and when then the grantor authorized an appointment by "last will and testament," he is to be understood as prescribing such and so many of the requisites as may be essential to the making of the instrument. As the grantor authorized an appointment in another mode about which the law makes no specific provision, it was therefore proper that the
101 *grantor should prescribe such safeguards as he deemed sufficient; and accordingly he required the presence of two witnesses. In my judgment a will in due form of law, wholly written and signed by the grantee, is a strict execution of one of

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the alternative powers with which Mrs. Shearman was vested.

I am aware of the conflicting opinions of eminent English judges in regard to cases like that in hand. Lord King, Lord Mansfield and Lord Kenyon, holding the appointment valid; Lord Hardwicke holding it invalid. Dormer v. Thurland, 2 P. Wms. 506; Earl of Darlington v. Pultney, Cowp. R. 260; Doe, lessee of Harman & wife, v. Morgan, 7 T. R. 103; Ross v. Ewer, 3 Atk. R. 156. In the absence of any controlling authority, I am of opinion the case must be decided on general principles; that Mrs. Shearman's will passed the title to the land over which she had a power, and in which she had a fee simple estate, and that the sentence of the Circuit court revoking the probate of the whole will, is erroneous as to the land conveyed by Timberlake, and should be reversed, and the probate of the will as to that subject be held valid and binding.

LEE, J., concurred in the opinion of Samuels, J., as to the effect of Timberlake's deed, but was inclined to think an olograph will was not a good execution of the power.

DANIEL, J., approved the decree of the Circuit court.

ALLEN, P., and MONCURE, J., concurred in the opinion of Samuels, J.

Decree reversed.

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102 *Goddin v. Vaughn's Ex'x & als.

Same v. Mason & als.

January Term, 1858, Richmond.

1. **Sale of Real Estate—Purchaser Entitled to Clear Title.***—Upon a sale of real estate, whether at public or private sale, where nothing is said about the title, the purchaser is entitled to have a clear title with covenants of general warranty.
2. **Same—Same—Exceptions.**†—But where the sale is of such a character, and made under such circumstances, as fully and sufficiently to make known to the purchaser the exact nature of the title he is to expect; as where the sale is made avowedly by an executor under the provisions of the will, or by a sheriff or commissioner under an order of the court, he can of course only demand such title as was in contemplation of the parties when the sale was made.
3. **Same—At Auction—One Moiety Vested in Infants—Right of Uninformed Purchaser.**—A purchaser not informed at the time of his purchase of land at auction, that the title to one moiety thereof is vested in infants, and that it can only be obtained by a suit in chancery, may, when informed of the fact, refuse to proceed with the purchase, and abandon it.
4. **Same—Same—Same—Same—Waiving of Rights.**—But if such a purchaser, upon being informed of

*__Sale of Real Estate—Purchaser Entitled to Clear Title.__—See Christian v. Cabell, 22 Gratt. 83, and *foot-note*.

†__Same—Same—Exceptions.__—In Fleming v. Holt, 12 W. Va. 162, it was said: "A purchaser at a public sale of land, made by a trustee, must look to the title of the grantor of the land; and he is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent; he cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle of *caveat emptor* applies. See Petermans v. Laws, 6 Leigh 529; Saunders v. Pate, 4 Rand. 8; Sutton v. Sutton, 7 Gratt. 237; Findlay v. Toncray, 2 Rob. 374; Bowles on Covenants, p. 418; *Goddin v. Vaughn, 14 Gratt. 117.*"

This language was approved in Jones v. Thorn, 45 W. Va. 193, 32 S. E. Rep. 176.

A sheriff selling under execution, with good faith, incurs no responsibility as to title; there being no implied warranty, raised by law, under such a sale. The rule *caveat emptor* applies to such a case. Saunders v. Pate, 4 Rand. 8. See also, *foot-note to* Christian v. Cabell, 22 Gratt. 83; Findlay v. Hickman, 10 Leigh 363.

__Same—Specific Performance—Defect in Title Unknown to Purchaser.__—In Middleton v. Selby, 19 W. Va. 174, it was said: "There is no question, that generally and where any defect in the title was not known to the purchaser at the time of the contract of sale, a court of equity will not decree a specific execution of a contract for the sale of land, unless the vendor can make a good title. (Watts v. Kinney, 3 Leigh 272; *Goddin v. Vaughn & Co., 14 Gratt. 117;* McCann v. Janes, 1 Rob. 256; Clarke v. Reins, 12 Gratt. 98.)" See, in accord, Linkous v. Cooper, 2 W. Va. 70, citing the principal case. And see *foot-note* to Griffin v. Cunningham, 19 Gratt. 571.

A purchaser is not bound to pay the purchase money for real estate until a good title, free from cloud which may disturb the purchaser, shall be made to him, unless the contract otherwise provided. Watson v. Coast, 35 W. Va. 473, 14 S. E. Rep. 252, citing the principal case; Tavenner v. Barrett, 21 W. Va. 657, 681; 2 Min. Inst. 791.

__Same—Same—Defect in Title Known to Purchaser.__—If the purchaser knew, when he made his contract, that there was a defect in the title, and that it would take a considerable time to remove it; or acquires this knowledge after his purchase and acquiesces in the delay, or proceeds, with knowledge of the defect, in the execution of the contract, he has no ground of complaint. Vail v. Nelson, 4 Rand. 478.

This proposition was approved in Rader v. Neal, 13 W. Va. 387, 388, citing the principal case, and Vail v. Nelson, 4 Rand. 478, as authority. See, in accord, Dodson v. Hays, 29 W. Va. 594, 2 S. E. Rep. 425.

Yet, when the express contract is for a perfect title, the party cannot be put off with a defective title, even if the defect was by him known at the time. Johnston v. Jarrett, 14 W. Va. 238.

__Same—Same—When Ability to Convey Title Must Exist.__—But the principle is well established that it is not essential that the vendor had at the time of the contract such title and capacity to convey the property, or such means and right to acquire it as would enable him to fulfil it on his part. It is sufficient, if he is able to convey, when he is required by the contract, or the equities of the case. And where time is not of the essence of the contract, the vendor will be allowed a reasonable time to obtain a perfect title. Rader v. Neal, 13 W. Va. 388; Mays v. Swope, 8 Gratt. 46; Dodson v. Hays, 29 W. Va. 594, 2 S. E. Rep. 425, citing principal case. See also, *foot-note* to Griffin v. Cunningham, 19 Gratt. 571.

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the state of the title immediately after the sale, plainly manifests his intention to proceed with the purchase, content to take a conveyance for the moiety which can be made at once, and to look to the court of chancery for the title to the other moiety, he thereby waives the objection which he was entitled to make for the want of a conveyance with general warranty.

5. **Chancery Practice—Decree Enforcing Contract Passes Title to Infants' Land—Case at Bar.**—M and V are joint owners of real estate, and they enter into an agreement in writing, that if either wishes to sell the property, he may fix a price which he will take, and if the other refuses to give it, he may have the whole property sold at auction. And in case of the death of one or both of the parties, their executors and administrators are directed to carry out the agreement as fully as though they were living. V died leaving a widow and several infant children, having made a will previous to the agreement, by which he forbade his executrix to sell any of his real estate. After V's death, M had the property sold at public auction, on terms which were satisfactory to V's representative, and which were proved to be beneficial to the children. A bill by
103 the widow and children of *V against the purchaser, for a specific execution of the contract, will be sustained, and a decree enforcing the sale will pass the title of the infants; though the proceeding does not conform to the act concerning the sale of infants' lands, nor to that concerning partitions.

6. **Same—Interlocutory Decree—Enforcing Contract—No Provision for Deed.**—It is not error in an interlocutory decree enforcing a specific execution of a contract against a purchaser, that it does not direct a deed to be made and tendered to him.

7. **Same—Decree for Sale of Land on Condition—Counsel for Plaintiff Made Commissioner to Sell Property—Effect.**—Where a decree for specific execution of a contract against a purchaser, provides that if the purchase money, or any part of it, is not paid by a day certain, the property shall be sold, it is not error to appoint the counsel of the plaintiffs, there being no objection to the person, the commissioner to make the sale; nor is it error to refuse to associate with him, one of the counsel of the purchaser.

8. **Same—Title to Land—Question of Law—Order of Reference Unnecessary.***—Where the facts are all before the court, and the objection to the title to land purchased is a question of law, it is unnecessary to refer the title to a commissioner.

9. **Purchasers Pendente Lite—Who Are—Case at Bar.**†—Whilst suit is pending the purchaser conveys the property in trust to secure a debt. The *cestuis que trust* are *pendente lite* purchasers, and are not necessary parties.

10. **Deed of Trust—Disqualification of Trustee—Case at Bar.**—A trustee in a deed of trust to secure a debt falling due at different periods, advances to the debtor money to pay the first installment, and takes a transfer of it. He can only subject the property to satisfy him after the balance of the debt is paid; and his interest does not disqualify him from acting as trustee.

11. **Injunctions—Obtained in Vacation—Filing of Answer.**‡—Where an injunction has been obtained in vacation, the defendant may file his answer and move the court to dissolve the injunction, without filing the answer either at rules or in term.

12. **Answer—Exceptions Not Well Founded—Failure to Pass upon.**§—If exceptions to an answer are not well founded, it is not ground to reverse a decree, that they were not set down to be argued, but the cause was heard and decided without passing upon them.

Joseph Vaughn and C. R. Mason, being the joint and equal owners of the property in the city of Richmond, known as the Swan tavern, and at a later period, as the Broad street hotel, they, by a writing under seal, bearing date the 14th of September 1846, entered into an agreement, by which, reciting their ownership of the property, and that death or other causes may make it necessary or advisable to sell it, they provide as follows: "that should
104 either party desire, it, he shall *fix such price thereon as he may be willing to give or take, and if not acceded to by the other, a sale of the whole shall be made upon the best terms that can be had. And in case of the death of one or both of the parties, our executors or administrators are hereby directed to carry out this agreement as fully as though we were living." There was an endorsement on this agreement, which provides, that "in case either party should wish the premises sold, and not wish to make an offer of what he should give, he shall have the right to say what he will take, and if not acceded to by the other, shall have a right to have the whole publicly sold to the highest bidder, by giving sufficient notice of the same."

Joseph Vaughn died in September 1849, leaving a widow and nine cildren, only one of whom had then attained the age of twenty-one years. His will was written in 1844, and was duly admitted to record in the County court of Hanover. By it he appointed his wife executrix of the will, "with full power and authority to receive and pay debts, and do all necessary and

*Chancery Practice—Title to Land—Question of Law—Order of Reference Unnecessary.—See the principal case approved as to the proposition laid down in the eighth head-note in Tracewell v. Boggs, 14 W. Va. 262; Thomas v. Davidson, 76 Va. 343. See also, monographic *note* on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 23 Gratt. 376.

†Purchasers Pendente Lite—Parties.—It seems well settled that purchasers *pendente lite* are not necessary parties to a suit for the sale of land. See Phillips v. Williams, 5 Gratt. 259; Price v. Thrash, 30 Gratt. 515, and *foot-note*.

‡Injunctions—Obtained in Vacation—Filing of Answer.—In Zell Guano Co. v. Heatherly, 38 W. Va. 422, 18 S. E. Rep. 615, it was said: "Answers, etc., except in cases of injunction, can only be filed in court or at rules. See *Goddin v. Vaughn, 14 Gratt. 102, 130;* Hayzlett v. McMillan, 11 W. Va. 464, 478." See also, monographic *note* on "Injunction"; monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

§Answer—Exceptions Not Well Founded—Failure to Pass upon.—See principal case approved in Hartman v. Evans, 38 W. Va. 672, 18 S. E. Rep. 812. See also, monographic *note* on "Answers, in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

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proper acts as I myself would, except it be to dispose of any lands or slaves, which is hereby prohibited."

In September 1854 Taylor & Williams, auctioneers in the city of Richmond, sold the said Swan tavern property at auction, when Isaac A. Goddin became the purchaser thereof, at the price of twenty thousand six hundred and forty dollars, one-fourth in cash, and the balance in six, twelve, eighteen and twenty-four months. At this sale it was not announced by the auctioneer, for whom he was selling the property, and it does not appear from the evidence that Goddin knew who were the owners of it until after the purchase.

It seems to have been supposed by the vendors, that under the agreement between Mason and Vaughn, the executrix of
105 Vaughn could make a good title to *his moiety of the property; and after the sale the question of her authority to convey was submitted to counsel, who seems to have decided against it, and to have advised a suit in equity to obtain the authority of the court to confirm the contract and convey the moiety of the property. Accordingly, in March 1855 a suit was instituted in the Circuit court of the city of Richmond, by Mrs. Vaughn, as widow and executrix of Joseph Vaughn, and his nine children, eight of whom were infants, who sued by their guardian, against Isaac A. Goddin, in which they set out the joint ownership of the property by Mason and Vaughn, the agreement between them, the death of Vaughn, and the sale to Goddin; and they alleged that when the sale was made they had no doubt that Mason and the personal representative of Vaughn could make a perfect title to the property; and that possession of it was immediately delivered to the purchaser. That they are advised the title cannot be made by the executrix, and that the aid of a court of equity is therefore necessary, in order to execute the agreement between Mason and Vaughn, the execution of which would be manifestly for the advantage of both parties. They further stated that Goddin had complied with his contract with Mason, but declined to execute the contract with the plaintiffs without a decree of a court of equity. That he was however anxious to complete his contract; but if he could not obtain the moiety of the lot owned by the plaintiffs, the whole sale would be canceled, as he had purchased on the condition that he should have the whole and not a moiety. They therefore prayed for a specific execution of the contract; and for general relief.

To this bill Goddin filed an answer, admitting his purchase of the property; and averring that he was ready to comply with the contract with the plaintiffs as soon as they could make him a good title to a
106 moiety *of the property to which they were entitled, as he had no difficulty with Mason as to his moiety.

In this suit the court directed an enquiry as to whether the sale was for the interest of the infants: and the commissioner having reported that the sale was beneficial to them, the court, on the 25th of March 1855, made a decree confirming said report, and directing the contract of sale between the plaintiffs and Mason with Goddin to be specifically executed. That the executrix of Joseph Vaughn should receive of Goddin the amount due from him, and his four negotiable notes, payable in six, twelve, eighteen and twenty-four months from their date, to the said executrix; and that upon the receipt of said money and notes, she should execute a conveyance of the property to Goddin, and take from him a deed of trust upon it to secure the payment of said notes as they fell due.

In May 1855 the executrix of Joseph Vaughn reported to the court, that Goddin had failed to comply with the decree; and it was ordered that an attachment should issue against him, unless, upon being served with a copy of the order, he should show cause against it on the 18th of the month. This motion was continued at the instance of the defendant until the 14th of June, when the defendant made his return to the rule, objecting to the title which he was required to take under the decree; insisting that he made no purchase from the plaintiffs, and that they had no power to convey the property to him, either with or without the aid of the court in this cause. And thereupon, it appearing that the sale was made by Taylor & Williams at the instance of C. Mason, the court, with the assent of the plaintiffs, dismissed the bill, without prejudice and without costs; it appearing that the suit was instituted with the assent of the defendant. This decree was on the same day set aside on
107 *the motion of the plaintiffs, and the rule against Goddin was continued until the first day of the next term.

In July 1855 the plaintiffs filed an amended bill, in which the previous bill and proceedings were set out; and an error in the bill in stating that the sale was made by the plaintiffs and Mason, was corrected; and it was stated that the sale was by Mason. It was further stated that Goddin had obtained a conveyance from Mason for his moiety of the property, and had executed a conveyance to secure the payment of the purchase money remaining unpaid, amounting to nine thousand two hundred and eighty-eight dollars; and that he had also executed another deed on the whole of said property to secure debts due to Goddin & Apperson. And making Goddin, Mason and James M. Taylor, the auctioneer who conducted the sale, and trustee in the deed from Goddin to secure Mason, parties, they prayed that Goddin might be enjoined from receiving the rents of the property, and that a receiver might be appointed; and that Goddin might be compelled to elect promptly to take the property on the terms of the sale; and that upon his declining to take it, that partition thereof might be made between the plaintiffs and him, or the sale of the whole decreed.

Goddin demurred to the bill; and also

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answered. He admitted the purchase of the property upon the terms stated in the bill; but he insists that he was to have a perfect title; and upon no other terms would he have bought. He says that at the time of the sale he did not know who were the owners of the property. He knew from the assurance of the auctioneers that he was to have a good title, and would have time to investigate it after the sale. That after the sale he was informed by the auctioneers that they had sold the property as the agents and by the direction of C. R. Mason, and Catharine S. Vaughn, executrix
108 of *Joseph Vaughn. That it was when the defendant called upon the auctioneers to comply with the terms of the sale, that he was, for the first time, informed of the inability of the parties to make him a perfect title at the time; and then he was informed of the contract between Mason and Vaughn. That some time thereafter, being still willing to consummate the sale on his part; and the said auctioneers, agents for the owners, assuring him that a perfect title would be made to him at an early day, he was put into possession of the property by the said agents, and at once commenced a thorough repair and improvement of the premises. That Mason being anxious to realize his proportion of the purchase money, the defendant settled with him according to the terms of the sale; Mason thereupon conveying his moiety to the defendant; and the defendant conveying the same to Taylor in trust to secure the balance of the purchase money due to Mason. That defendant was willing to facilitate the perfecting the title to the other moiety of the property, and therefore signed the answer prepared for him by the plaintiffs' counsel. But he insists that he is not thereby to be understood as waiving his right to a perfect title to said property, or the obligation of the plaintiffs to do whatever was necessary in law to give him such a title. That when a copy of the decree made in this cause was served upon him, he employed counsel to examine the title which the plaintiffs proposed to make to him for the property; and that counsel, after a careful examination of the case, advised him that he could not get a good title to plaintiffs' moiety of said property under the decree by any deed made under the same. The defendant therefore refused to take a title under said decree.

The grounds of objection to the title are: First. That by the will of Joseph Vaughn his executrix is expressly prohibited from selling his real estate, except
109 *for division. Second. That there is no proof of the alleged contract between Mason and Vaughn; and only an unattested copy is filed in the cause. Third. That the mode prescribed by the statute either for the sale of infants' lands or for partition, has not been pursued in this case, and therefore that the decree would not bind the infants.

The defendant further stated that he had expended between four and five thousand dollars in additions to and improvements upon the property. He insisted it was the plaintiffs who were in default in complying with the contract; and declared his willingness to comply with the terms of the sale whenever a good title was made to him; and that so far from abandoning the purchase, he was forced, on account of the improvements he had made on the premises, as well as for other good reasons, to insist upon a good title being made by the complainants to their moiety. He insisted further, that the property was sold by the plaintiffs as well as Mason, and he objected that from the nature of the property, it being a public hotel, to take it out of his hands and put it into the hands of a receiver, would greatly injure its value; and he denied that there was any danger of loss from his failure to comply with the terms of the sale when a good title should be tendered to him. As to a partition of the property, he supposes the plaintiffs are scarcely serious in what they say. He trusts that the court will compel them to make him a good title to their moiety of the property: and he calls for strict proof of the execution of the contract between Mason and Vaughn, and for whatever else, and for whatever other steps, might be necessary and proper to perfect the title thereto.

There was proof of the execution of the agreement between Mason and Vaughn; and also of the continued possession
110 of the property by Goddin, and of *his expending some four or five thousand dollars in improvements upon it. It also appeared in proof that Mason had conveyed his moiety to Goddin, who had conveyed the same to Taylor to secure the balance of the purchase money; and that Goddin had also conveyed his interest in the whole property to secure a debt to Goddin & Apperson. These parties filed a petition in the cause, asking that they and their trustees might be made parties. And Goddin also filed a petition, asking leave to file a cross bill.

In February 1856 the cause came on to be heard upon its merits, as well as upon the petitions filed, when the court rejected the petitions, but gave leave to the defendant Goddin to file his cross bill as an original bill. The court also overruled the demurrer; and being of opinion that either party was entitled to have the contract of sale executed, made a decree that Goddin should, within ten days after being served with a copy of this decree, pay into the Farmers Bank to the credit of the cause, the sum of nine hundred and fifteen dollars and four cents, being the interest upon the purchase money of that moiety of the property which belonged to Joseph Vaughn, from the 15th of August 1854, when said Goddin purchased the same, to the date of the decree; and also two thousand and sixty four dollars, being the first installment of the principal, which was to be paid in cash; and that he should execute to James Lyons (who was the counsel for the plain-

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tiffs) as commissioner of the court his four negotiable notes for two thousand and sixty dollars each, payable severally at six, twelve, eighteen and twenty-four months from the date of the decree, with interest. And if the said Goddin should fail to comply with the decree, Mr. Lyons was appointed a commissioner and directed to sell the moiety of the said property upon the terms and in the mode prescribed in the decree; he first giving security in
111 the *penalty of five thousand dollars, with conditions according to law.

In March 1856 Isaac A. Goddin filed a bill in the Circuit court of the city of Richmond, seeking to enjoin the sale of the moiety of the Swan tavern property which had been conveyed to him by C. R. Mason, and which he had conveyed in trust to Taylor to secure the balance of the purchase money due to Mason. The bill states the fact of the purchase of the whole property at auction, and the difficulties about the title, as stated in the case of Goddin v. Vaughn, and the proceedings in that case, and the other facts before stated, relied on by him in that case. That the property sold for its full market value at the time of the purchase; and that owing to the stringency in the money market, and of the great depreciation of the value of real estate, it would not, except for the improvements put upon it by Goddin, sell for as much as he gave for it; and that a sale of it for cash or for a large part of the purchase money, would result in a ruinous sacrifice to Goddin. That on account of the delay in making him a good title he had not been able to sell the property when real estate commanded a good price, and the money market was easy; and he had not been able to effect a sale since, in consequence of the defects in said title and of the said altered state of things.

The bill further stated, that the trustee Taylor had by the direction of Mason advertised the property conveyed in the deed of trust to him to be sold on the 26th of the month, for the payment of the bonds given by the plaintiff for the deferred installments of the purchase money.

The plaintiff further insisted that he was entitled to demand and have a perfect and unclouded title to the whole of said property; and that he was entitled to have the opinion of the Supreme court of ap-
112 peals *upon that title. That if a perfect title could then be made to him for the whole of said property, he was entitled to have said deed of trust canceled, and the terms of sale and of credit changed and adapted to the altered state of things. That to sell the property conveyed in said deed of trust when there were such clouds upon the title, and pending the appeal in the other case, and especially to sell for six thousand five hundred and thirty-six dollars in cash, as advertised, in the then condition of the money market and the depreciated condition of real estate in the city, would be to inflict wanton and irremediable injury upon the plaintiff.

The prayer of the bill was for an injunction to the sale; that the deed of trust might be delivered up to be canceled; and for general relief. The injunction was granted.

On the 26th of March 1856, in vacation, Mason answered the bill. He states that himself and Vaughn purchased the Swan tavern property; and that they entered into the agreement hereinbefore mentioned. That Vaughn died, and in the year 1854 the defendant caused the property mentioned in said agreement and in the bill to be advertised for sale; and that on the 16th of August of that year the property was sold at public auction, and purchased by the plaintiff at the price of twenty thousand six hundred and forty dollars, and he was immediately put in possession of it, and had so continued ever since. He said it was not true that the plaintiff purchased with the distinct understanding that he was to get at once a clear and indisputable title to the whole property, because he purchased with the full knowledge of the state of the title; and he knew, therefore, that the widow and children of Vaughn were the owners of one moiety of the property. And he knew that defendant was to convey him only one moiety of the property,
113 and that he was *to look to the widow and children of Vaughn for the title to the other moiety. That defendant had conveyed his moiety of the property to plaintiff, who had accepted the conveyance, and was therefore estopped by that act, and his reconveyance of the property, from complicating the title of the defendant with that of Vaughn; for which the defendant insisted he was in no wise responsible.

As to the complaint that if the deed of trust is enforced the plaintiff will suffer loss, the defendant said, that the loss, if any, would be the result of no fault of his, but of the folly of the plaintiff in becoming the purchaser of property which he had no means to pay for, and thus of preventing the defendant from selling his property to others who could have paid for it.

The plaintiff filed various exceptions to the answer of Mason; but as this court was of opinion that they were not well founded in fact, it is unnecessary to state them.

It did not appear that Goddin knew, before the purchase of the property, who were the owners of it, or the difficulties in the way of making the title; except as it might be inferred from the fact, that as assessor for the city of Richmond, in 1850, he had assessed this property as the property of Joseph Vaughn and C. R. Mason; and that two obituary notices of the death of Vaughn appeared in the Enquirer and Religious Herald, published in Richmond, on the 25th and 26th of October 1849.

In May 1856, on the motion of the defendant Mason, the court in vacation dissolved the injunction granted in this case: whereupon Goddin applied to this court for an appeal; which was allowed.

John Howard and Alexander H. Sands, for the appellant, insisted:

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1st. That a purchaser is entitled to
114 have a good and *marketable title; and as a general rule is entitled to a general warranty of title. 1 Sugd. Vend. 455; Hall v. Betty, 4 Mann. & Grang. 410; Garnett v. Macon, 2 Brock. R. 185, 244; Marlow v. Smith, 2 P. Wms. 198, 201; Rose v. Calland, 5 Ves. R. 186, 189; Roake v. Kidd, 5 Ves. R. 647; Stapylton v. Scott, 16 Ves. R. 272; Sloper v. Fish, 2 Ves. & Beame 146; Omerod v. Hardman, 5 Ves. R. 722, 734; Flureau v. Thornbill, 2 Wm. Bl. R. 1078; Rawle Cov. for Title 562; Rucker v. Lowther, 6 Leigh 259; Dickinson v. Hoomes' adm'r, 8 Gratt. 353, 394; 2 Sugd. Vend. 545; and that though the court's opinion should be in favor of the title, yet the purchaser ought not to be compelled to take it if there were reasonable doubts of its sufficiency. Pyrke v. Waddingham, 17 Eng. L. & E. R. 535, approved in Collard v. Sampson, 21 Id. 352.

2d. That Mason sold the whole property, and was therefore bound to warrant the title to the whole. Sugd. Vend. 310; Lloyd v. Crispe, 1 Eng. C. L. R. 95; Hall v. Betty, 4 Mann. & Grang. 410. That he did not sell under a power from Vaughn, because it was a bare, naked power, uncoupled with an interest, and was terminated by the death of Vaughn. Story Agen. 88, 147, 148; Knapp v. Alfred, 10 Paige's R. 205; Hunt v. Rousmanier's adm'rs, 8 Wheat. R. 1, 74; Huston's adm'r v. Cantril & als., 11 Leigh 136. And that Goddin had done nothing by which he waived his right to such title from Mason.

3d. That the proceedings in the suit were not such as would bind the infant heirs, and pass the title by the decree. That these proceedings were not such as were required either in a suit for the sale of infants' lands, or for partition; and that infants' lands could only be effectually sold in one or the other of these proceedings. Pierce's adm'r v. Trigg's heirs, 10 Leigh 406; Code, ch. 124, p. 526; Sess. Acts 1852, ch. 97, p. 79; Custis v. Snead, 12
115 Gratt. 260; Garland v. *Loving, 1 Rand. 396. And that the case was distinguishable from Daniel v. Leitch, 13 Gratt. 195, because that was a judicial sale.

4th. That it was error not to direct the execution of a deed in the decree, Goddin being entitled to a deed when he paid the purchase money. Sugd. Vend. 212; Hook v. Ross, 1 Hen. & Munf. 310; Ross v. Hook's adm'r, 4 Munf. 97; Beverley v. Lawson's heirs, 3 Id. 323; Grantland v. Wight, 2 Munf. 179. Form of decree given in Sands' Suit in Equity, p. 471, 472.

5th. That the trustees and cestuis que trust in the deed to secure Goddin & Apperson, should have been parties in the first suit. 1 Daniel's Ch. Pr. 252; Anonymous, 3 Swanst. R. 139; Braker v. Deveraux, 8 Paige's R. 513.

6th. That it was error to appoint the counsel of the appellees the commissioner to sell the appellant's property. York Buildings Co. v. McKenzie, referred to in Davoue v. Fanning, 2 John. Ch. R. 268-9.

7th. That it was error not to require the commissioner to give security before proceeding to act; the statute being imperative in all cases of sales by a commissioner of the court.

8th. That the answer of Mason having been filed in vacation, it was not a part of the record, and could only be regarded as his affidavit. 1 Rob. Pr. 139; Tate's Dig. p. 569, § 94; Id. p. 116, § 34, note 2; Id. p. 128, § 59; Code, ch. 171, p. 649, § 1, 2, 3, 4; p. 650, § 34.

9th. That the exceptions should have been set down to be argued. Code, p. 650, § 35; and it was error to decide any other question in the cause before passing upon them. Clarke v. Tinsley's adm'r, 4 Rand. 250. And the exceptions should have been sustained.

James and Wm. H. Lyons, for the appellees, insisted:

116 *1st. That the contract between Mason and Vaughn gave to each the right to have the whole property sold; and that the devisees of Vaughn were bound by it. Therefore, it was not necessary in this case to proceed under the act in relation to the sale of infants' lands, or that in relation to partitions. They cited 2 Tucker's Com. 461; 2 Story's Equ. Jur. § 778. And the sale having been proved to be for the benefit of the infants, and they being plaintiffs in the suit, they are as much bound by the decree as if they were adults. Brown v. Armistead, 6 Rand. 594; Brook v. Hertford, 2 P. Wms. 518; Ellison's Case, 5 John. Ch. R. 261; Macpherson on Infants, p. 363, 382, 383, 386, 41 Law Libr.; Nalder v. Hawkins, 7 Cond. Eng. Ch. R. 352.

2d. That the claim on the part of the appellant to a conveyance with general warranty, was for the first time set up in this court, after he had been in possession for three years. That this right was a mere implication, and might be waived by the purchaser. That knowing the infants could not give him such a warranty, he took possession and had held it; and not having made the objection until after the decree, he must be held to have waived it. Vail v. Nelson, 4 Rand. 478; 1 Sugd. Vend. p. 243, note 1; Id. 398, 402; Roach v. Rutherford, 4 Dess. R. 126. They insisted further, that it was the right of Goddin to have a conveyance of such title as the heirs of Vaughn could make, though that was less than under his contract he had a right to demand. And having in his answer insisted upon his purchase, the court was bound to make the decree. They cited 1 Sugd. Vend. 242; 2 Tuck. Com. 466.

3d. That Goddin being the grantee of Mason, he could not require that this last should be made a party in the suit of Vaughn's heirs against Goddin; and
117 *Goddin & Apperson and their trustees being pendente lite purchasers, the plaintiffs are not bound to make them parties.

4th. That it was no ground for reversing the decree, that the plaintiffs' counsel was

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appointed the commissioner to sell; and that the security required was ample to cover any amount which would be in his hands at one time; that the notes were to be made payable to him as commissioner, and the trust appearing on their face, he could not negotiate them.

5th. That the statute having authorized the judge to dissolve an injunction in vacation, the authority to file an answer in vacation must be held to follow as a necessary consequence. Code, ch. 179, § 12, p. 678; Eden on Inj. 118.

LEE, J. It may not be questioned that where a sale of real estate is made in the ordinary mode and in general terms without any stipulation as to the character of the title which the purchaser is to get, he is entitled to demand that a clear title shall be made, and that it shall be assured to him by deed with covenants of general warranty. And this rule holds good equally where the sale is made at public auction as where it is concluded by private negotiation. In either case, however, where the sale is of such a character and under such circumstances as fully and sufficiently to make known to the purchaser the exact nature of the title which he is to expect, he can of course only demand such title as was in contemplation of the parties when the sale was made. As in the case of a sale by an executor, avowedly as such, under the provisions of a will, or by a sheriff or commissioner under the order of a court, and other cases of the like kind. In these the purchaser can only expect to get the special title which the vendor
118 is authorized to convey, *nor is he entitled to demand covenants of general warranty.

In the cases before us it is alleged that at the time of the sale of the property in controversy, the appellant had full and complete knowledge of the state of the title, and was aware that the title to a moiety was in the heirs of Vaughn, all of whom with one exception were infants under the age of twenty-one years. This however is denied by the appellant who alleges that he purchased in entire ignorance of the state of the title, upon faith of the declaration made by the auctioneer at the time of the sale, that a clear and indisputable title would be made. Nor is there any sufficient proof to establish this knowledge at the time of the sale. But it is proven very distinctly, and indeed may fairly be considered as admitted by the appellant, that after the sale but before any steps were taken to consummate the contract, he was informed of the true situation of the property, and learned that the title to one undivided moiety was in the children of Vaughn as his heirs or devisees, and could only be obtained by a resort to proceedings in chancery.

Now if at this point, the appellant had refused to proceed further with the contract because the title which he was to receive was not such as he had contracted for, he might have been well justified in doing so, and the court of chancery would in vain have been appealed to to compel him to specific performance. But he did not adopt this course. On the contrary immediately after the sale and before a single step had been taken to complete the purchase, being informed by the auctioneer in whom the title was vested, and how and where the title to the moiety of Vaughn's heirs was to be obtained, he expressed no dissatisfaction, but with this knowledge of the state of the title, plainly manifested his intention to go on with his purchase,
119 *content to take a conveyance from Mason for his moiety, and to look to the court of chancery for the title to that of Vaughn's heirs.

It is in vain to say that the agreement between Vaughn and Mason of the 14th of September 1846 was not produced till some months afterwards, and that therefore the appellant did not have full knowledge of all the facts when he decided upon his course. Even where a fraud has been practiced it is not necessary that the party should be aware of all the circumstances of the transaction; it is enough that he should know what he is about to do will confirm the transaction if it were otherwise liable to be impeached. Murray v. Palmer, 2 Sch. & Lef. 474, 486. But there was nothing in that agreement to deter the appellant from proceeding to complete his purchase if otherwise disposed to do so. Its effect would rather have been to confirm him in his purpose. He was told, he says, that a good title would be made to the moiety of Vaughn's heirs, but that it would be necessary to obtain it by resort to the court of chancery. This was deemed satisfactory, and he determined to proceed with his purchase. What was to be the basis of the decree was a matter of very little consequence if the title passed by it. But although the original agreement was not shown him, he was informed of the existence of such a paper and of its provisions. He says in his cross bill that he requested to see the agreement and the will of Vaughn, but that neither was shown him, and that he would at once have rescinded the agreement if he could have foreseen the difficulties and delay to which he was to be subjected. He did not however rescind it, but concluded to proceed with it. In his answer to the amended bill, he says, this was when the auctioneer called on him to comply with the terms of sale, and that some time thereafter he was put into possession. So that if this agreement
120 *could have had any influence in determining his course, he was apprised of its existence before he had taken a single step towards completing his purchase.

Thus, as it seems to me, the appellant with sufficient knowledge of all material facts, did elect to complete his purchase and take the title of Vaughn's heirs; and the decision of these causes must depend on the solution of these questions: first, is

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the title of Vaughn's heirs good, and can it be fully and effectually transferred to and vested in the appellant under the proceedings that have been had? second, is the appellant still entitled to insist as the condition of his performing the contract, that this title shall be assured to him with covenants of general warranty?

It is no where alleged that there is any defect in the title itself as claimed and held by Vaughn's heirs, no better or other title whatever is alleged to be outstanding in a third person, nor is it pretended that there has been any forfeiture under the revenue laws, or any lien or incumbrance of any kind whatever resting upon it. Their title, then, is good; but it is insisted on behalf of the appellant that this title cannot be transferred to him under the proceedings which have been had. It is argued that the court of chancery cannot convert the real estate of infants by a sale save only under the provisions of the statute authorizing a sale of infants' lands in certain cases at the suit of the guardian, or that providing for such sale in certain cases of partition, and that the proceedings in this case are under neither of those statutes and conform to none of their provisions. This argument, however, omits a most material element in the case. It ignores completely the contract of the 14th of September 1846, or denies to it any effect as a proper basis for the action of the court. It is contended that it confers a mere power upon Mason to make a sale which could not be exer-
121 cised after the death of Vaughn, *and that the case is not helped by the concurrence of the executrix of Vaughn because by the will she is expressly prohibited from selling any lands or slaves. Whether Mason could or could not, by his own act, make a sale of the property after the death of Vaughn that would be binding upon the heirs of the latter is, in the view I take of the case, not material to be decided, although it may be argued with some plausibility that the effect of the agreement was for the purposes of a sale according to its terms, to revive the right of survivorship, and thus enable the survivor to sell and convey the property, being liable of course to account for a moiety of the proceeds to the estate of the deceased joint tenant. Nor do I deem it material to enquire how far the executrix of Vaughn could act under the agreement with the provision in the will prohibiting her from selling lands, though it may be observed that the agreement expressly provided for its being carried out after the death of either party, the contingency of which is recited as a principal inducement to entering into it, and provides that the executors of the parties shall carry out the same as fully as they could themselves if in life; and this agreement was entered into more than a year after the date of Vaughn's will, which appears to have been made in 1844, some time before Mason and Vaughn had acquired the property, their deed from Hodges and wife being dated on the 27th of April 1846. For if Mason could not by his own act, consummate a sale after the death of Vaughn that would be effectual to pass the title to the whole property to the purchaser, with or without the concurrence of the executrix of Vaughn, I think it clear that the agreement conferred upon him the right in equity to have a sale of the property according to its terms, and this right could not be taken away by the death of Vaughn, nor could it be impaired by any will that he might have made or might
122 thereafter make. *It constituted a material element of the joint tenancy and entered into its substance; and the heirs of Vaughn though not named, were yet bound by it, because they took the title that devolved upon them subject to the terms and conditions which it imposed. The regular course of proceeding, it is true, would have been, to file a bill against the heirs of Vaughn and ask for a decree for the sale of the property; this however Mason did not do, but undertook to make the sale by his own authority, and did not seek the aid of a court of chancery either before or after the sale, as the bill which has been filed to affirm the sale is not in his name but in the names of the executrix and heirs of Vaughn. This irregularity however will not necessarily vitiate the proceeding. It has been held by this court that where the guardians of infants had made a sale of their wards' land upon a bill by them to affirm the sale the case would be a proper one for the consideration of the court under the statute providing a mode by which a guardian might obtain a sale of his wards' lands, and that if the court should be satisfied the interest of the infants manifestly required a sale, and that the one that had been made was advantageous to them, it might confirm it instead of requiring a new sale to be made under its decree. Garland v. Loving, 1 Rand. 396. The case in judgment, I consider quite as strong as the case just cited, and I think it entirely competent for the court to confirm the sale made by Mason if the circumstances are such as to render it proper. That they are so, I think sufficiently appears. It is shown that the sale was fairly made and that it was to the interest of the infants that the same should be ratified, whilst the widow and the only one of the heirs of Vaughn that had arrived at full age had fully concurred in it.

That the bill filed is in the names of the heirs and not in that of Mason con-
123 stitutes no serious objection. *It can make no difference to the appellant, so he gets the title, whether the suit in which the decree is rendered is prosecuted in the names of the former or in that of the latter. Nor was it necessary that it should conform to the statute for the sale of infants' lands at the suit of their guardian or to that concerning partitions. The power of the court over the subject did not depend upon either of these statutes, but grew out of the general principles of equity, and is founded upon the agreement between

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Vaughn and Mason. It was the duty of the court, of course, to see that the names of the infants were used for a proper purpose and to promote a beneficial object, but when satisfied of this, and acting for their benefit, it pronounced its decree, the infants are as much bound by it as if they were of full age, and this even if they had been defendants. That infant plaintiffs are as much bound and as little privileged as one of full age has long been considered the established doctrine in England. Gregory v. Molesworth, 3 Atk. R. 626; Brook v. Hertford, 2 P. Wms. 518; and so laid down as settled law by Judge Carr in Brown v. Armistead, 6 Rand. 594. That the sale was for the benefit of the infants and that it is to their interest that it should be confirmed, is ascertained by the report of the commissioner, and indeed is sufficiently shown by the appellant himself. And I entertain no doubt that the decree of the court carrying the same into effect will bind the infants as effectually as they could be in any mode whatever. Whether Mason could have maintained a bill convening the heirs and the purchaser and seeking to confirm the sale is not at all material to enquire. Certainly the appellant by settling with him for his share of the purchase money and accepting a conveyance for his moiety, and consenting to look to the heirs of Vaughn for their title, took away any interest he might otherwise have had to resort to
124 active measures, *and exonerated him from the duty of initiating the proceedings. And by the decree as it is, the heirs of Vaughn are as effectually bound as they could have been by any decree that might be rendered in a suit prosecuted by Mason.

Much of what has been said will apply to the claim now set up by the appellant to covenants of general warranty for the interest of Vaughn's heirs; some further observations on this point may be added.

I have said that a party who purchases real estate in the usual way without any stipulation as to the title is entitled to demand covenants of general warranty. But this right founded on implication may as I have already intimated, be repelled by the circumstances, or it may be waived by the vendee as evinced in his acts and declarations. A vendee may if he please elect to take what the vendor can give though it may not be all he contracted for, and if with full information he chooses to confirm a contract which he had the right to rescind, he will be bound by it, and no new consideration will be necessary to render the confirmation obligatory. Chesterfield v. Janssen, 2 Ves. R. 125, 140; Roche v. O'Brien, 1 Ball & Beat. 330, 355; Cole v. Gibbons, 3 P. Wms. 290; Morse v. Royal, 12 Ves. R. 355. And even in a case of fraud, if instead of repudiating the transaction, the purchaser deal with the property as his own, he will be bound though he afterwards discover a new circumstance of fraud, for that will be considered as only strengthening the evidence of the original fraud, and will not revive the right of repudiation which has been once waived. Campbell v. Fleming, 1 Adolph. & El. 40, 28 Eng. C. L. R. 29.

The question of waiver of objection to the vendor's title is, in every case, one of fact: did the purchaser intend to waive, and has he actually waived, the objection; but the intention may be inferred from his acts, and no direct expression of it is
125 required. Indeed his *silence may in some cases be tantamount to the clearest expression of being content with the title. 2 Sugd. Vend. (6th Am. ed.) 8; Burroughs v. Oakley, 3 Swanst. R. 159. Where a purchaser knows when he makes his contract that there is a defect in the title, and that it will take a considerable time to remove it, or acquires this knowledge after his purchase and acquiesces in the delay, or proceeds with knowledge of the defect, in the execution of the contract, he cannot afterwards complain. Pincke v. Curteis, 4 Bro. Ch. Cas. 329; per Green, J., Vail v. Nelson, 4 Rand. 478, 481. So, where a purchaser knowing of an objection to a title enters into possession of the estate, he may be considered to have himself executed the purchase, and thus waived his objection. Fludyer v. Cocker, 12 Ves. R. 25; Binks v. Lord Rokeby, 2 Swanst. R. 222. And granting a lease to a person in possession under the vendor, will be held to be a taking possession, for the possession of the tenant is the possession of the landlord. Stephens v. Guppy, 3 Russ. R. 171, 3 Cond. Eng. Ch. R. 346. Attempting to resell is an important circumstance upon the question of waiver, but it is of itself not conclusive, as the party may have designed merely to ascertain the value without really intending to sell. Knatchbull v. Grueber, 1 Madd. R. 151, 170. So, the preparation of a conveyance is a strong circumstance, as showing that a stage of proceeding had been reached subsequent to the discussion of title, and it may be supposed, therefore, that all objections had been removed or abandoned. Burroughs v. Oakley, 3 Swanst. R. 159. See, also, Ogilvie v. Foljambe, 3 Meriv. R. 52; 2 Sugd. Vend. ch. 8, § 1, p. 7, et seq. And if a purchaser take possession under a contract, and afterwards rejects the title, he must relinquish the possession, although he may have expended money in making improvements. Nicloson v. Wordsworth, 2 Swanst. R. 365.

Now, as we have seen, the appellant
126 was informed *after the sale but before any step had been taken to complete the contract, that the title to one moiety was in the heirs of Vaughn all of whom except one were infants, and that their title was to be obtained and transferred to him by a suit in chancery; yet with this knowledge he proceeded to take possession of the property and make such repair and improvements as his taste or judgment suggested; he settled with Mason for his moiety of the purchase money, and accepted from him a conveyance of his title; and

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executed a deed of trust upon the property to secure the payment of part of that purchase money; he fully concurred in the proceeding instituted to obtain the title from the heirs and filed an answer to the bill admitting and stating his readiness and anxiety to complete the same; and even after he had raised obstacles to the completion of the contract in the way proposed he yet still insisted in his answer to the amended bill that the complainants (the executrix and heirs of Vaughn) should be compelled to make him a good title to their moiety, and that he should not be put to the necessity of filing a cross bill for that purpose; and this at a time when, if he did not know it when he filed his first answer, being in the hands of his counsel he must have known that the heirs of Vaughn could not be compelled to convey with covenants of general warranty, though I apprehend, he must be supposed to have known this when he first elected to go on with his purchase. He also executed a second deed of trust upon the property to secure the payment of borrowed money, and he continued in possession receiving the rents and profits down to the decree, resisting the suggestion made in the amended bill for the appointment of a receiver. Under these circumstances, I think it quite too late for the appellant to claim to be entitled to covenants of general warranty for the moiety of Vaughn's heirs either from
127 them or *from Mason, and that he must be held by his acts and conduct to have the right to insist upon such covenants.

The distinction sought to be made between the waiver of a defect in a title and of covenants in a deed cannot be maintained. In either case it is an alleged defect in the title proposed; and if a party shall be held by his acts and conduct to have waived a defect in the substance of the title, a fortiori he shall be held to have waived covenants for assurance of a title acknowledged to be good or in which no flaw is shown or pretended.

Several other questions were raised and discussed by the counsel to which I will now briefly advert.

It is said to be a grave error in the decree that it contains no provision that a deed shall be made or tendered to the appellant, and a precedent found in the excellent treatise of Mr. Sands (Sands' Suit in Equity, p. 471, 472), is cited as giving the usual and proper form of such a decree. That this may be a very correct and safe precedent, I am not disposed to question, but so far as I have observed it has not been generally adopted. On the contrary, the more usual practice has been in cases of this kind where a sale is directed to withhold by express provision a conveyance of the title till after the coming in of the report. And the court can as effectually transfer the title by a subsequent order as by a provision in the decree. At the most, I cannot think it so material as to render necessary the reversal of the decree.

The appointment of the counsel for Vaughn's heirs as the commissioner to make the sale, and the refusal of the court to associate with him as such one of the counsel of the appellant, is also complained of as error in the decree. It is the constant practice of the courts to name the counsel prosecuting a claim to a decree for the sale of property as the commissioner, and
128 I am *not aware that the legality of such an appointment has been heretofore questioned. If there be no objection personally, to the counsel so named (and any personal objection in this case is wholly disclaimed), I cannot see any impropriety in such an appointment and especially as the whole matter is under the control of the court whose duty it is to see that its commissioner has acted with perfect fairness and impartiality, and to correct and, if necessary, punish any deviation from the line of duty. Nor do I see any necessity or particular propriety in associating with him the counsel of the other party. If the former is liable to be biased in favor of his clients, the latter is not less so in favor of his, and from this diversity of interests divided counsels might ensue not at all favorable to the prompt and harmonious execution of the decree of the court. At any rate it is a matter within the sound discretion of the court and I cannot see or say that that discretion has been unduly exercised.

I can perceive no necessity in this case for a reference to a commissioner to examine and report upon the title. In England it is true, upon a bill for specific performance, either party may have a reference as to title. 1 Sugd. Vend. (ed. 1843) 357. The practice has not generally obtained to this extent with us. Where the title is doubtful and obscure or depending upon matters in pais, as in the case of Beverley v. Lawson's heirs, 3 Munf. 317, a reference may be very proper and necessary. Here the facts were all before the court, and the question was one of law most appropriate for the court to decide. Jackson v. Ligon, 3 Leigh 161, 180, Judge Carr's opinion. Even according to the English practice where the title is clear, no reference is necessary. Omerod v. Hardman, 5 Ves. R. 722; Rose v. Calland, Id. 186. And such in my view was the title in question here.

The omission to make the trustees
129 or the cestuis que *trust named in the deed to secure Wellington Goddin and J. L. Apperson, parties, is not an error of which the appellant can complain, if error at all. But I think it was no error, for those parties must be regarded as standing on the footing of pendente lite purchasers, and it was therefore not necessary to notice them in these proceedings. Nor do I think the appellant can be heard here to object to the trustee Taylor. If disqualified to act as trustee, he was rendered so by the act of the appellant. But it is difficult to see how he is disqualified. If he claims to be substituted, as the appellant

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alleges, to the rights of Mason for the amount he advanced to the appellant to enable him to make the cash payment, he can of course only expect to come in after the debt to Mason is fully satisfied, and thus he would have an interest to make the property sell for as much as possible, so as to create a surplus after satisfying Mason's debt out of which his supposed claim might be paid, but he can have no interest in so much of the proceeds of the sale as would be required to discharge the debt to Mason for which and for which alone he could make the sale. Thus his interest would be concurrent, rather than conflicting, with that of the appellant. But in addition to this, the appellant made no objection to a sale upon this ground, nor did he ask the court to substitute some other person as trustee in place of Taylor in case the injunction should be dissolved, and it may be not unreasonable to infer that he was content Taylor should continue to act as such. The objection is made for the first time in this court, and comes too late even if it could have availed the party in the court below.

Another objection taken for the first time in the argument here, is that the motion to dissolve was premature, or at least that the answer should not have been read on the hearing because it had not been filed
130 *either in court or at the rules.

Generally it is true that an answer can only be filed during the session of the court or at the rules, but by our statute, as I think, an exception is made in cases of injunction. The object of giving the judge in vacation power to dissolve an injunction was to prevent delay, and this would be to some extent defeated if a party had to wait until the rule day or a session of the court before he could put in his answer and have the benefit of it on a motion to dissolve. I think the larger power to entertain and decide the motion to dissolve embraces that of receiving the answer and making it a part of the record. If there were any thing in the objection it should properly have been made when the motion to dissolve was heard or at least when the petition to reinstate the injunction was heard and considered by the court.

The last objection I shall notice was that the exceptions to the answer were not set down for argument as the statute requires. There would be some force in this objection if the exceptions could have been made available to the party on argument. I think they could not have been, for I consider the answer as substantially and sufficiently responsive to the bill in all its allegations. That the whole property was sold at the auctioneer's sale, is not contested, and is I think as sufficiently admitted in the answer as it could be by the most categorical answer in the affirmative: and the whole case proceeds on the assumption that the whole property was sold as an entirety, though the sale was subsequently in effect converted into a sale of moieties by the act of the appellant. The other exceptions are for matters rather lying in inference or proof than in the knowledge of the respondent, or are too technical and hypercritical in their character to require consideration here, in view of the
131 provision of *the Code (ch. 181, § 4, p. 680), which declares that a decree shall not be reversed at the instance of a party who has taken depositions for an informality in the proceedings when it appears that there was a full and fair hearing upon the merits and that substantial justice has been done.

Upon the whole I think there was no material error to the prejudice of the appellant in the decree in the case of Vaughn's heirs, and none in the order dissolving the injunction or in that refusing to reinstate it, in the case against Mason and Taylor, and am of opinion that the same should be affirmed.

DANIEL, MONCURE and SAMUELS, Js., concurred in the opinion of Lee, J.

ALLEN, P., dissented upon the merits in the first case. He concurred in affirming Goddin v. Mason.

Decrees affirmed.

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132 *Bailey & als. v. Poindexter's Ex'or.

January Term, 1858, Richmond.

Wills—Emancipation—Dependent on Slave's Election—Effect.*—Testator provides in his will that the slaves loaned his wife for life, shall have their choice of being emancipated or sold publicly. Their emancipation is made by the will to depend upon their election to be free: And as slaves have no legal capacity to choose, the provision is void and of no effect.

***Wills—Emancipation—Dependent on Slave's Election—Effect.**—Slaves have no legal capacity to elect between freedom and slavery; and where it appears to have been the intention of the testator that the manumission is to depend on the election of the slaves, the bequest is void. This proposition laid down by the principal case was approved and followed in Williamson v. Coalter, 14 Gratt. 394; and both of these cases were cited in Shue v. Turk, 15 Gratt. 273, as authorizing the proposition.

But, in both the principal case and Williamson v. Coalter, 14 Gratt. 394, MONCURE, J., dissented in a strong opinion in which JUDGE SAMUEL concurred.

And in Jones v. Jones, 92 Va. 594, 24 S. E. Rep. 255, it was said: "It is claimed that the true construction of the language used was to give Bob his right to elect to be free or to remain in slavery. And not being able as a slave, under the decisions in the cases of *Bailey v. Poindexter, 14 Gratt. 132*, and Williamson v. Coalter, 14 Gratt. 394, to make such election, the provisions of the will were inoperative, and he continued to be a slave. We do not think that this case presents the same question that was decided in those cases, but, if it did, we would not consider those decisions as precluding us from a re-examination of that question, since they are in conflict with the prior decisions of this court during a period of more than fifty years; were decided by a

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This was a bill filed in April 1854 in the Circuit court of New Kent, by Richmond T. Lacy, executor of John L. Poindexter, to obtain a construction of the will of Poindexter, and directions for the guidance of the executor. The heirs and devisees of Poindexter, and persons claiming under them, were the defendants in the suit. The difficulty in the construction of the will related to the provisions in relation to his slaves. The will was made in November 1835, and was admitted to probate in December of the same year. By the first clause of the will the testator gives to his nephew Jaqueline L. Poindexter the testator's interest in the tract of land on which said Jaqueline then lived; also a tract called Cedar Lane at the death of the testator's wife; and testator's negro woman Louisa and her children, Sarah, Martha and Barbary and their increase, also testator's Ratler filly, his new saddle and bridle, and his wearing apparel (except his watch), to him and his heirs forever. By the second clause he lent to his wife during her natural life or widowhood, his plantation Cedar Lane, and all the remainder of his property, after the payment of his just debts, and the legacies named in the will. He then directs his wife to pay, out of the property given to her, certain annuities during her life, amounting to ninety dollars,
133 *and some other small sums. He also charged her with hiring out his servant Aaron to whomsoever he might choose to live with, and to pay to him at the end of every year all the money arising from his hire. He then left legacies, to be paid at the death of his wife; one to Ann Lewis Howle of one thousand five hundred dollars, and one to G. Bryan of five hundred dollars. And then comes the three following clauses:

"The negroes loaned my wife, at her death I wish to have their choice of being emancipated or sold publicly. If they prefer being emancipated, it is my wish that they be hired out until a sufficient sum is raised to defray their expenses to a land where they can enjoy their freedom; and if there should not be enough of the perishable property loaned my wife to pay off the legacies to Ann Lewis Howle and Georgianna Bryan, they are to be hired until a sufficient sum is raised to pay the deficiency. If they prefer being sold and remaining here in slavery, it is my wish they be sold publicly, and the money arising be equally divided between my sister Eliza Marshall, the children or heirs of my brother Carter B. Poindexter, my nephews William C. Howle and Daniel P. Howle, and my niece Nancy Bailey."

"If my wife should marry again, it is my wish she should have only one-third of the property loaned her, and the other two-thirds to be disposed of in the same manner as directed in the event of her death."

"If any of the servants loaned my wife should be refractory or hard to manage, I wish my executor to dispose of such at public sale, and the money arising to be funded or loaned out at six per centum per annum, and my wife to have the interest of it during her life, and at her death to go to the heirs of the personal property loaned her above mentioned."

On the same day on which the will was written, the following codicil was added:

"I wish it understood that in the event
134 of my negroes loaned to my *wife being emancipated at her death, and not sold for the benefit of my sister," &c., &c., the persons mentioned in a previous clause, "that my nephew Jaquelin L. Poindexter shall pay the sum of one thousand dollars, to be equally divided between them; and that I give him my plantation Cedar Lane on that condition."

The bill stated that the executor had delivered to the widow personal and perishable property appraised at one thousand one hundred and forty-six dollars and five cents, and twenty slaves, of whom several had died, and, between the death of the testator and that of the widow, thirteen slaves had been born. That the widow was dead, and that no part of the property put into her possession, except the slaves, had been returned to the executor or accounted for, and that he only received the slaves.

The bill was taken for confessed as to all the defendants; and the cause came on to be heard in November 1855, when the court held that the negroes whereof the testator died possessed, were by the terms of the emancipating clause in his will contained, absolutely free at the death of the life tenant, and that it was not proper or necessary to put said slaves to their election. And also that the issue of the females born after his death and in the lifetime of his widow, were also free at the death of the life tenant, said issue being embraced by the general terms of the emancipating clause of said will. And certain accounts were ordered which need not be stated. From this decree, the defendants applied to this court for an appeal, which was allowed.

The case was argued at great length, in writing, by Gregory, Pierce, John Howard and Robertson, for the appellants, and by Branch, Crump and Patton, for the appellees. The reporter has found it impossible to combine in one all the arguments on a side; and equally impossible to insert
135 all of them. He is indebted *to Mr. Howard for the note of his argument; and has selected that of Mr. Patton on the part of the appellees, because it is the last which will appear from him; and Judge Robertson's, because it was in reply to Mr. Patton.

John Howard, for the appellants, having examined the question as to the true con-

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bare majority of the court, two judges dissenting in each case, and are so contrary to reason and to justice that we would hesitate long before we would hold that a slave could not elect to be free when that right was given him by his owner."

Contracts—Slaves.—In Woodland v. Newhall, 31 Fed. Rep. 438, the principal case and Stevenson v. Singleton, 1 Leigh 72, were cited as holding that contracts to which a slave is a party are null and void.

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struction of the will, and insisted that the bequest of freedom to the slaves was made dependent upon their election to become free, then proceeded as follows to consider what is the legal status of the negro slave, and whether he has the right and legal capacity to make such an election:

African slavery, as it exists in Virginia and the southern states, is an institution sui generis. It is often compared to the Feudal villenage and the Roman servitude. It most resembles the last; but it is different from both. Commonwealth v. Turner, 5 Rand. 678; Neal v. Farmer, 9 Georgia R. 579. And no illustrations or analogies drawn from those sources can elucidate its legal character or relations. Ibid. In discussing legal questions growing out of these relations, the remark of Tucker, J., in Elder v. Elder's ex'or, 4 Leigh 252, may be generalized; and it may be said with perfect truth that there is an absence of all authority or analogy upon the subject, so far as any system of jurisprudence is concerned, except our own. The legal character and nature of the slavery in this state must be decided, therefore, from positive law. What law? The constitutional and statute law. For, whatever doubts may be entertained of the correctness of the decision, since the judgment of Lord Mansfield in Somersett's Case, 20 Howell's State Trials, p. 1, it has been regarded as settled, that African slavery is unknown to the common law of England, and therefore unknown to that law as introduced into the colony, now the state of Virginia. And it
136 was upon *this ground that the general court decided in Turner's Case, 5 Rand. 678, that an indictment could not be sustained against a master for malicious, cruel and excessive beating of his own slave, there being no statute upon the subject. In regard, therefore, to his civil rights and relations, the slave is that which the constitutional and statute law makes him. He is that, in legal contemplation, and nothing more. He is unknown to the law, in that respect, except in the ita lex scripta est. What then is the civil status of the slave, as shown by the constitutional and statute law? I contend that by that law, and from the necessary nature of slavery as it exists thereunder—de natura legis et ex necessitate rei—the slave has no civil rights and no legal capacity whatever. Recognized rights on the part of the governed imply civil duties on the part of the government, for rights and duties are correlative terms. Jus obligatio sunt correlata. If the slave has recognized civil rights, the state protects, and is bound to protect, those rights, and the obligation is to the slave. Recognized civil rights also imply civil remedies to enforce them, for without these, rights are nothing; and hence the universal maxim of the law, that there is no legal right without a legal remedy. Civil remedies are the legal sanction and muniment of civil rights, their best criterion and only safeguard. If the slave has civil rights, he must have civil remedies which attach to him as a slave.

Now, all civil rights may be reduced to three principal or primary articles—the right of personal liberty, the right of personal security, and the right of private property. 1 Black. Com. 129, 130. But which of these civil rights has the slave, that the state recognizes on her part any obligation to the slave, to enforce, or does enforce? And what legal remedy has the slave, as such, to enforce it? Save the privilege given him by statute, in
137 the single and exceptional *case of a suit for freedom, in what manner can a slave assert any legal right, plead, or be impleaded? Has he magna charta or habeas corpus? Where are his constitutional guarantees? To ask these questions, is to answer them.

"In a state of slavery (says St. George Tucker, a strong friend of the slave, speaking of the institution as it exists among us), the right of personal liberty and the right of private property are wholly abolished; the person of the slave being at the absolute disposal of his master; and property, what he is incapable, in that state, either of acquiring or holding to his own use." 2 Tuck. Com. on Black., App. p. 54. And as to personal security, the protection of life and limb, given him by the law (for he cannot claim or command it as a right), that but perpetuates his existence and market value in a state of slavery, a state of absolute negation of all legal right and capacity.

A learned juridical writer of much philosophic accuracy of thought has well said, "Chattel slavery may exist under restrictions by municipal law on the power of the master, in view of the interests of society, without vesting the rights of a legal person in the slave. Savigny. Heub. R. R., B. 11, C. 2, § 65. The person held in slavery may continue to have the character of property in the eye of the law, in states wherein, under the influence of public opinion or other moral causes, protection is in practice insured to the slave as a natural person, unknown to other communities wherein the law upon which the relation rests is the same in judicial apprehension." Hurd's Topics of Jurisprudence connected with conditions of Freedom and Bondage, p. 42. Law, indeed, as to the slave, is only a compact between his rulers, with which he has nothing to do, and to which he is utterly unknown. So far from having civil rights, he is but the object of the civil rights of others.

138 *By the constitution of the United States, slaves are recognized as property; and though in the apportionment of representation and of direct taxation, they are included under the designation of "three-fifths of all other persons," yet their rights as persons are utterly ignored. Dred Scott v. Sanford, 19 How. U. S. R. 414; 3 Madison Papers, tit. Slaves. And that congress has passed no law, and has no authority to pass any law, touching the rights and relations of Virginia masters in and to their slaves as property, except to

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recognize, protect and enforce those rights and relations as they exist under the state constitution and laws, need scarcely be stated to this court, whose decisions have illustrated its jealous fealty to the supremacy of state sovereignty, in all matters within the circle of its peculiar and exclusive jurisdiction.

By the constitution of Virginia slaves are expressly recognized as property, and not at all as persons having civil rights in any respect whatever. Art. iv, § 22, 23.

And now, looking to the statute law of the state, we find that from the earliest period, so far as their civil status is concerned, slaves are always spoken of and treated, in the numerous acts of the house of burgesses and the general assembly, as mere property. It is a curious fact, that there is no statute directly reducing negroes into slavery. "In 1620 (says Captain Smith) a Dutch ship of warre brought us 20 negars" for sale; they were bought by the colonists; and that was the origin of African slavery in Virginia. They were first regarded as personal chattels, were bought and sold, and held like any other personal estate; were subject to the payment of debts, and went to the executor or administrator like any other personalty. Then, for a long time, in particular cases, such as descents, &c., they were made real estate, and passed to the heir at law. 3 Hen. Stat. 333,
139 Oct. 1705; 4 *Hen. Stat. 222, Feb. 1727; 2 Wash. 1–7, Ibid. 68–70; 2 H. & M. 69; 6 Munf. 200. They continued to be such real estate during the whole period of the revolution, and down to 1792, when, by Rev. Code, ch. 103, it was enacted, that "all negro and mulatto slaves, in all courts of judicature in this commonwealth, shall be held, taken and adjudged to be personal estate." This was re-enacted by 1 Rev. Code, p. 431, 1819; and by Code of Va. p. 458, 1849, it is summarily said, "Slaves shall be deemed personal estate."

Looking at these acts, it is safe to say that the law regards a negro slave, so far as his civil status is concerned, as purely and absolutely mere property, to be bought and sold, and pass and descend as a tract of land, a horse or an ox. From this it necessarily follows, that the condition of the negro in slavery is that of absolute civil incapacity, or rather that of an absolute negation of civil existence. Being but mere property himself, he is incapable of owning property of any kind, or of making any legal contract by which property of any kind can be acquired or held. Nor can he do any civil legal act by which the property of others can be lawfully divested or alienated, or the relations of property be in any wise legally changed or affected. In regard to property, and the legal relations of property, he is emphatically and absolutely unknown to the law, except as the subject of property owned by another. And so the courts have uniformly held. The Supreme court of North Carolina, in a recent case, has well expressed the law, in the southern states, upon this point: "Under our system of law, a slave can make no contract. In the nature of things he cannot. He is, in contemplation of law, not a person for that purpose. He has no legal capacity to make a contract; he has no legal mind. He is the property of his master, and all the proceeds of his
140 labor *belong to his owner. If property is devised or given to him, the devise or bequest is void, and the personalty given either belongs to the giver or becomes the property of the owner. A slave has no legal status in our courts, except as a criminal or as a witness in certain cases. In the southern states the policy of our laws in keeping slaves within their proper sphere, has run through all the legislation of which their acts are the subject matter." And the court then decided, that "Contracts made by slaves are void; and if a slave executes his note or bond, and a free man is the security upon it, the note or bond is void, and the security is not liable." Batten v. Faulk, 4 Jones' Law R. 233.

In Virginia the statutes are numerous in which the legal incapacity of slaves to make contracts is clearly declared or implied, and the policy of keeping them in their "proper sphere" of absolute civil non-entity, distinctly enforced by various penalties inflicted upon all persons trading or dealing with them. Oct. 1705, ch. 39, § 15, 3 Hen. Stat. 450; Nov. 1753, ch. 7, 6 Hen. Stat. 359; 1785, 12 Hen. Stat. 183; 1792, Rev. Code, ch. 103; 1819, 1 Rev. Code, ch. 111; 1849, Code of Va. p. 460. And this court has expressly decided, in the case of an executory contract of emancipation, that even upon the full payment by the slave to the master of the contract price for his freedom, the slave cannot enforce a specific execution of the contract. Sawney v. Carter, 6 Rand. 173.

In Stevenson v. Singleton, 1 Leigh 72, another case of a contract by a master with his slave for his emancipation, Cabell, J., delivering the opinion of a full court, says, "In the case of Sawney v. Carter, 6 Rand. 173, this court refused, on great consideration, to enforce a promise by a master to emancipate his slave. It is impossible to distinguish that case from this. This court proceeded upon the principle that it
141 is not competent *to a court of chancery to enforce a contract between master and slave, even though the contract should be fully complied with on the part of the slave."

It is easy to see that these decisions are founded not less upon grounds of paramount public policy than upon sound legal principles. If legal rights be conceded the slave, the courts would become a constant forum for settling disputes between master and slave; from which would arise a state of things utterly incompatible with the proper subordination of the slave; nay, with the existence of slavery in the community. Nor, indeed, from the relation between master and slave, can any contract, by or with a slave, acting for himself, have any possible legal validity whatever. For the

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parties to every valid contract must be free agents; they must have an "agreeing mind;" but as the will of the slave is under subjection to that of the master, the requisite independence and freedom to make the contract or not, does not exist. A still further and stronger reason is, that since the slave himself, and all the acquisitions of the slave, belong to the master, a contract by the master with his slave, is but a contract by the master with his own property concerning his own property. Nor is it any answer to say that, with the consent of the owner, the slave is competent to contract with third persons; for the slave in such case is but the agent of the master, whose will and control appear in every such permitted act of the slave. The acts of the slave, indeed, are but the acts of the master, if authorized or ratified by him: otherwise, they are of no legal validity or effect. And so emphatically is this true, that the slave cannot act as the agent of any other person than his master. State v. Hart, 4 Ired. R. 246.

There have been similar decisions to the above effect, in all the southern states, in which the legal relations between master and slave have been brought
142 *under adjudication. That a promise or declaration made to a slave, or for his benefit, cannot be enforced in a court of law or equity; that a slave cannot sue or be sued (the exceptional case of a suit for freedom being provided for by statute, or proceeding upon the legal fiction that he is free, and is therefore entitled to relief from bondage); that he cannot own or acquire property of any kind in any way; that he can make no valid contract of any sort—not even that of marriage; that, in fine, he has no civil rights whatever; that his civil rights of every character are transferred to his master; that law as to him is only a compact between his rulers, and the questions which concern him are matters between them. See Beall v. Joseph, Harden's R. 51; The State v. Samuel, 2 Dev. & Batt. 177; Hall v. Dolly Mullen, 5 Har. & John. 190; Susan v. David Wells, 3 Brevard's R. 11; Bland and another v. Dowling, 9 Gill & John. 500; Gist v. Tookey, 2 Rich. R. 424; State, use of Clements, v. Van Lear & als., 5 Maryland R. 92; Sarah and Melinda v. Gardner et als., 24 Alab. R. 719; Smith v. State, 9 Alab. R. 990; Bynum v. Bostick, 4 Dess. R. 266; Cunningham v. Cunningham, Cam. & Nr. 353; Girod v. Lewis, 6 Mart. La. R. 559; Brandon v. Planters and Merchants Bank of Huntsville, 1 Stew. R. 320; Lucy and Mark, 4 Monr. R. 167; Emerson v. Howland, 1 Mason's R. 45; Graves v. Allen, 13 B. Monr. R. 190; Lenoir v. Sylvester, 1 Bailey's R. 632; Ex parte Boylston, 2 Strobh. R. 43; State v. Boom, Taylor's R. 105; State v. Mann, 2 Dev. & Batt. Law R. 579; Fable v. Brown's ex'or, 2 Hill's R. 378; Neal v. Farmer, 9 Georgia R. 507; Dred Scott v. Sanford, 19 How. U. S. R. 407, 475.

These decisions are legal conclusions flowing naturally and necessarily from the one clear, simple, fundamental idea of chattel slavery. That fundamental idea is, that, in the eye of the law, so far certainly as civil rights and relations are con-
143 cerned, the slave is *not a person, but a thing. The investiture of a chattel with civil rights or legal capacity is indeed a legal solecism and absurdity. The attribution of legal personality to a chattel slave,—legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action, and corresponding legal obligations growing out of such qualities, faculties and action—implies a palpable contradiction in terms.

In delivering the judgment of the Supreme court in Dred Scott v. Sanford, Chief Justice Taney states, in the clearest manner, the true light and condition in which the African race was esteemed and held at the time of the foundation of our state and federal governments, and historically and philosophically accounts for the existing legal and political relations between the white man and the negro. See 19 How. U. S. R. 407-14.

An application of the foregoing principles and decisions ought, as it seems to me, to settle this case. In a bequest to slaves of a mere election between freedom and slavery, we have seen that there is no absolute, but only a conditional emancipation; that the election of the slaves to become free, is a necessary condition precedent to the accruing of their freedom; and therefore, that on their will and pleasure, on their choice or volition, is made to depend their future legal status. Recurring then to the direct question to be decided—Are slaves endowed with the civil right or legal capacity to choose between freedom and slavery? Can they emancipate themselves by their own volition? Can they divest the property of others in themselves, by any legal act of their own? But if it has been shown that the slave has no civil rights whatever; that he has no civil status; that he can do no legal, civil act; that he has no legal mind, will or discretion; that he has absolutely no existence in the eye of the civil jurisprudence, except as a chattel, the subject of property,
144 and *the object of the civil rights of others; with what reason can it be contended that he has the civil right and legal capacity to divest the property of others in himself; or to do that great, transcendent act of supreme civil dignity and sovereign power, the transformation of himself from a thing into a person, from a chattel to a man, clothed with all the high attributes of a citizen, which attach to his race? And if his master, the maker of the laws, endowed with all civil rights and plenary civil capacity, cannot emancipate him except by deed or will, executed in solemn form, can he emancipate himself by the simple expression of his pleasure to be free? Or, on the other hand, if the law requires (Sess. Acts 1855-6, p. 37) that in order to enslave himself,

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if free, a negro must go through regular prescribed forms in a high court of justice, with all the safeguards of judicial protection around him, shall it be said that he can enslave himself forever, perchance by the mere light volition of a moment, the utterance of a word, or the nodding of his head? Where is the legal consistency in such anomalies and contradictions as these? How can they be reconciled with the established legal incapacity of the slave, or with either the spirit or the letter, or the purposes and policy of the emancipation laws?

Nor is it possible to escape the force of these views, by saying that in electing to become free, there is no exercise on the part of the slave of any civil right or capacity, but the mere performance of a condition, which, however unwise or absurd, the testator had a right to impose as a condition precedent to the emancipation; for this is but to change the form, without affecting the substance of the difficulty; which then only resolves itself into the identical original enquiry, What civil right or legal capacity has the slave to perform, or claim to perform, a condition, the performance of which is to operate his
145 enfranchisement? *The answer is, that he has no civil rights or legal capacity at all, and therefore none to perform the required condition. Change or turn the question as you may, this fundamental and impregnable obstacle arises, which no ingenuity can evade, and no fertility of hypothesis alter or affect. The act of election involves the exercise of civil rights and legal capacity; and an emancipation made dependent upon the exercise of civil rights or legal capacity by the slave, is necessarily void ab ovo. The event can never happen upon which the freedom is to accrue; and the case comes clearly within the principle of the decisions cited and approved in Taylor v. Cullen, 12 Gratt. 398; which decisions themselves are but illustrations of the ancient, general and cardinal rule in respect to grants or bequests upon conditions precedent, that, until the condition is performed, the estate or right cannot vest, and if impossible to be performed at the time of its creation, the estate or right can never vest at all, but is originally void. Co. Litt. 206; 2 Bl. Comm. 157; 1 Lom. Dig. 273, § 16.

Nor has the master any just ground of complaint against this result, as tending to abridge his rights in respect to his slaves. The power to emancipate is not unlimited. Before the act of 1787, emancipation was absolutely prohibited, except by consent of the governor and council first had and obtained. That act authorized and permitted emancipation in the mode thereby prescribed, to wit: by deed or will. That act is the law of this case. It empowers the master to manumit his slave by deed or will; but it must be his own complete act; he cannot authorize and empower the slave to manumit himself or not, according to his will and pleasure. And so, in principle and substance, this court has decided; for it has held that "emancipation is the conjoint act of the master and the law, with which the slave has nothing to do."
146 *Wood v. Humphreys, 12 Gratt. 340.

And as on the one hand, "he cannot refuse freedom when conferred upon him" —(ibid.)—e converso, he cannot elect to take or decline it, when it is left to his option.

But it is said, that though slaves are chattels, and are incapable of forming any legal contract, or doing other legal civil act, yet that they are not mere chattels, that they are human, sentient, moral and intellectual beings; that as such, they are dealt with by the law; and therefore, that they ought to be held capable of an election between freedom and slavery. And a class of cases has been cited, at first blush giving countenance to this view. Thus, in Bean v. Summers, 13 Gratt. 412, cited by Mr. Crump, occurs this remark of Moncure, J., delivering the opinion of the court: "Slaves are not only property, but rational beings; and are generally acquired with reference to their moral and intellectual qualities." Now it is to be observed in this discussion, that the true enquiry is, not what is the moral and intellectual character or capacity of the negro race, or for what qualities or habits slaves are generally acquired or esteemed, but what is the relation they sustain to the law of the land? And by reference to the case cited, it will be seen that the remark of the judge, above quoted, had no allusion whatever to the civil relations or status of the slave, but on the contrary referred to his moral and intellectual qualities as affecting his peculiar value as an article of property. The question was, whether a court of equity will decree the specific execution of a contract for the sale or delivery of slaves at the suit of the purchaser, without any allegation or proof of peculiar value; and in dealing with this question, the court looked to the character of the slave as an article of property, and to his moral and intellectual qualities as calculated to engender sentiments of friendship, affection and esteem on
147 the part of the master towards *the slave, which might invest the slave with such special and peculiar value, in the eye of the master, as that adequate compensation for the loss of the slave could not be had at law in an action for damages. All the South Carolina decisions cited in the opinion of the court, proceed upon the same ground. See particularly Young v. Burton, 1 McMul. Eq. R. 25. And they decide, as the Court of appeals decided in this case, that a master may very well attach such a special and peculiar value to his slave on account of his personal qualities, as that no jury could give adequate compensation for his loss. The court say: "Slaves are not only property, but rational beings; and are generally acquired with reference to their moral and intellectual qualities. Therefore damages at law, which are measured by the ordinary market value of the subject, will not generally afford

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adequate compensation for the breach of a contract for the sale of slaves. There is at least as much reason for enforcing the specific execution of such a contract as a contract for the sale of real estate. The only difference between the two cases seems to be this, that while in the latter specific execution will always be enforced if the contract be unobjectionable, and the suit be brought in due time, it will not in the former, if the slaves were purchased as merchandise, without reference to their peculiar value to the purchaser, or that the plaintiff is a mere mortgagee or other incumbrancer; in which case, as the slaves are to be sold at all events, damage at law assessed according to their market value, would be adequate compensation." The reasoning of the court plainly shows that it regarded the slave merely as an article of property, to which his qualities or habits, or to which peculiar circumstances might attach a special value, just as special value is attached to real estate from natural causes; and to argue thence that a negro slave was adjudged or recognized by that case to
148 *be endowed with the social and civil attributes of a white man, would be about as logical as to argue that real estate was adjudged or recognized to be endowed with the same attributes, because such is its character as property, and such the peculiar associations and feelings with which it is invested and regarded by mankind, that the law will enforce the specific execution of a contract for its purchase or sale.

In Boyce v. Anderson, 2 Peter's R. 150, cited by the same counsel, Judge Marshall said, "A slave has volition, and has feelings which cannot be entirely disregarded." But look at the case. It was an action of damages to recover the value of slaves lost by the negligence of the captain and commandants of a steam boat, as common carriers. The Supreme court held that the law regulating the responsibility of common carriers, did not apply to the case, because the carrier has not, and could not have, the same control over slaves that he has over inanimate matter; that in the nature of things a slave resembled a passenger, and not a package of goods. The same might have been said of an apprentice, or other person bound to service. And the chief justice, in delivering the opinion of the court, referred to the fact, that though there are no slaves in England, there are persons in whose service another has a temporary interest; but that the responsibility of a carrier, for injury which such person might sustain, has never been placed on the same principle with his responsibility for a bale of goods. But surely, in deciding that point, the English courts had no reference to the civil status of the persons so held to service; nor did the Supreme court in this case have any reference to the civil status of the slave. It considered the qualities, habits and character of the slave, as affecting his character as an article of transportation. "A slave (says the judge) has volition, and has feelings which cannot be
149 entirely disregarded. These *properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of treatment cannot be adopted, unless stipulated for by contract. But left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over a common package," &c. And therefore the carrier was not held to as high a degree of responsibility in the transportation of slaves, as in the transportation of a common package. The same principle, it is presumed, would apply, sub modo, to dogs, cattle, wild animals, &c. over which "the carrier has not and cannot have the same absolute control as over a common package." It might be good logic, but it would be bad law, to say that therefore dogs, horses, cattle and animals, feræ naturæ, were recognized, as something more, in legal contemplation, than mere property. It is alike bad logic and bad law to say that, by this case, slaves are recognized as any thing more. In the discussion of legal propositions, nothing is more dangerous than to adduce the incidental remarks, dicta or allusions of judges, applicable enough, or excusable, in the cases in which they occur, to elucidate points of an utterly different character arising in an utterly different connection, and embracing relations and consequences to which the judges in the cases cited had no reference, and which they could not possibly, by any logical association of ideas, have had in mind.

But the learned counsel need not have cited these authorities to prove that negro slaves have intelligence, feelings and volition. As late indeed as 1782, a doubt was publicly expressed in the British parliament, as to whether an African negro has a soul. And many philosophic specu-
150 lations have been indulged in *regard to his claim to be considered of the same origin and genus as ourselves. But common observation teaches that our slaves, in some cases, have a very high degree of intellect and moral sense, and all of them have, in these latter times, a strong enough will of their own, which needs no invigoration or activity from a bestowal upon them of civil rights and legal capacity incompatible with their condition as slaves. The moral and intellectual qualities of our slaves, in fact, as in the case of Roman and all other slaves, enter largely into the elements of their value; it is because they have intelligence, a sense of right and wrong, and volition, that they are such useful instruments, as Aristotle calls them in domestic and social life. And it is the pride and pleasure of many families in Virginia to cultivate the intellectual, moral and religious faculties and feelings of their slaves to as high a degree as circumstances will admit.

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But all this has nothing to do with the question under consideration. The court is not sitting as an ethnological society, to ascertain and determine the peculiar natural or acquired characteristics of the negro race; nor as a committee to investigate the elements and extent of the value of slaves. The enquiry is, What is the legal status of the slave under our laws? Has he any legal volition, the exercise of which can change his legal condition, or affect the legal rights of the white race? If so, where is the statute which gives it? Where is the decision which defines its character and extent, or sanctions the legality, and prescribes the limits of its exercise? No statute can be found; and the absence of all authority is sufficiently illustrated by the citation of such cases as Summers v. Bean, and Boyce v. Anderson.

A much more plausible argument or illustration might have been drawn from a more direct and practical source. It might be said that the criminal code
151 of *Virginia recognizes slaves as responsible beings, and affixes penalties to the commission of crime by them; and that therefore the law of the land thus admits them to be endowed with intelligence, free will, and a moral sense—the same qualities or capacities which are requisite for rational choice between freedom and slavery. But even this will not bear examination. For, by recurring to the true issue, we see that the enquiry is, not as to whether a negro slave can commit a crime and will be punished for it, but what is his civil status. A married woman may commit a crime and will be punished for it, though she has no power to make a contract, and her civil being is absolutely merged in that of her husband. Her civil relations are very different things from the relation she sustains to the criminal law. The commission of a crime implies intelligence, free will, and a moral sense; but these do not fix the civil status, or necessarily affect it in any manner. Idiots, lunatics and infants of tender years have all a fixed civil status, and fixed civil relations to property. They may inherit or be inherited from. They may be the objects of devises or bequests, though they cannot devise and bequeath. They may and do hold thousands of slaves, who, considered as natural persons, are endowed with some sort of intelligence, free will and moral sense; yet the slaves, though thus endowed, cannot inherit or be inherited from; they cannot be the objects of devises or bequests, nor can they devise or bequeath, nor can they hold or acquire property in any manner of any kind. The civil status, therefore, is one thing; the criminal status is another and very different thing. The civil status has reference to property and all its relations; the power of holding it, using it, controlling it, acquiring it, and parting with it. The criminal status has reference to the moral relations between man and man. An individual may
152 have a very high *position in the one scale, and none at all in the other. An idiot may hold property, but is incapable of committing crime. A slave may commit crime, but is incapable of holding property. The two things are distinct and different, and have no necessary legal or logical connection the one with the other. In ascertaining the criminal status or capacity of a party charged with crime, no reference need be had to his civil abilities or disabilities. In ascertaining the civil status or capacity of a party who attempts to do a legal civil act, no reference need be had to his responsibilities at the bar of the criminal courts. We must, therefore, look to the civil jurisprudence for the civil status of the slave, and to the criminal jurisprudence for his criminal status. And in looking to the civil jurisprudence for the civil status of the slave, we have seen that the slave, as such, has no civil capacity or existence whatever.

But it is contended that the capacity of a slave to elect between freedom and slavery, is res adjudicata, and citation is made to Pleasants v. Pleasants, 2 Call 270, and to Elder v. Elder's ex'or, 4 Leigh 252.

Now, in regard to Pleasants v. Pleasants, it is sufficient to observe that the direct question raised in this case does not appear either to have been mooted or suggested by the bar, nor to have been considered or at all alluded to by the court. Nor indeed was there any just reason why it should have been argued or considered. For the wills of both John and Jonathan Pleasants conferred an absolute emancipation, when the laws of the country would permit it, and the slaves arrived at thirty years of age. For though John Pleasants, in the first clause of his will, apparently bestows a mere election, yet he immediately adds, in explanation, "I say all my slaves to be free at the age of thirty years," &c. Such is Judge Green's view of this will, when citing it in a subsequent
153 case. *Maria v. Surbaugh, 2 Rand. 232. And the two wills were considered identical, and construed together by this court. The whole case shows that both court and counsel regarded the slaves as absolutely emancipated, upon the conditions above mentioned, and therefore no question arose or could arise as to the legal right or capacity to elect. Certainly nothing is said in the argument about the right of election; nothing in the opinions of any of the judges; and no provision is made in the decree, giving the slaves an opportunity for an election; which certainly would have been done, if it had been considered that any thing was to be done by them to complete their emancipation. The decree proceeds upon the supposition of an absolute emancipation of the slaves when thirty years of age, and the laws would permit it; and "decides, that though if the testator had devised them upon condition that the devisees should emancipate them immediately, the condition being unlawful, would have been void, and the property vested; yet, that the condition that they should

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become free when the law would permit it, was not." The truth is, the great question in that elaborately argued and considered case, turned upon the doctrine of perpetuities and executory limitations, and not upon what is the civil status of the slave, or what constitutes or amounts to emancipation in a will. And that case decides nothing at all in reference to the main point in this.

So likewise in regard to Elder v. Elder. The question as to the civil capacity of a slave to emancipate himself, by electing to become free, does not appear to have been suggested by counsel, nor considered by the court. There was a question raised as to the necessity of the choice being made within a given time (twelve months), but no allusion is any where made in the case as to the enquiry whether the slaves had any legal right or capacity to elect at
154 all. This *question was, in fact, passed over sub silentio, as it well might, nay, certainly ought to have been; for, so far from having been raised for adjudication by the pleadings, the plaintiff's bill proceeded upon the concessum of such legal right and capacity, and claimed the slaves upon the ground that the stipulated time for making the election had passed, and claimed Mingo, indeed, upon the ground that he had elected, within the given time, to remain a slave—(see abstract of the bill and answer, p. 253 of the reported case); and by "consent of parties" in the court below, it was referred by the chancellor to commissioners to ascertain the choice of the slaves. By all which it appears, that in no shape or form was the question mooted by counsel or passed upon by the court below, and that in fact it could not have been passed upon, as it was not suggested by the pleadings, and the decree was entered as a consent decree. And as the point was not passed upon by the court below, of course it could not be the subject of revision in the Court of appeals. Even if this court had elaborately considered and decided it, the one way or the other, the decision would have been clearly extrajudicial, and of no binding effect in subsequent cases. But this court did not consider or decide the point at all, nor did it consider or decide any thing in reference to the civil status or capacity of the slave. Much stress will be laid upon certain expressions which fell from the judges who sat in the case; but a careful analysis of the opinions delivered will show that they all proceed upon the concession of the capacity of the slaves to make the election, which was certainly right in that case, for the reasons above stated. And it will further be seen that the two main questions argued and decided were, first, Whether sending the slaves to Liberia was a legal mode of emancipation; to which question the expressions above alluded to wholly referred
155 —(see especially *the first clause of Judge Tucker's opinion, and of Judge Cabell's and Judge Carr's); and secondly, Whether time was of the essence of the condition on which they should be sent to Liberia, that condition, i. e. their choosing to go, being tacitly assumed as legal and valid, as above shown. Elder v. Elder, on this point, is the law of that case, and none other. The most, in any possible view, which can be contended for is, that the point was decided by implication, sub silentio, without argument or consideration; in which event, it would not be binding authority even if decided by a full court, which was not the case. Great questions like this, affecting state policy not less than large private interests, ought never to be determined without thorough discussion and careful consideration; and it is not too much to ask or expect of this court, a full court of five judges, untrammeled by loose phrases or obiter intimations in supposed decisions upon points not argued and not under adjudication, to take into serious deliberation the novel but highly important question now for the first time distinctly presented, upon full argument, for its authoritative judgment.

Still another view of this will leads to the conclusion that it is void. Supposing it legally possible for the slaves to make an election, until election is made they certainly are not free, but remain in a state of slavery, with the power at any time to leave it. In what sort of condition is that? It is not freedom, because the choice of freedom has not been made. It is not slavery, because that implies the right and power of coercion on the part of the master, while the moment that coercion is applied, the subject of it may defeat and defy the authority of its application by electing to be free. That is, the negroes may enjoy all the benefits and advantages of the condition of slavery without the necessity of compulsory labor, or the fear of salutary punishment for indolence or in-
156 subordination. *And this state of things is to exist for an indefinite time, as no limit is prescribed in the will as the period of possible election. An intermediate and anomalous condition like this is fully covered by the rule, and the reason of the rule, established in Rucker's adm'r v. Gilbert, 3 Leigh 8, and Wynn & als. v. Carrell & als., 2 Gratt. 227.

Mr. Howard then entered into an elaborate review of the history and the policy of the emancipation laws and of the laws in pari materia. He contended, that since the earlier decisions of this court favoring freedom to the slave, there had been a radical revolution in the legislation and policy of the state in respect to the institution of slavery; that that institution was now consolidated and fortified by the organic and statute law, and that its protection and perpetuation was a chief part of the public policy of Virginia and of all the southern states; that the maxims of the civil and common law in favorem libertatis, arose from a state of things, and were applied to a class of persons, utterly different from those before us; that those maxims had no just application to our negro slaves; and

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that it was the duty of the courts of the commonwealth, in cases of doubtful emancipation, to favor and perpetuate slavery, instead of following the suggestions of a false philanthropy in aiding its destruction. But it is impossible to present here even an outline of this part of the argument, as the point is not considered in the opinion of the majority of the court.

Patton, for Poindexter's executors, after discussing some minor points, proceeded as follows:

Are the slaves loaned to the wife of the testator entitled to their freedom, subject to the charges on them imposed by the will? This is the principal and most material question.

There has been a good deal of
157 discussion by the *counsel, of the question, whether the slaves were absolutely free at the death of the tenant for life. I shall not engage in that discussion. I am willing to concede for the purposes of this argument; and indeed candor compels me to say, that in my opinion it is true, they were not free at the death of the widow. Certainly they are not to be discharged from the liability to be hired out to meet the charges on them prescribed by the will. And I do not think they were entitled to freedom unless they on being put to their election choose to be free. I am willing that the will shall be construed exactly as if the testator had said in terms, "I am indifferent, so far as my own wishes go (though I have no doubt he wished them to be free), whether my slaves are emancipated or not; but I wish them to have their choice of being free; and if they wish to be emancipated, I direct my executors to emancipate them, after raising from their hires enough to pay certain charges, and to raise a fund to defray their expenses to a land of freedom. If they do not choose to be emancipated, I direct them to be sold publicly." I maintain on authority, reason and analogy, such is the fair interpretation of the will; and that the negroes are entitled to their freedom on the terms (and only on the terms) thus prescribed by the will.

As to the first proposition, I might say, as was said in Elder v. Elder, 4 Leigh 256, by Judge Carr, "It is just as clear as any form of words could make it, that he intended his slaves should be emancipated if they chose to be, instead of to remain in slavery;" and by Judge Cabell, "The intention of the testator to emancipate his slaves is too evident to require argument." Judge Tucker says, "Of the intention (of the testator to emancipate) I think there can be no reasonable doubt."

Now in that case, as in this, there
158 was no express *emancipation. In that case it was inferred from the direction to send them to Liberia, a free state, if they chose to go; in this, if they choose to be free, they are to be hired to raise a fund to carry them "to a land of freedom." In this (making the case stronger than Elder v. Elder), it is not matter of inference, but it is expressly declared they shall have their choice of being emancipated or not. If any thing less than a clear, distinct, express emancipation by will, will be sufficient, this testator has shown the intention to emancipate if the slave desired it. It would be a useless waste of time to cite authorities to prove, that to show an intention to give an estate or emancipate a slave, express words are not necessary; but any words which show the intention, have the same legal effect as if that intention was expressed. It is not necessary to depend merely on the authority of Elder v. Elder; though certainly none higher, more venerable, or more entitled to respect, can be found, than the solemn, deliberate, well considered judgment of this court in the time of Carr, Cabell, Brooke and Tucker. If the judicial judgment of such a tribunal, formed with deliberation, and after argument by some of the most eminent lawyers in the state, upon a will in every essential particular like the one before us; a decision which was probably before the testator when he wrote this will; or before the person who wrote it for him, is not sufficient to settle the law of this case, I know nothing better calculated to destroy confidence in the administration of justice, or to unsettle and impair the rights of property or the security of liberty or life.

Presuming then that the court will have no difficulty in saying that the testator intended that his negroes should be emancipated by his executors if they made choice of freedom; and that such intention being ascertained from the will, it is the same thing as if he had said so in so many
159 words, I need say nothing more *in answer to the idea on the other side, that the will does no more than bequeath, that the slaves shall have the choice of saying whether they wish to be free or not. Of course if the testator intended nothing more, giving them their choice would be idle nonsense; their expression of it mere wind; the offering it to them, cruel and absurd mockery. When we find however that the true interpretation of the will is, that the testator has devised that if they express their choice to be free, then they shall be emancipated, we find that the whole argument on the other side has been built upon a false hypothesis, and every thing said in support of it becomes "idle wind," because wholly irrelevant to the question.

A great deal of labor and learning have been employed to prove that the legal status of a slave is that of a personal chattel; that he is mere property; that he can do no legal civil act, can make no contract, &c.: and all this for the purpose of showing that he cannot make himself free by his own choice; that he can have no effectual will on the subject, and cannot be invested with any power of emancipating himself. Whilst all this is true—at least to a great extent—for the purposes of the argument it is rendered wholly futile by the fact, that he is not in the case in question allowed to emancipate himself. The negroes in this case do not

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make themselves free, or continue slaves by their own choice. They are emancipated not by any choice of their own, or by any act of their own, but by the will of their master, who has a right by the law to emancipate them. They are free not because he has given them power to emancipate themselves (which it is conceded he cannot do), but because he has the right and has in effect declared that they shall be emancipated. They are property, and so far as concerns the right of emancipation, nothing but property. And it is because they
160 are property and *subject to the absolute power of the master to emancipate them or not, that when by his will he in terms or effect declares they shall be emancipated they are entitled to the freedom he confers on them by virtue of his power, not theirs; by his lawful act, not theirs. The executor emancipates them, not because they have any authority over him; not because their choice gives them the right to be free; but because their master and his testator has required them to be emancipated, on making their election.

It is true that the testator has chosen to make the power and duty of the executor in carrying into effect his will, that the slaves should be emancipated, to depend on the previous ascertainment of the wishes of the slaves themselves. But that does not prevent the emancipation being the act of the testator. If the will is to be construed as directing the emancipation, and the emancipation is by the will of the testator, how is it possible that the validity of the act of emancipation can be affected by the considerations or causes which induced the testator to emancipate his own slaves. It is, I presume, a matter of no importance how insufficient, or even how absurd or ridiculous may be the causes which influenced him, or the events on which he makes the emancipation to depend: His intention to emancipate would be none the less effectual, and the emancipation none the less his act.

If a testator by his will declared during the late presidental eleotion, If Fremont is not elected president of the United States, then I wish all my slaves to be free: Or, If I make a crop of one hundred bushels of potatoes, I wish all my slaves to be emancipated: Or, If my wife's cat kittens between this and Christmas, I will all my slaves to be free; otherwise not: In all these cases, I presume, if the wills were admitted to probate, the right to freedom, on the happening of the event, would
161 be clear; and would *be ineffectual if they did not happen. Yet it would hardly be contended, that Buchanan by defeating Fremont; the potatoes; or the cat by having her litter in the time prescribed, had emancipated the slaves; or that the bequest was void because one man cannot emancipate another man's slaves; because potatoes are merely property; or a cat has no legal status, and cannot do any legal civil act!!! And yet it might be with as much reason so argued. I mean to treat the learned and ingenious argument on the other side with all respect: but it seems to me they are fairly exposed to this reductio ad absurdum.

Nor does the exercise of this power in the mode pursued by this will, involve any inconsistency with the analogies of the law: but the contrary. Nothing is more common, nor more unquestionably valid, than for the owner of property to make his disposition of it by deed or will, depend on the choice or discretion of others: and even on the discretion and choice of others whose legal status is such as to disable them from disposing of their own property by deed or will, or from making a valid contract. A man may provide by deed or will, that his estate may be given as a particular person, though an infant or a married woman, may appoint by deed or will. He makes the choice of the infant or the married woman determine the destination of his own property. But this right of choice does not create a right of property in the donee of the power; nor is it inconsistent with the disability of the donee of the power, whether an infant or married woman, to dispose of their own property, or make contracts binding themselves. The appointees in such cases derive their estate not from the donee of the power, but from the grantor of the power. It is his estate that is given, not theirs. In like manner the giving the choice to slaves for the purpose of enabling the owner to determine whether he
162 will emancipate *them, confers on them no power to do any civil act, no capacity to make themselves free or slaves. Their expressed wish to be free is the reason which induces the master to emancipate them.

Still it is argued that there is something in the peculiar character of slavery, in the legal status of slaves, in their incapacity to do any civil act, or some thing else in the policy of the law, which forbids a man to give them the choice whether they wish to be free or not. I am at a loss to understand what public policy is opposed to his doing so. If a man desirous of giving freedom to his slaves, unwilling to exercise his unquestioned power of emancipating them whether they wish it or not, were to call them up and consult them about it, and decide according to their wishes expressed to himself, who could complain? Would not every body say that he was not only authorized to do so, but that it was a most humane and considerate course of proceeding? If he were to make a deed of emancipation in which he recited that he had offered to his slaves their choice of freedom; that some of them had declined it, but that others had expressed a choice of freedom; and that in compliance with their wishes he had proceeded to execute this deed of emancipation: Does any body suppose that the deed would be invalidated thereby? or whatever difference of opinion there might be as to the wisdom of permitting the wishes of his negroes to guide his action, that public policy would be op-

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posed to his course? There can be but one answer to these questions.

An owner of a slave has just as absolute a power of emancipation by will as he has by deed. His power and control over his property continues after his death, as fully as it did before; so far as he exercises that power by last will and testament. And surely he may invest his executor with the power of emancipation; and declare the same terms and conditions on which
163 *they shall be emancipated by the executor as he might have imposed on himself. If he may lawfully suffer his own act of emancipation to be determined by ascertaining the choice of his negroes in his lifetime, why may he not emancipate them subject to their choice, to be ascertained after his death?

I trust I have already shown that the legal validity of the act is not questionable on the ground that he thereby invests a slave with a power in or control over his emancipation inconsistent with his civil incapacity. Is there any thing inconsistent with the status of slavery in a moral point of view, in his wishes being consulted as a guide to his owner in deciding whether he will emancipate him. It is a great mistake to suppose that a slave is a mere chattel: that in regarding the master's legal or moral powers, rights and duties in respect to him, he is property and nothing but property. The whole civil as well as criminal law is full of rules and statutes recognizing a slave as a rational, moral and accountable human being, endowed with the feelings, passions and affections of human nature; capable of having both wishes and opinions respecting his own welfare; though restrained both by civil and criminal law, from expressing them in forms prohibited or condemned by the law. But subject to the rules growing out of a condition of slavery, or specific restrictions, there is nothing to prevent a slave from expressing a wish to have his freedom. He may unquestionably do so in response to the enquiry of his master; and has not, nor assumes, nor is invested thereby with any civil right, or exercises any civil act by doing so.

Slaves may be and frequently are enabled by their masters to do civil acts binding on their masters. They are not unfrequently, indeed constantly, authorized to act as agents of their owners in making contracts for their masters, and even for them-
164 selves by *his authority. They are daily invested with the custody and safe-keeping of their master's property, and even with the sale of produce, the collection of money, &c. &c. In short, the value of slaves would be very much impaired to their owners if they were incapable of doing any civil act even by the authority, or as agents of their masters.

An illustration or two will serve to show that slaves may be invested with the right of choice in respect to themselves; and that their masters may be bound by the exercise of their choice when authorized to choose for themselves. Nothing is more common than for masters, in deference to the feelings of their slaves, to send them out for hire, with written authority to choose to whom they will be hired for a year; and for the price he is willing to take. Can the master be compelled to hire him to whoever will give the price, or is the contract with the person chosen by the slave void because he cannot be invested with the right to choose his hirer, or because authorized by the master to make the selection?

I send my servant to a merchant tailor, with authority in writing to buy for himself a suit of clothes of any fashion or quality he chooses: Cannot I invest him with such a choice, and would I not be bound to pay for the clothes he bought?

There is nothing then in the status of a slave which prevents a master from giving him a right to make a choice even in respect to matters affecting his own comfort, or feelings or even caprice. And of all things there is the least objection to his being consulted about and allowed to choose whether he wishes to be free or not. The law gives the master the absolute and unqualified discretion to emancipate. He alone is to judge of the sufficiency of the reasons for emancipation. And in the eye of reason, and looking to the humane and patriarchal nature of the institu-
165 tion, *and the affectionate relations it creates between masters and their slaves, nothing can be more natural, and in accordance with its civilizing and humanizing tendencies, than that a master should not voluntarily, and still less that he should be required by law, when he breaks up their relations by emancipation, to do so without regard to the wishes of the slaves; and thus force them into freedom against their will or without consulting them. To talk about this being required by the policy of law, now when the statute has provided that a negro after being emancipated may come into court, and be made a slave on his own choice, is it seems to me both bold and desperate.

I feel that I owe an apology to the court for so protracted a discussion of this question, especially after the able arguments of Messrs. Branch and Crump, both representing the slaves. Some of these views, however, have not been anticipated by them, or at least have been presented now in a new aspect, and may possibly be acceptable to the court. The very elaborate arguments on the other side called for an extended reply, and the argument of Mr. Howard, which has been filed since those of Messrs. Branch and Crump, presented the argument on the other side in a somewhat new form, to which it was proper therefore that I should reply.

There is another reason for an apology for treating the question so gravely on principle; and that is, that the question is res adjudicata; and ought to be considered as not open for argument in this court; if it were doubtful as an original proposition. The cases of Pleasants v. Pleasants, 2 Call

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319, and the case of Elder v. Elder's ex'or, 4 Leigh 252, especially the latter, is a direct adjudication on the very question, and in every aspect of the argument. I will not occupy the time of the court in showing that the distinctions between the two
166 cases relied on by the other *side, do not exist, or that if they are distinctions they make no difference in principle.

In Pleasants v. Pleasants, it may be said the question, as to making emancipation depend on the choice of the slave, was not directly made and argued. But it is scarcely less authoritative for that reason. The right of the slaves to freedom was earnestly and zealously controverted both by Wickham and Randolph. If they who were seeking every possible and plausible ground of argument, did not resist the right on the ground that a choice was given to the slaves, it must have been because those eminent lawyers, one of them perhaps the ablest and the most astute lawyer the state ever had, were satisfied there was no force in such an objection.

In Elder v. Elder's ex'or, it is evident that the identical arguments relied on here, were urged by the counsel in that case; and certainly were considered by the court, and decided. Numerous cases have occurred since probably of the same sort, which have been executed in conformity to the case of Elder v. Elder, in submission to its authority. Numerous cases have since been adjudged by this court, in which Elder v. Elder has been cited; and no intimation has been given by the court, of its being regarded as not authority, or as open to review. It ought to be regarded no longer as an open question.

Robertson, for the appellant, in reply:

My associates have furnished elaborate arguments fully answering those presented by the opening counsel for the appellees. I shall endeavor to confine myself to the closing argument of Mr. Patton on the same side. My purpose is to avoid as far as practicable general and abstract discussions touching the civil condition or status of slaves, or the evils or benefits of negro slavery, and to argue the points
167 which arise *in this particular case, in reference to the rights of the parties concerned, under the law and policy of Virginia.

Mr. Patton discusses four questions:

The two first relate to errors conceded or rather affirmed by him to exist in the decree appealed from; one in emancipating, inadvertently no doubt, the slaves bequeathed to J. L. Poindexter; the other in refusing an account of certain property willed by the testator to his widow for life. It is enough to say, that I concur with Mr. Patton on both points, and ask that the decree may be so far reversed.

I may add here a further ground for reversal, namely, that the decree confers on the slaves absolute and unconditional freedom. In doing this it violates the express provision of the will which makes the freedom or continued slavery of the negroes to depend on their own wishes or preference. It is unsustained by precedent; and if the case of Elder v. Elder, relied on by the appellees, be law, it is in direct conflict with that case. Indeed this error also seems admitted by Mr. Patton.

The third question argued by Mr. Patton is, Are the slaves loaned to the wife entitled to freedom subject to the charges of the will? This, as he says, is the main question before the court.

I do not understand Messrs. Gregory and Pierce to contend (as Mr. Patton supposes) that the testator intended to give nothing more than a mere right of choice. Doubtless he intended that they should enjoy the full benefit of their choice. All that my associates or myself contend for is, that they cannot lawfully make the choice or election which the testator intended.

To allow a slave to be free at his election, my associates contend, is to allow him to free himself. Mr. Patton denies this, and insists that in the case before
168 *us, the slaves do not make themselves free, nor continue slaves by their own choice: they are emancipated, he says, not by their own act, but by the will of their master: they are free, not because he has given them power to emancipate themselves (which it is conceded he cannot do), but because he has the right, and has in effect declared, that they shall be emancipated. I give the argument of Mr. Patton entire. It is merely a verbal criticism. It is impossible to deny upon his own concessions, that the election of the slaves—the act of the slaves—is (upon his supposition that such an act is lawful) if not the sole condition, at least an indispensable condition to their freedom. Mr. Patton had told us previously that the slaves are entitled to freedom on the terms, and only upon the terms, prescribed by the will. They are not freed then, or emancipated by the will, standing alone; not freed or emancipated (again to quote his language), "unless they, on being put to their election, choose to be free." They could not certainly be free, we admit, but for the will of the testator; but it is equally true, upon the arguments and concessions of Mr. Patton, and I may add upon every sound principle of construction, they cannot be freed, unless they choose to accept the boon. It may therefore be well said, that it does depend upon their own act whether they shall be free or continue slaves. Their choice, their will, the will and choice of slaves, durante servitute, is in that view an indispensable element to make them free, in concurrence with the will of the testator himself.

In the same strain Mr. Patton repeats that the executor emancipates them (the slaves) not because they have any authority, not because their choice gives them the right to be free, but because the testator has required them to be emancipated, on making their election. This is in-
169 deed labor in vain. The slaves *can-

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not be free unless they make choice of freedom: they cannot be continued in slavery unless they make choice of slavery. Their choice is the indispensable condition which is to make them free, or continue them in slavery; and yet they are not made free or continued as slaves by reason of their choice. Would they be free, if they do not choose freedom? No. Mr. Patton admits it. Could they be continued as slaves but for their choice to be slaves? No. Mr. Patton does not pretend it. Yet it is the will alone, he would have it, that makes them free or slaves. Not so. It is the will undoubtedly in part; but it is also, in part, the performance of the condition precedent, by the objects of the testator's bounty, which in this, as in all other cases of precedent conditions, is essential and indispensable to confer and complete the title. The title is incomplete—ineffectual—unless and until this condition shall be performed—performed by the slaves. There must be, as already said, the concurrence of the will of the slaves (the will of slaves to make themselves free) with the will of their master. We do not deny that the will of the testator was necessary to entitle them to freedom; but we do insist that the will in this case is not sufficient alone to make them free, without their own consent—their own act.

Still further to justify this very subtle criticism, Mr. Patton goes on to say, that it is a matter of no importance how insufficient or ridiculous may be the causes assigned for emancipating slaves; and he tells us, by way of illustration, if a testator should make the freedom of his slaves to depend on the election of Fremont as president; on his (the testator's) making one hundred bushels of potatoes; or on his wife's cat kittening before Christmas—that in all these cases, the condition would be good and effectual.

Be it so. There is nothing unlaw-
170 ful, so far as I *perceive, ridiculous as they may be, in any one of these conditions. Even a cat, I presume, may lawfully have kittens. The law of God and nature allows it; and there is no clause in the constitution, or special statute, known to me, which forbids it.

But mark how dexterously Mr. Patton has shifted his ground. It is not the absurdity of the condition in this case, to which my associates or myself alone chiefly object, absurd as it is, but its illegality: the imposition of a condition to be performed by slaves, whereby they are to acquire or surrender, according to their own discretion and choice, a right or privilege—a condition at variance with the law and policy of the state, and utterly incompatible with the status of slavery; because it supposes in slaves, while slaves, the attributes and capacities of freemen. The illustrations given by Mr. Patton, are all instances of conditions lawful in themselves, and he asks that the same rule shall be applied to an unlawful condition as to a lawful one.

To make this more clear: The condition he puts that slaves should be free if Fremont should be elected, would have been perfectly lawful, and the emancipation effectual. But suppose the condition had been that the slaves should vote, and have their votes recorded, in Virginia, in favor of Fremont. Then the condition would have been against law and public policy; and it being a precedent condition, no title could ever arise. And this distinction is clearly illustrated by the case of Pleasants v. Pleasants. The slaves there were to be free on condition the legislature should by law permit them to live in the state as free persons: for they might have been freed by being sent out of the state at once. Moses v. Denegree, 6 Rand. 561. It seems to have been conceded on all hands, that had the will given them freedom on condition that they should remain in the
171 state (the law then forbidding *such emancipation), the condition would have been void. So in the case put—a condition that the slaves should be free if they would vote for Fremont, would, as the law then was, and now is, have been incapable of being performed, being contrary to the law of the state. But a condition that they should be free in future on voting, &c., whenever the law might authorize slaves to vote, might, provided such law should be passed, be entirely lawful and effectual. And the illustrations of Mr. Patton, so far from showing the absurdity of the argument of my associates, only serve to render more visible the error of his own.

Leaving his illustrations, the learned counsel falls back on the "analogies of the law," forgetting that in his only authority, it is expressly said, and very truly, by Judge Tucker, that no analogy whatever can be found. The instances of analogy to which the counsel refers, most forcibly illustrate the truth of Judge Tucker's remark, and demonstrate the fallacy of Mr. Patton's argument.

Infants, it is said, may execute powers requiring choice of objects, and discretion. But if so, not all infants can do this; not infants of very tender years; not infants at the breast; certainly not those in ventre sa mere.

Married women too may do the same. Ita lex. But married women may have sound legal discretion in the eye of the law, not only to do this, but many other acts requiring such discretion. They may take estates by deed or will. So may infants even in ventre sa mere, or idiots, or lunatics. They are all free persons, though under partial or temporary disabilities. To reason in favor of similar powers, rights or capacities in slaves, on the ground of analogy, is to plunge at once into a labyrinth of error.

If the illustration is of any avail to Mr.
Patton, it must be by showing that
172 these powers, &c., may exist *in slaves. Does he believe this? Does he seriously think a slave can execute a power of appointment, whereby an estate is

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to vest under the will of a donor, because such a power may be executed by a feme covert or an infant? Surely not; no more than he can make a contract, or, as even an idiot or lunatic may do, take a devise or legacy. And why? The want of legal capacity—of legal discretion—is an insuperable bar to the performance by a slave of any act whatever, requiring discretion, consent or choice, whereby he is to secure to others or acquire for himself any estate, right or privilege whatever. So perfect is this barrier, that he cannot even for a moment take by gift or devise so much interest in property as will give to his owner the right to claim it. It would really be a novel doctrine, but will be assuredly the next step, if Mr. Patton's arguments prevail, to hold that powers of appointment may be executed by slaves, or other acts lawfully done by them to vest property or rights in themselves and others.

But at last Mr. Patton more directly approaches the question on which this case essentially depends, namely, whether an election can be lawfully made by slaves to determine finally their own future status or destiny as slaves or freemen. Giving them their choice, to enable the owner to determine whether he will emancipate them, confers on them (says Mr. P.) no power to do any civil act; no capacity to make themselves free or slaves. Their expressed wish to be free is the reason which induces the master to emancipate them.

This is the position, and then comes another illustration: "If a man were to call them up and consult them about it (their emancipation), and decide according to their wishes expressed to himself, who could complain?" No one, I admit without hesitation. The thing being decided, the
173 act of emancipation carried *into effect, which is the case supposed, the slaves would be free, notwithstanding he may have made their freedom depend upon their own wishes. I go further: It matters not, as already said, how absurd the reason, nor how unlawful the act on which the freedom may have been granted; if it were carnal connection with a white woman, or for assaulting a white man, the grant being consummated, would be effectual, and the title to freedom a vested right. We do not deny that if this testator had actually emancipated his slaves, because they had expressed a wish to him to be free, or because they had said or done any other thing whatever, reasonable or absurd, lawful or unlawful, they would have been free. But he has not said this. His language cannot be tortured into any such meaning. The act which, if they can be free, can alone make them so, remains yet to be done. The emancipation is not consummated, and cannot be, unless they choose it. It is in vain to say that this choice, this consent or election, is not a civil act. What else is it? If a grant of an estate or privilege of any kind were made to a free person on condition that he would elect a trade or profession, or serve in the navy or army for two years; or a power to appoint by deed, &c., among legatees, &c., would not the election and the designation be civil acts? A slave owner might say to his slave, Put your cross mark to this deed or contract and you shall be free, and free him accordingly. But if he were to say in a deed, contract or will, my slave shall be free doing or performing any civil act in futuro, executing a deed or contract, or power of appointment, &c., the gift would be nugatory: It could never be enforced or perfected, because the acts themselves are, as already said, precedent conditions, incompatible with the condition or status of the slave, and such as presuppose him already endowed with the legal capacity of a freeman.

174 *Having argued that a deed actually made, whereby a slave owner emancipates his slave in compliance with the slave's wish—which we concede, being done, could not be undone—Mr. Patton advances a step further: An owner of a slave, he says, has just as absolute power to emancipate by will as by deed; and surely he may invest his executor with the power of emancipation on the same terms, &c., as he might have imposed upon himself. "If he may lawfully suffer his own act of emancipation to be determined by ascertaining the choice of his negroes in his lifetime, why may he not emancipate them subject to their choice to be ascertained after his death?" This is quite ingenious, but utterly fallacious: It has already been answered. An owner may consummate an emancipation in his lifetime upon any consideration he pleases, or without any reason or consideration whatever but his mere will or whim; and the act being consummated, will be effectual; but an emancipation to take effect upon any consideration or condition to arise or be performed by a slave in futuro, will not be valid if the condition be unlawful or cannot be performed. Thus, a man by will or deed may liberate his slave because he has children by a white woman; but he cannot by his will authorize his executor to liberate him on condition that he shall at a future day have such children.

He may give his slave freedom by a deed in his lifetime or by will; or may give the slave over to a third person, on condition that his wife's cat may have kittens or the slave herself may have a male child before that time. This parturition of the cat or of the slave is, in the course of nature, unprohibited by law, and in no way counter to public policy. But he can confer no such right on the slave, or on the third person, dependent upon the future choice, volition or election of the slave, because such
175 acts are civil acts, inconsistent *with the state of slavery and the law and policy of the state.

A man may call up his sons, and say to them, you shall have between you, Tom, Dick and Harry, as "Old Tom" shall desire, choose, or appoint: and on learning that desire, may consummate the gift by a deed

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on that express ground. But he cannot by his contract make a valid disposition of this kind to take effect in futuro. He cannot impose (as Mr. P. has it) any such terms binding on himself in futuro, or make a title to slaves or property of any kind dependent on the will or desire of a slave. In other words, he cannot confer on slaves the power of election or appointment, by word, deed or will, unless that new doctrine shall be now established, as it must be, if Mr. Patton's views shall be sustained by this court.

To say that giving slaves their choice between freedom and slavery confers on them no power to do any civil act, is a contradiction in terms—simply a denial of a matter of fact. To give them their choice (if legal) is to give them the power and right to choose—to exercise their will and discretion—the will and discretion of slaves—and to make that will a rule for the court, and the lawful foundation of divesting the property of others, and vesting new rights and privileges in themselves. What is a civil act, if an election—an election whereby the persons electing renounce a benefit or secure to themselves new rights and privileges, be not so regarded? a right and power, in the case before us, of fixing their future destiny, and that of their offspring: of elevating themselves from the condition of chattels to that of freemen: a right which imposes upon an executor, and upon the courts of the country, the duty of consulting with slaves and of being governed by their will. It is a legal solecism to speak of such election or renunciation as any thing short of civil acts—civil acts of the highest character.

176 *Mr. Patton misleads himself, in speaking of terms and conditions imposed by a master on himself in his lifetime, in relation to the emancipation of his slaves. A master might say to "Old Tom," that shall be your cabin during life. Your sons Tom, Dick and Harry shall live with you and work for you as long as you choose; and Old Tom might be permitted to enjoy these privileges as long as his master lived. But they would impose upon the master no obligation. He might recall or revoke them at pleasure. And if he should by his will give Old Tom permission to occupy the cabin, or to enjoy the society or services of the sons so long as he might choose, or to send them to Liberia, or go there himself, if he or they should choose, the bequests would all, in a legal sense, be nullities; provisions addressing themselves to the humane discretion of the executor, heir or devisee, but incapable of enforcement by or for the objects of the testator's bounty. Clearly the slave children could not be free by reason of the election or choice of a slave father: and yet the election must be as effectual to free them as to free himself; to free one slave as to free any other.

As bearing directly on these propositions, I refer to the case of Sawney v. Carter, 6 Rand. 173; and as still more apposite, that of Skrine v. Walker, 3 South Car. Equ. R. 262; and Stevenson v. Singleton, 1 Leigh 72.

It is true, that slaves are not mere chattels; but they are mere chattels in a legal sense, except, so far as the law may have given them legal rights, or subjected them, or others on their account, to legal responsibilities for their acts. Beyond that, slavery is an insurmountable barrier. The law makes them responsible for crimes; the law gives them the civil right of instituting suits for freedom; but none can believe for a moment that a slave could sue his owner or any free person whatever,

177 but for the express permission *of the statute. It is a right juris positivi only.

Mr. Patton says, they may be enabled by their masters to do civil acts binding on their masters. They may be his agents in making contracts; in having the custody of property, selling produce, collecting money, &c. Doubtless they may do all this: that is to say, they may do all that slaves are authorized by law or recognized usage to do in and about the business of their masters. These acts confer or constitute rights and obligations in the masters, but give no rights or privileges to the slaves. Indeed, slaves would be but of little value if most of these duties and services might not be performed by them. The ploughman must have charge of his plough and team: the herdsman of the cattle, &c.: the marketman or woman must sell the vegetables, &c., and receive the money if directed by the owner. It may be that the owner may be made liable for their acts when by his authority or usage he has induced others to trust to them on the ground of fraud. Upon the same principle that he might be liable if he were habitually to send a well-trained and sagacious dog with a basket to bring him meat from the butcher. Would that be in a legal sense a civil act of the dog? Or do any of the mechanical or menial duties enumerated by Mr. P. rise to the dignity of a civil act, or bear the remotest resemblance to a deliberate election, by which a slave is to acquire or renounce a right for himself, or secure or destroy one in third persons?

To show the utter inconclusiveness of all these, and all similar "illustrations" of Mr. Patton, suppose the testator to will that his slaves after his death should be allowed to have the custody of property, make contracts, buy and sell, &c., for themselves or for their future owners. Could the will in these respects be executed or enforced? Surely not: and why?

178 Simply *because such acts, however authorized or tolerated by the actual though revocable permission or acquiescence of the owner in his lifetime, are so contrary to the status of slavery, the rights of ownership in slave property, the public policy and laws of the state, that no court could give effect to any executory contract or disposition of the kind. It would be to create that prohibited intermediary state;

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that rejected anomaly of slaves possessing rights and exercising privileges exclusively pertaining to free persons. See Wynn v. Carrell, 2 Gratt. 227; Smith v. Betty, 11 Gratt. 752; Wood v. Humphreys, 12 Gratt. 333; Adams & als. v. Gilliam & als., 1 Pat. & Heath 161; Rucker v. Gilbert, 3 Leigh 8; Escheator v. Dangerfield, 8 Rich. S. C. Equ. R. 96.

After an elaborate argument on this question of election, Mr. Patton apologizes for discussing it at all, inasmuch as it is, he says, res adjudicata. He refers to Pleasants v. Pleasants, 2 Call 319, and especially to Elder v. Elder, 4 Leigh 256.

The sole reference to the question of election in Pleasants v. Pleasants, is an expression in the will of John Pleasants, that all his slaves shall be free if they choose it when they arrive at thirty, &c. But this is followed by an immediate declaration by way of explanation, "I say, &c., to be free at the age of thirty years," leaving out the qualifying expression, "if they choose it;" which doubtless was thrown in currente calamo, rather than as a condition or requirement of any distinct and formal election by the slaves. It was evidently regarded in this light, and as wholly unimportant, by the heir and executor who filed the bill; by all the counsel on both sides; by the defendants who opposed the emancipation; and by the whole court; for it is not once adverted to, either in the bill, or answer, or arguments, or opinions. If it had been regarded as a formal pre-
179 liminary condition, it must *have been noticed; and the court must either have dispensed with its performance, or pointed out the manner in which the election should be made. And yet notwithstanding their failure to do so, and the utter silence of the parties, their counsel and the court, to notice the question in any way, this case is referred to, as adjudicating it so authoritatively as to preclude all discussion.

I will suggest, as a sufficient reason why this question was not raised or noticed, the expressions in the will of Jonathan Pleasants, declaring that the slaves should be free at thirty, and adding, "or at least such as will accept thereof, or as his trustees, &c., might think fitted for freedom," &c., the condition was in the disjunctive, and was fully performed by the trustees in suing on behalf of the slaves. But be this as it may, it is enough to say that the point in question was neither decided nor so much as noticed by the court.

As to the case of Elder v. Elder, I remark:

First. That it is the only case in Virginia in which the question before us has been directly in the view of the court.

Secondly. That the opinions of the court, as before said, were uncalled for—mere obiter dicta. The executor and residuary legatee were both parties to the suit—the latter indeed the plaintiff. They consented that the slaves should have their election; and the order was made at their instance.

Mr. Patton speaks of the case as one argued by eminent counsel. The arguments of the counsel are not reported. It is evident they mainly relied on other grounds, namely, the intention inferrible from sending them to Liberia; the fact of an election to remain slaves—that this election was not made in twelve months—the condition of the issue—the ability of the Colonization society to pay the expense of transpor-
180 tation—*the hires—refunding bonds, &c. It does not appear that the question as to the lawfulness of the election was touched, or at least seriously argued by counsel.

Thirdly. The opinions and decree are not those of a full court, and being pronounced ex re nata, and unsupported by law or precedent, cannot be so far regarded obligatory as to preclude this court from a full consideration of the questions before it.

There is one circumstance in which the will before us is very peculiar, and differs from that in Elder v. Elder.

It does not merely present the alternative of liberty or slavery. The slaves are to have their choice whether they will be emancipated or sold publicly. The testator adds, "If they prefer being sold, and remaining here in slavery, it is my wish they be sold publicly, and the money equally divided," &c.

Now, their right is as perfect to choose the one alternative as the other. Suppose they reject the first and accept the last: They choose to be sold publicly. But suppose there are no debts, and the legatees all concur, with the assent of the executor, in a wish to divide the slaves in kind. In an ordinary case, this would be their clear right. Could that right be intercepted or controlled by the choice or election of the slaves, who declare they prefer being sold publicly? They might urge that the legatees were hard masters and mistresses; or meant to sell them privately to hard masters; and that this was the very reason which induced the testator to require, if they preferred being sold, that they should be sold publicly. Surely their will, their choice, could not stand in the way of any disposition or alienation, consistent with the lawful rights of the legatees, had no such choice been given to or made by the slaves. Yet there is no more reason why their choice should not decide the
181 mode of *disposition under the last alternative than under the first.

But this is not the only difficulty to be encountered by attempting to confer on slaves this civil privilege of election. Let us enquire into the manner in which the privilege is to be exercised.

A number of slaves of both sexes, and of all ages and conditions, are to elect whether they prefer being emancipated, or sold publicly as slaves.

At what age is the right to attach? Is there to be a distinction between adults and minors? There is no such thing as lawful age to be predicated of slaves. The condition of a slave of twenty-two is precisely the same as that of one of nineteen.

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If those under the age of twenty-one are to elect, is there to be a fixed and certain age prescribed by the court? or is it to depend upon the mental capacity of the slave? If a certain age, what is it to be? If to depend on adequate capacity, how and by whom is that capacity to be ascertained? If by commissioners, shall their judgment be conclusive, or will it be open to objection?

Who is to elect for infants of very tender years—at the breast perhaps? Is the court to stand in a parental relation to infant negroes; make them wards of court; appoint for them guardians, or prochein amies? Or will the court say, as was done in Elder v. Elder (by consent), that the mothers shall choose, not for the infants at nurse merely, but for all under twenty-one? And the fate of the slaves, and it may be of intelligent young slaves not quite one and twenty, and if females, that of all their future progeny, decided perhaps by a drunken, superannuated, or ignorant and reckless mother, who might be swayed either way for a bottle of whisky? If we are to be governed by analogy, why not leave the election for young slaves to their fathers instead of their mothers?

182 Why shall *not the husband choose both for his children and his wife—their mother?

It may be said the relation of husband and wife does not exist. Very true, in a legal sense; but there is that relation nominally, and analogy may as properly be resorted to as to this relation as analogies from age, there being no legal age, or analogies from the equitable jurisdiction of the chancery courts over infants, lunatics, guardians, &c.

If these analogies are to govern the case, suppose slavery be elected by the minors, or some one or more persons appointed to elect for them; and when they come of age, they raise the question that it was manifestly to their injury; or that the election was made or procured by fraud and imposition: May the truth and justice of the case be enquired into? or must they and their posterity forever be held in bondage under an election so procured? In cases of free infants, they are allowed until of age to elect. Ward v. Baugh, 4 Ves. R. 623. As to the adult slaves themselves, is it not every way probable, that many among them may be utterly incapable of making a sound and discreet decision?

And if any one be appointed, or the court itself shall undertake to decide this question, and exercise for the slaves what was intended to be a personal privilege in each and every one of them, where is the authority under the law of the land, under any adjudicated case, or under the will of this testator, to assume that power? The power on the one hand to condemn to perpetual slavery, or on the other to perpetual exile—the necessary consequence of emancipation. If the courts should undertake to do this, or authorize any one to do it for any one of the slaves of whatever age, they do not, of a certainty, execute the will of the testator, but make one for him.

It is absolutely certain that the testator meant his *slaves should choose for themselves. Their freedom or public sale was to be as they might prefer—not as might be forced upon them by any one else. Each was to have his or her own wish. Who can wish for them? No such power is vested in courts, nor commissioners, nor guardians, nor prochein amies, nor mothers, nor fathers, either by statute, or by the common law. Suppose there be infants of tender age without mothers or known fathers: who then is to wish for them? their grand mothers or grand fathers? perhaps in their dotage. Who are to choose or wish for idiots, if any, or lunatics, or doting old men and women? Say they are held incapable one or all, to judge for themselves, and that commissioners shall be appointed to choose for them: Does not the court know, and must they not act with discretion upon that state of facts—that our community hold different opinions as to the condition of slavery—some holding the slavery of the African race as the greatest of blessings, and freedom the direst curse that could be inflicted on them; and others the reverse. Which class should a court select or recommend? It is not unfrequent, where commissioners are to be appointed in a case, to select the counsel on both sides. Perhaps there could be no fairer mode. Take the counsel then in this case. Now turn to their arguments, and perhaps well known opinions. They must of course be guided by their own judgment and discretion as to what is for the benefit of the slaves, and not the wishes of the slaves; for if their wishes were to govern, it would be idle and absurd to appoint commissioners to act for them. Say at least they must decide for the very young, or very old; idiots, lunatics, &c.

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What might be the anticipated result? Why, that two would choose for them the blessing or curse of slavery, and the other two the blessing or curse of *liberty. I will not trace the question further, in calculating what might be the views of the court, or any umpire authorized to decide. Is it not most indisputable that this testator never would have entrusted to the court itself, or any others, to impose upon his slaves either the condition of slavery here, or freedom in exile, against their wishes, when he declined or refused to make choice for them himself? And must not the court recognize, in the difficulty and delicacy of allowing this privilege to slaves, so incompatible with their legal, moral and intellectual condition, or transferring it, against or without their consent, and against the intention of the testator, to others, who might designedly or unintentionally consign them and their posterity forever to misery—an unanswerable argument against the privilege or power itself?

184

To what stress was the court not driven in Elder v. Elder, when it entrusted this

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delicate power of deciding for infants, at random, to their slave mothers; and attempted to throw some guard around ignorant slaves, by an unprecedented order of privy examination; an order to examine slaves, and consult them—men and women—privily and apart from those having the ownership or custody of them: to exclude the owners and possessors from access to their own slaves. To what further extent is the law-making authority of the court to be carried to put in practice these new doctrines? And of what avail is this privy examination? The influence has perhaps been previously exerted. Their minds have been impressed by abolitionists perhaps on the one side, or interested claimants on the other. They have been menaced, frightened out of their propriety, by the terrors of the lash, at home; the dread of misery and starvation abroad; or poisoned by indulgence in whisky, and promise of more, till their wits, if any they had, are unsettled.

185 *Or the moment after the privy examination, they beg permission, from the same causes, to retract their consent.

It is a wise and just rule, that before parties entitled to an election, especially infants and persons of infirm minds, or liable to undue influences, shall be required to make it, that they should be well apprised of their rights, and the consequences of that election. Who is to instruct these ignorant slaves, to make them understand the benefits or evils of different plans for their future condition and residence? They are to be sent to a land where they can enjoy freedom. What land is that? Will the counsel name it? or commissioners? or the court? or shall the slaves go it blind? These are not fanciful obstacles. They are real difficulties which may or must arise in this or other cases, and which the court must therefore consider.

Finally. There being a devise over in this case, the condition precedent must be strictly performed; and if this cannot be, the devisees over cannot be deprived of their interest. It is an ineffectual, inoperative condition; and such conditions are regarded in law precisely as if no condition whatever was prescribed. Moses v. Denigree, 6 Rand. 561.

On the fourth question—that relative to the condition of the slaves born during the life estate—Robertson referred to a review of the authorities presented by him on the first argument of this cause. He contended that the question was conclusively settled by the case of Maria v. Surbaugh, as far back as 1824 (2 Rand. 282), which had been repeatedly recognized, and even as late as the recent case of Cullins v. Taylor, May 1855 (12 Gratt. 398): That the case of Lucy v. Cheminant, and other cases seemingly opposed to that of Maria v. Surbaugh, were founded on a shadowy distinction between wills, wherein the mothers were mentioned by name, and those

186 in which the names *were omitted: That in the case at bar the phrase was, "the negroes loaned my wife, at her death I wish to have their choice," &c.: And they being "all the remainder" of his slaves, after taking out such as were otherwise disposed of by the will, the effect and intention must be held to be the same, as if he had added their names—on the principle, id certum est quod certum reddi potest: That the only purpose of adding the names would be to designate the slaves intended; and any other sufficient designation would answer the same purpose: That the case, therefore, in effect fell directly within the very deliberate and emphatic opinion pronounced by Judge Green in the case of Maria v. Surbaugh.

He further suggested, that in Lucy v. Cheminant, the court were probably misled by the petition to suppose that the mothers were not designated by name, though their names, he thought, were to be found in the will exhibited in the record.

Upon the whole I submit that the decree, exclusive of errors on minor points, is erroneous:

First, in decreeing freedom to the issue born during the life tenancy.

And secondly, in declaring any of the slaves free, unless they could lawfully make, and should actually have made their election so to be.

DANIEL, J. There does not seem to me to be any serious doubt as to the intention of the testator in respect to the emancipation of his slaves.

The language of the main clause in the will bearing on the subject is as follows: "The negroes loaned my wife, at her death I wish to have their choice of being emancipated or sold publicly. If they prefer being emancipated, it is my wish they be hired out until a sufficient sum is raised to defray their expenses to a land where they can enjoy freedom; and if there should

187 *not be enough of the perishable property loaned my wife to pay off the legacies to Ann Lewis Howle and Georgianna Bryan, they are to be hired until a sufficient sum is raised to pay the deficiency. If they prefer being sold and remaining here in slavery, it is my wish they be sold publicly, and the money arising be equally divided between my sister Eliza Marshall, the children or heirs of my brother Carter B. Poindexter, my nephews William C. Howle and Daniel P. Howle, and my niece Nancy Bailey."

Here it seems to me is a plain and unambiguous tender by the testator to his slaves, of an election, at the death of his wife, to be emancipated or to be sold publicly as slaves. If they prefer to be emancipated, it is his will that after being hired out till the sums mentioned are raised, they shall enjoy their freedom. If, on the other hand, they prefer to remain in slavery, then it is his will that they remain slaves.

This view of the character of the bequest is not as I conceive affected by the subsequent clause of the will relating to the slaves. The office of that clause is, to em-

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power the executors to sell such of them as should be refractory, and, by consequence, to exclude them from the benefits of the previous provisions in favor of all the slaves loaned to the testator's wife. This exception to the bequest does not serve in any manner to declare or explain the nature of the bequest.

The codicil to the will does, however, I think, aid in showing that the idea of an election, by his slaves, with its consequences, was distinctly and prominently presented to the mind of the testator whilst engaged in planning and setting out the scheme of his will. For reading the codicil and the clause in the will respecting the emancipation of the slaves, together, we see that the testator, after tendering to the slaves, in plain terms, the option of being emancipated or sold publicly, proceeds not only to point out distinctly
188 *what is to be the effect of their election, in each of its aspects, on their own condition, but makes the measure and shape of bequests, to other objects of his bounty, dependent upon it. In case the slaves prefer to remain in slavery, they are to be sold, and the proceeds divided between the sister and certain of the nieces and nephews of the testator. On the other hand, if they prefer to be emancipated, the consequent disappointment of the legatees just mentioned, is to be compensated by a pecuniary legacy of a thousand dollars to be paid them by Jaqueline L. Poindexter, another of the testator's nephews, and obviously one of the most favored objects of his testamentary regard.

With these views of the will before me, I cannot undertake to say that there would not be as plain a violation of the testator's intentions in forcing emancipation and its consequences on his slaves, against their election to remain here in slavery, as there would be in withholding freedom from them, on their expressing a preference to be emancipated.

Looking to the subject matter of the bequest, it is true we may conjecture that it was probably the expectation of the testator that many, perhaps most of the slaves, would elect to be emancipated; yet when we see that no provision is made in the will for the support of any of them in the strange land to which, in case of their emancipation, they were to be transported, we may as fairly suppose that it was in the contemplation of the testator that there would be some of them, especially of the aged and infirm, who would prefer to remain in their present condition.

In this aspect of the case, what warrant have we for declaring that an election by the slaves to be emancipated is not at all essential to their receiving their freedom under the will of the testator? It is conceded that the effect of such a decision would be to work an absolute emanci-
189 pation of all the slaves, *in spite of a choice to the contrary by any or all of them; it being admitted by the counsel, who recommends this course to us, that in such a state of things the clause in respect to the election of the slaves to remain in slavery would be wholly void and inoperative. The will would, then (according to his view of it), of itself confer the franchise, and no act of the negroes would be allowed to defeat their manumission, or to operate their disfranchisement.

We cannot adopt the course recommended, without running counter to the plain and express directions of the testator. The whole tenor of his will shows that he intended the manumission of the slaves to depend on the performance by them of the precedent condition of electing to be emancipated. We have no authority for regarding this condition as mere surplusage, and declaring the slaves absolutely emancipated. If the condition is legal and possible, we are bound, in carrying out the testator's intentions, to allow to the slaves an opportunity to perform it. If, on the other hand, we find it to be illegal or impossible, we are equally bound to declare the bequest, dependent on its performance, void.

It is not competent for us, supposing the condition to be illegal or impossible, to pronounce, as the will of the testator, what we may conjecture he would have directed in respect to his slaves, had he foreseen the difficulties which now present themselves. Nor did we pursue any such course in the case of Osborne v. Taylor, 12 Gratt. 117. The slaves there were declared to be absolutely and unconditionally free, not because of any belief or conjecture on the part of the court that such would have been the testator's will had he known of the illegality of the condition which he sought to annex to the bequest of their freedom; but because, having by a distinct clause declared them to be free, he could not
190 then confer on them the capacity *of electing to disfranchise themselves, and assume a condition of qualified slavery.

On the supposition that an election in this case by the slaves to be emancipated, is illegal or impossible, the two cases, instead of calling for the same judicial result, furnish marked illustrations of the directly opposite legal effects of conditions precedent and conditions subsequent. There the election by the slaves to assume a state of qualified slavery, was essential to the defeat or destruction of the bequest of freedom; whilst here the election by the slaves to be emancipated is essential to give any force or validity whatever to the bequest. We are thus led necessarily to the enquiry, whether the condition precedent in this case be legal and possible, or otherwise.

Is the condition one which the slaves have the legal capacity to perform?

To answer the question, it is essential to institute a brief enquiry as to the true condition here of the class of persons to which they belong.

Chancellor Kent, in the second volume of his Commentaries, at page 253, in speaking of the laws of the southern states on the subject of domestic slavery, says, "They are doubtless as just and as mild as i

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deemed by those governments to be compatible with the public safety, or with the existence of that species of property; and yet in contemplation of their laws, slaves are considered, in some respects, as things or property, rather than persons, and are vendible as personal estate. They cannot take property by descent or purchase, and all they find and all they hold belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights. They are assets in the hands of executors for the payment of debts, and cannot be emancipated by will or otherwise, to the prejudice of creditors. Their condition is more analogous to that of the slaves of
191 the ancients than to *that of the villeins of feudal times, both in respect to the degradation of the slaves, and the full dominion and power of the master."

In the case of Emerson v. Howland, 1 Mason's R. 45, which was a suit brought by a master to recover wages for a mariner slave who by his own consent had been discharged from service, Judge Story, in delivering an opinion sustaining the action, uses the following language: "The slave could not consent to be discharged. The contract was entered into by the owner, in Virginia, and must be construed with reference to the lex loci contractus. In Virginia slavery is expressly recognized, and the rights founded upon it are incorporated into the whole system of the laws of that state. The owner of the slave has the most complete and perfect property in him. The slave may be sold or devised or pass by descent, in the same manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract, and the perpetual right to his services belongs exclusively to the master."

Judge Tucker, in his notes to his edition of Blackstone, vol. 2, p. 145, after defining social rights to be such as appertain to every individual in a state of society, without regard to the form or nature of the government in which he resides, proceeds to say that they include all those privileges which are supposed to be tacitly stipulated for, by the very act of association, such as the right of protection from injury, or of redress for the same, by such an action, and the right of acquiring, holding and transmitting property; that in all civilized nations all free persons, whether citizens or aliens; males or females; infants or adults; white or black, of sound mind, or idiots and lunatics, have their respective social rights according to the customs, laws and usages of the country. "Slaves only (he continues), where slavery is tolerated by
192 the laws, are *excluded from social rights. Society deprives them of personal liberty, and abolishes their right to property; and in some countries even annihilates all their other natural rights."

And in his Appendix to the same volume, p. 55, after remarking that the Roman lawyers look upon those only as persons who are free, putting slaves into the rank of goods and chattels, he says, that the policy of our legislature seems conformable to that idea. And he proceeds, "Slavery (says Hargrave) always imports an obligation of perpetual service, which only the consent of the master can dissolve." And "the property of the slave is absolutely the property of his master, the slave himself being the subject of property, and as such saleable and transmissible at the will of the master."

To the like effect are the remarks of Chancellor Dessausseure in the case of Bynum v. Bostick, 4 Dess. R. 266. He there expresses the opinion that the condition of the slaves in this country is analogous to that of the slaves of the ancient Greeks and Romans, and not that of the villeins of feudal times. That by the civil law which, in that regard, is the law of this country, they are incapable of taking property by descent or purchase. And that they are generally considered not as persons, but things.

In the case of Girod v. Lewis, 6 Martin's R. 559, it is asserted that slaves have no legal capacity to assent to any contract: that whilst with the consent of the master they had the moral power to enter into such a connection as that of marriage, the marriage, whilst they remain in a state of slavery, could be productive of no civil effect, because slaves are deprived of all civil rights. And in Graves v. Allen, 13 B. Monr. R. 190, it is declared that whilst they may, with the assent of their masters, have the physical use and enjoyment of property, they are incapable of be-
193 coming the *legal owners thereof; and that any devise to them except that of freedom, is void. See also Roberson v. Roberson's ex'ors, 21 Alab. R. 273; Neal v. Farmer, 9 Geo. R. 555; Skrine v. Walker, 3 Rich. Eq. R. (S. C.) 269; Thomas v. Palmer, 1 Jones' Eq. R. (N. C.) 249; Dred Scott v. Sanford, 19 How. R. 407, 475.

The general principles declared and illustrated by these authorities, have been fully recognized by this court, whenever it has had occasion to make any express declaration of opinion respecting them. The law empowering masters to manumit their slaves by deed or will, it is true, has on various occasions been most liberally interpreted in favor of the latter. Yet the court has uniformly refused to recognize any capacity in the slave to contract with his master for his manumission. Sawney v. Carter, 6 Rand. 173; Stevenson v. Singleton, 1 Leigh 172. And has also repeatedly denied the validity of bequests in which it has been sought by masters to clothe their slaves, whilst remaining in a state of slavery, with certain privileges and immunities, such as being allowed to remain in the service of particular persons, and receive wages for their labor, or to live on certain lands, working them, and enjoying the profits, freed from all obligation to render service to persons under whose care and protection they were left. As in Rucker's adm'r v. Gilbert, 3 Leigh 8; Wynn

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v. Carrell, 2 Gratt. 227: and Smith's adm'r v. Betty, 11 Gratt. 752.

It is argued, however, that the precise question under consideration has been decided by this court in the case of Pleasants v. Pleasants, 2 Call 319, and Elder v. Elder's ex'or, 4 Leigh 252.

It is true, that in each of the wills of John and Jonathan Pleasants, out of which the controversy in the first mentioned of these cases arose, expressions are used, which, if taken alone, would indicate a desire on the part of the testators that
194 the wishes of *the slaves should be consulted in respect to their manumission. But when we look to the general tenor and leading purposes of the two instruments, it is left extremely doubtful whether either of the testators designed that the operation of the bequests should depend in any measure on the choice of the slaves. No such question seems to have been presented by the pleadings; nor does there appear to be, either in the extended arguments of counsel, or in the opinions of the judges (delivered at much length), or in the decree of the court, any reference whatever to the option of the slaves. Any authority to be deduced from the case, as bearing on the question in hand, would, therefore, necessarily be the result of presumption or conjecture, and entitled, I think, to little if any weight.

In the case of Elder v. Elder's ex'or (it must be admitted), the will, to be construed and executed, does, in all its features disclosing a purpose on the part of the testator to leave the manumission of his slaves to their election, bear a very close resemblance to the will in the present case. The case, however, as an authority, is, I think, obviously open to some of the same criticisms that apply to Pleasants v. Pleasants. For it does not appear from the abstract of the bill, that the complainant raised any question as to the capacity of the slaves to make an election; the gravamen of his allegations being, that the slaves, conditionally emancipated by the will, had never elected to go to Liberia; but that on the contrary, the executor having fully explained the will to them, and their rights under it, they had declared they would not go to Liberia, and preferred to remain in Virginia in slavery; and that they had remained here for nearly two years since the testator's death: nearly a year beyond the expiration of the period within which they were, by the terms of the will, to make their election. It will be seen, too, that, during the progress
195 of the cause in *the court below, the complainant consented to an order of the chancellor appointing commissioners to examine the slaves, and to ascertain from each individual, and report to the court, whether they were, severally, willing to go to Liberia.

Of the arguments of the counsel, in this court, we have no report, and we are therefore without the means of ascertaining, except from intimations thrown out by the members of the court in the course of their several opinions, on what grounds it was sought to reverse the action of the chancellor. I think, however, that it may be fairly deduced from the opinions of the judges, that the stress of the case was on the questions, whether the testator could emancipate his slaves by directing them to be sent to Liberia, and whether, according to a fair interpretation of the will, the slaves were bound to make their election within twelve months after the decease of the testator. It was to these questions that the court mainly addressed their attention and remarks. I have failed to discover any observation in any one of the opinions of the judges, from which to raise the inference that the distinct question of a want of legal capacity in the slaves to make an election at all, was a matter of discussion before this court. In the state and shape in which the controversy apparently stood before this court, it might perhaps be going too far to say that the question could not have arisen. But in view of the circumstances which I have adverted to, it seems obvious to remark that for this court to have decided the case adversely to the negroes, on the ground that they had no legal capacity to make an election, would have been, to place itself seemingly in the ungracious attitude of being astute to set up an objection to the claim of freedom, which the appellant was not insisting on, and which, from his bill,
196 as well as from his *course in the court below, he did not appear disposed to raise.

From these considerations, whilst there are remarks in the opinions of some of the judges showing that there did not appear to them to be any thing illegal or impossible in the condition of an election by the slaves, the decision as an authority would yet seem to me to come far short of occupying the position on which it would have stood had it appeared that the question had been distinctly presented to, and adjudged by, the court.

Therefore, whilst entertaining the highest regard and veneration for the great learning, ability and general worth of the judges who decided that case, I cannot recognize the decision as imposing, on the exercise of our own judgments, those restraints which could result properly alone from a decision in which the question appeared to have been fully considered and unequivocally adjudged.

Nor do I think we should be deterred from a free examination of the question by apprehensions, lest, in the event of our coming to a conclusion at variance with the supposed authority of that case, we might inflict possible injury on fiduciaries and their securities, in instances where (it is suggested), relying on such authority, executors and administrators may have assented to like bequests. For I do not think that the case has ever been regarded by the profession as an authority, on the force of which the definitive settlement of the question could be safely predicated. Indeed, in the present case the Circuit court has so

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far disregarded the authority of Elder v. Elder as to declare the negroes free, without first instituting the proceedings that were had, in that case, to ascertain their choice; and their own counsel, in the argument here, have widely differed among themselves in respect to *the necessity or propriety of any such proceedings. 197
And I should suppose that the instances (if any) are extremely rare in which executors, acting under wills with such peculiar features, have failed to protect themselves, by seeking the advice of the courts, before committing themselves to the hazardous and irremediable step of assenting to the bequests of freedom.

Under these circumstances, I have conceived it to be my duty to regard the question as one to be tested by the general and well acknowledged principles pertaining to the subject, and not as one controlled by the influence of a special adjudication.

And when we so treat the question, it seems to me that there can be no longer any serious difficulty as to its proper solution.

When we assent to the general proposition, as I think we must do, that our slaves have no civil or social rights; that they have no legal capacity to make, discharge or assent to contracts; that though a master enter into the form of an agreement with his slave to manumit him, and the slave proceed fully to perform all required of him in the agreement, he is without remedy in case the master refuse to comply with his part of the agreement; and that a slave cannot take any thing under a decree or will except his freedom; we are led necessarily to the conclusion that nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election in respect to his manumission.

Any testamentary effort of a master to clothe his slave with such a power, is an effort to accomplish a legal impossibility.

No man can create a new species of property unknown to the law. No man is allowed to introduce anomalies into the ranks under which the population of the state is ranged and classified by its constitution *and laws. It is for the master to determine whether to continue to treat his slaves as property, as chattels, or, in the mode prescribed by law, to manumit them, and thus place them in that class of persons to which the freed negroes of the state are assigned. But he cannot impart to his slaves, as such, for any period, the rights of freedmen. He cannot endow, with powers of such import as are claimed for the slaves here, persons whose status or condition, in legal definition and intendment, exists in the denial to them of the attributes of any social or civil capacity whatever. 198

No conflict with these views is exhibited, by showing that the master may make his slave his agent, and bind himself to others by his acts. The only analogy between the position of a slave and that of a freeman employed in a like capacity is to be found in the fact that the slave and the freeman are both, for the occasion, the mere creatures of the master, and in the further fact that the power given is, in either case, revocable at his pleasure.

The resemblance between the condition of the slave and freeman, for the time, grows not out of the fact that the master has invested the slave, or recognized him as invested, with the characteristic powers of a free person, but out of the fact that the freeman has chosen to subject his own conduct and actions, for the occasion, to the will and control of another.

The agency of the slave, in truth, instead of affording any argument in behalf of the existence of his social or civil rights, is but an instance or illustration of the complete dominion of the master; of his entire control over all the powers and faculties of his slave; and of his right, consequently, to use him as an instrument or medium through which to make or execute contracts with third persons.

A master contemplating the manumission of his slaves might, no doubt, first ascertain their wishes on *the subject, and if he pleased, then proceed to shape his course accordingly; and it could form no objection to a deed or will emancipating them, should it appear on the face of the instrument that the act of manumission was in conformity with their choice. 199
But by establishing this proposition, the counsel for the appellees do not, it seems to me, reach any ground on which to found an argument in favor of the validity of the bequest in this case. In the case supposed, the act of emancipation is executed, complete and ended. It neither adds to, nor detracts from, its force that the master, in the execution of the instrument, consulted the wishes of the slaves. The operation of the instrument, there, is in no wise dependent on any thing that the slaves have done or are to do in the matter. But in the case before us, the operation of the will, as an instrument of emancipation, is made to depend on the choice of the slaves. In the case supposed, the master has fully manumitted his slaves. In the case before us, the master has endeavored to clothe his slaves with the uncontrollable and irrevocable power of determining for themselves whether they shall be manumitted. And in so doing, he has, I think, essayed the vain attempt to reconcile obvious and inherent contradictions.

In considering whether the legislature, in authorizing a master to manumit his slaves by will, could have contemplated, as valid instruments of emancipation, wills such as the one before us, a view of the many serious difficulties which, from obvious considerations, would most probably grow out of and attend the whole subject of an election by slaves, especially by such of them as might be laboring under the disabilities of infancy, idiocy or lunacy, furnishes to my mind a strong argument in favor of the negative of the proposition. It is difficult

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to suppose, in the opposite view, that the legislature would not have anticipated such difficulties, and made provisions for the regulation of the subject, instead of
200 embarking the chancery *courts, without guide, upon a new and extensive jurisdiction, which would needs be fruitful in litigation of the most perplexing, if not mischievous character.

On the whole, it seems to me that the provisions of the will respecting the manumission of the slaves, are not such as are authorized by law and are void, and consequently that the Circuit court erred in declaring the slaves and their increase to be free at the death of the life tenant.

In the absence of any proof or statement showing specifically the several kinds and descriptions of personal and perishable property which it is alleged were received by Mrs. Poindexter, and not returned or accounted for at her death, it would, I think, be premature to attempt to prescribe the rules by which to measure the extent of the accountability of her representative for such property, inasmuch as the rules which would apply to certain articles of such property, might not be properly applicable to others.

The views which I have expressed in regard to the bequest respecting the manumission of the slaves, leads to questions which thence arise between the next of kin and some of the legatees of the testator. But as none of these questions are distinctly and specifically raised in the bill, as it does not clearly appear that all the parties who may have an interest in these questions are now before the court, and as the case must necessarily go back, it seems to me it would be most proper to refer these questions also to the Circuit court, where all who have an interest in the subject, if not already before the court, can be made parties, and allowed an opportunity of presenting to the court more distinctly the several questions bearing on their respective interests.

MONCURE, J. I think the bequest contained in the will of John L. Poin-
201 dexter, that the negroes loaned to *his wife for life should at her death "have their choice of being emancipated or sold publicly," is a valid bequest, and emancipated them in futuro, upon a condition precedent.

Whether a master should have power to emancipate his slave or not, is a question which addresses itself to the legislative, and not the judicial department of the government. It was answered by the legislature by the act of 1782, giving the right to emancipate by will or by deed. That act, substantially, has ever since remained, and yet remains, in full force; modified only by the act of 1806, requiring slaves thereafter emancipated to leave the state.

That a master may emancipate his slaves, to take effect in futuro; as for instance, after the death of his wife; has been repeatedly adjudged by this court, and may now be considered as the settled law of the land.

That a master may emancipate his slaves upon a condition precedent, if there be nothing unlawful in the condition, is a proposition which will not be denied: as for instance, if his wife die without issue living at her death. This would not only be a lawful, but a reasonable condition, having for its object a provision for the issue, but for which the emancipation would be absolute. But no condition however unreasonable or even capricious would, on that account merely, be unlawful.

A master may emancipate his slaves against their consent. Why may he not make such consent the condition of emancipation? There seems to be nothing in the policy of the law which forbids his doing so. He may certainly, in his lifetime, consult the wishes of his slaves, and emancipate them or not accordingly. Why may he not direct his executor to consult their wishes, and emancipate them or not accordingly? Is not the one as much opposed to the policy of the law as the other? the
202 consultation by *the master, as much as the consultation by the executor?

It may be said that one is an executed, and the other an executory act of emancipation. But both are, in fact, executed acts. Both of them, so to speak, convey an estate or interest—a right to freedom; the one an absolute, the other a conditional right. The latter is as much an executed act as if the condition were wholly independent of the wishes of the slaves.

If the slaves were wholly incapable of making a discreet choice, and could merely guess what was best for them, there would be nothing in that incapacity which would make the condition unlawful. As before stated, a condition is not unlawful, merely because unreasonable or even capricious.

But slaves have some capacity to choose, though it may, generally, be very weak and imperfect. They are responsible for their criminal acts; and may incur, and have to suffer the heaviest penalty of the law. The moment they become free they are legally capable, without any increase of intelligence, of making contracts, buying and selling property, and doing other acts which require the exercise of mental faculties. And as the law now is, they may, by their own choice, return again to slavery. Slaves have certainly feelings and wishes which the master may be willing to consult in regard to their emancipation. To do so, is not to create that middle state between slavery and freedom, which is unlawful. It is merely to propound a question to a slave requiring a categorical answer. If he wishes to be free, he is made a freeman in an instant; but is made so by the act of his master, whether that act be executed before or after the expression of his wish; provided it be executed according to law. There is not a particle of time intervening between his slavery and his freedom; and so no particle of time in which he occupies a state between the two.

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203 *The dominion of a master over his slaves (as over his other property) may be exercised not only by an act which is to operate during his life, but by an act which is not to operate till after his death; and that dominion embraces the power of emancipation. He may emancipate them by deed or by will—in presenti or in futuro—absolutely or conditionally. If he attempt to violate the policy of the law, by creating a mixed state of slavery and freedom, his act will be void: or if he violate a rule of law, by annexing to a gift of the slaves a condition which is repugnant to the gift, the condition will be void. And his act of emancipation, whether absolute or conditional, in presenti or in futuro, by deed or by will, is in subordination to the claims of creditors, and to the obligation of the master to indemnify the community against the expense of slaves likely to become chargeable.

His legatees, certainly, cannot complain of his act or the manner in which he has seen fit to exercise it. They can claim only what he has chosen to give them; and cannot complain that he has given them his slaves only on condition that they prefer to remain in slavery. It was his to give them absolutely or conditionally; and it is theirs to refuse or accept them as given. There is nothing in the policy of the law which requires them to claim the slaves against his will. They certainly may, if they choose, give effect to it. Why should they not be compelled, if need be, to do so? Why should they be permitted, contrary to the general rule, to claim under and against the will? The intention of the testator, if lawful, must prevail. It is a law to all who claim under his will. They must do all they can to give effect to it.

It is argued, that slaves have no civil rights or legal capacity, and cannot therefore elect between freedom and slavery, though authorized to do so by their master.

204 The premises of this argument are certainly true, *at least as a general rule, but the conclusion is, I think, unsound. The fallacy of the argument (if I may be allowed to say so) consists in supposing that to make such an election would be to exercise a civil right or capacity. It is admitted that slaves are capable of receiving freedom, if conferred in the mode prescribed by law. It must also be admitted that it may be conferred conditionally. It was so conferred in the cases of Pleasants v. Pleasants, 2 Call 319; Elder v. Elder's ex'or, 4 Leigh 252; Dawson v. Dawson's ex'or, 10 Id. 602, and Hepburn, &c., v. Dundas, &c., 13 Gratt. 219. The right to confer it absolutely, which the law expressly gives, includes the right to confer it conditionally. The only question is, Whether such condition may be the willingness of the slave to receive his freedom. Why may it not? Slaves emancipated absolutely, still have an election between freedom and slavery. They may become slaves again under the provisions in the Code, p. 466, § 1, and p. 746, § 26; or under the act of February 18, 1856, Sess. Acts, p. 37. Why may not the master give them such an election directly, instead of giving it to them indirectly, by first making them free? Why should he be compelled to lose his property in such of his slaves as prefer to remain so, in order that he may give freedom to such as prefer it? It is said that a slave emancipated by an election given him by his master, would become free by his own act, and not by the act of his master. But this is not so. A slave can become free only by the act of his master; and the act must be done in a certain prescribed mode. When the act has been done in that mode, it may be made to depend on the willingness of the slave as well as upon any other condition. And whether made to depend on that or any other condition, it is the act of the master, and not the happening or performance of the condition which confers the right

205 to freedom. *The agency by which the condition is performed, is constituted by the master; and such performance is thus, in effect, his own act. There is nothing in the relation of master and slave, nor in the condition of slavery, which can prevent a master from adopting the agency of his slave for such a purpose. He can do so on the same principle on which it is admitted he may make his slave his agent for other purposes. Certainly nothing is better settled than that a slave cannot make a valid contract, even for his own freedom; and cannot enforce the execution of a promise of his master, even though it be to confer freedom upon him, and though the consideration on which it was made has been fully performed on the part of the slave. But it is equally well settled that a slave may avail himself of an act of emancipation duly executed by his master, whether such emancipation be absolute or conditional.

But if it can properly be said, that to make such an election would be to exercise a civil right or capacity, it would be as a mere incident to a capacity which is expressly given by law. A slave, as before stated, is certainly capable of receiving his freedom. And, if it be conferred in the mode prescribed by law; that is, by deed or will duly executed and recorded, he may propound such deed or will for probate, and may appeal from a sentence against him. He may sue in forma pauperis for his freedom, and may resort to a court of equity for relief when he has no adequate remedy at law. It is as competent for a slave emancipated on condition that he elects to be free, to make such election, as it is for a slave absolutely emancipated to propound the deed or will for probate, appeal from the sentence, or sue for his freedom. Such right of election is incident, as such remedies are incident, to the legal capacity of the slave to receive his freedom.

206 *If this were a new question, therefore, and especially if it be conceded, as it now must be, that emancipations in futuro are lawful, I would think the condi-

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tion lawful and the emancipation valid in this case.

But I regard the question as res adjudicata. Elder v. Elder, I think, has decided it. I would feel myself bound by that decision, even if I doubted its soundness. It is a case of the highest authority, having been argued by very able counsel, and having been decided by a unanimous court of four of our ablest judges, Tucker, Brooke, Cabell and Carr, Judge Green being absent from sickness. It was decided in 1833, a quarter of a century ago, and has ever since been regarded as a binding authority. On the faith of it counsel have advised, testators have made their wills, courts have construed them, and executors have carried them into effect. To disregard it now, and decide otherwise, may be attended with the greatest evils. The same reasons which are said to require us to disregard that case, seem equally to require us to disregard all the cases which decide that emancipations in futuro are lawful; and thus the whole law would be unsettled in regard to the emancipation of slaves.

But it is said that the question was not raised nor decided in Elder v. Elder; that the order in that case appointing "commissioners to examine privily and impartially all the slaves of the testator's estate, and to ascertain from each and report to the court, whether he or she was willing to go to Liberia," was made by consent of parties; and therefore that the question is not res adjudicata. The bill which was filed by the residuary legatee, alleged that the slaves conditionally emancipated by the will had never elected to go to Liberia; but that, on the contrary, the executor having fully explained the will to them, and their rights under it, they had declared they would not go to Liberia, and preferred to remain in Virginia in slavery;
207 *and that they had remained here for near two years since the testator's death. The executor, in his answer, stated that the other personal estate of the testator being inadequate to the payment of his debts, he had hired out the slaves for that purpose, and had not yet given them their election, though he had explained their rights to them, and did not doubt that when they should be allowed to make their election, they would prefer to go to Liberia. In this state of the pleadings the consent order was made. The commissioners reported that all of the slaves except one preferred to accept their freedom and go to Liberia; and the court decreed accordingly. The argument of the case in this court is not reported; and we can only infer what it was from the opinions of the judges. It is reasonable to infer that among the points argued, were those which were decided. It was decided, among other things, that such of the slaves as preferred to go to Liberia were effectually emancipated; and that it was unnecessary, to perfect their title to freedom, that they should elect to go within twelve months after the testator's death, provided they made such election when it was offered to them; or that the Colonization society should agree to defray the expenses of sending them; provided any person should agree to do so. It appears from the opinion of President Tucker, that these points were argued by counsel. It cannot be said with propriety that they did not arise in the case; or that it was improper for the court to decide them; or that the fact that the order before mentioned was by consent, affected the decision. If the slaves really had been unwilling to go to Liberia, as the bill alleged, a report of that fact by the commissioners would have put an end to the case; and therefore the plaintiff consented to an order appointing commissioners to ascertain the fact; but he did not intend thereby to waive any
208 right he might *have to the slaves, even though they might be willing to go to Liberia. Nor did the order have that effect. Carr, J., said, "In the construction of wills, we are to find out the meaning, the intention, the will of the testator; and unless that violates some principle of law, it must be carried into execution. He thought the intention plain in the case, and that it did not violate any principle of law. Cabell, J., said, "The intention of the testator to emancipate his slaves, is too evident to require argument; and it is equally clear that there is nothing illegal in the mode which he has adopted for the execution of that intention. Slaves may be emancipated by deed or will, at the pleasure of their owners; but they forfeit their freedom, unless they remove, within twelve months, beyond the limits of the commonwealth. It can therefore be no objection to the emancipation in this case, that the testator has directed it on the condition of their willingness to go to Liberia." Brooke, J., concurred. Tucker, P., said, "The first questions in this case turn upon the intention of the testator, and the legality of that intention. Of the intention, I think there can be no reasonable doubt." "As little doubt exists of the legality of this intention. The slaves were not to be free until they should be sent to Liberia; and they were not to be sent there against their consent. It is not perceived that there is any thing in the policy of the law, as there certainly is not in its statutory provisions, which forbids an emancipation by transportation to a free colony." None of the judges seem to have had any doubt upon the question, whether the conditional emancipation of the slaves was valid. Their decision of that question seems to be in accordance with the construction which has uniformly been put upon the act of 1782, and acquiesced in ever since its passage.

In Pleasants v. Pleasants, 2 Call 319, the wills of John and Jonathan Pleasants,
209 which were the subjects *of controversy, were made before the passage of that act, when it was not lawful to emancipate slaves in this state; and the case was decided shortly thereafter. The will of John was, that his slaves should be free if they chose it, when they arrived at

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the age of thirty years, and the laws of the land would admit them to be set free without their being transported out of the country, &c. The will of Jonathan was, that whenever the laws of the country would admit absolute freedom to them, his slaves should, on their coming to the age of thirty years, become free, or at least such as would accept their freedom. The court, consisting of Judges Pendleton, Carrington and Roane, unanimously held that the slaves were entitled to their freedom. Nothing was said in the case about the right of election given to the slaves. The great question was, Whether the doctrine of perpetuities and executory limitations applied to the case; and whether, according to that doctrine, the bequest of freedom was limited on a contingency too remote? It did not occur to the counsel or the court that an election between freedom and slavery could be given to slaves under the act of 1782. If it had, it is incredible that the objection would not have been taken or suggested by some of them. It is said, that the objection was not taken because the emancipation was considered to be absolute. It can hardly be supposed that the counsel for the claimants of the slaves would have admitted, without a question, that the emancipation was absolute, if it had been considered that its validity depended upon that. An order to take the election of the slaves was doubtless not applied for, because it was known that all would elect their freedom; especially as, by the act of 1782, they were not required to leave the state. I regard Pleasants v. Pleasants as a case of great importance on the question under consideration. It involved a large amount of property,
210 *and the freedom of a great many negroes. It was argued by very able lawyers, and decided by very eminent judges, who had the best opportunity of knowing the meaning and policy of the act; and it may almost be considered as a contemporaneous exposition thereof. No subsequent decision of this court has impaired the authority of the case; nor has the doctrine settled by it been changed by subsequent legislation; though there have since been several general revisions of our laws, and two conventions to amend our constitution.

That case was followed by Elder v. Elder, in which the question of the right of election was more distinctly presented by the will, and raised by the pleadings and proceedings, and in which, as we have seen, the most confident opinions were expressed by the judges in affirmance of the right.

Elder v. Elder, in its turn, was followed by Dawson v. Dawson's ex'or, &c., 10 Leigh 602, in which the testator directed all his slaves to be emancipated and sent to a country where slavery is not tolerated, if, within twelve months, they should elect to be emancipated on these terms; otherwise to be sold. It was tacitly conceded by all parties in the case, and by the court below and this court, that the right of election existed. The matter directly in controversy was the right to the Bell-Air tract of land, which by the codicil was given to "Benjamin Dawson, for the equitable support and maintenance of the slave population thereon." Benjamin Dawson claimed under the codicil an absolute estate in the land and slaves thereon. The court below decided that the codicil gave him only the use thereof, in trust for the support and maintenance of the slaves during the interval of twelve months or longer, which might elapse between the death of the testator and the election of the slaves; but that nevertheless, as the slaves were
211 not yet freedmen, *and would not be until they so elected, they therefore had no capacity to enforce against Dawson the trustee any accountability over and above their maintenance; and he was entitled to all the profits beyond, discharged of the trust, namely, the use of the Bell-Air estate until the slaves thereon should make their election. This court, consisting of Tucker, Brooke and Cabell, unanimously affirmed the decree. In doing so, they must have affirmed the validity of the conditional emancipation of the slaves; for otherwise the trust created for their support would have been void, and Benjamin Dawson could have had no interest in the Bell-Air estate. The most that can be said against the authority of the case is, that the question as to the validity of such an emancipation was not directly raised. The plain reason why it was not is, that neither the parties nor the counsel nor the court seem to have entertained any doubt upon the question. And this shows how uniform and universal has been the opinion which has prevailed upon the subject.

The principle thus recognized, affirmed and acted on in Elder v. Elder's ex'or, and Dawson v. Dawson's ex'or, has never since been questioned in this court, nor changed by legislation; though there have since been, besides many annual sessions of the legislature, one general revision of our laws, and one session of a convention to amend the constitution.

If public opinion has undergone any change as to the policy or propriety of authorizing masters to emancipate their slaves, or to emancipate them in futuro or upon condition, such change must develop itself in the action of the legislature, and not of the courts, whose business it is jus dicere, non jus dare, to expound the law as it is written and settled, and not as it ought to be, or as it may be supposed that public opinion would have it to be.
212 *There are certainly difficulties surrounding the subject of emancipations depending upon the choice of slaves. Who are to choose for such as are of too tender years to choose for themselves? is a question which it is difficult to answer; at least, to give an answer which will apply to all cases, or even as a general rule. But these difficulties are not of themselves sufficient to prevent the court from administering the law, if it can possibly do so. They

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were overcome in Elder v. Elder, and may be, perhaps, in most cases. There is nothing to indicate that they cannot be overcome in this case, as they were in that. If in any case they cannot be overcome, the intention, of course, must fail of effect. But whenever they can, they ought to be overcome; ut res magis valeat quam pereat. Whenever the law authorizes an act to be done, and a party bona fide endeavor to do the act according to law, the court should endeavor to effectuate his intentions.

The will in this case was written in November 1835, two or three years after the decision of Elder v. Elder, and probably with that case before the draftsman, or in his mind. But for that case, the testator might have emancipated the slaves absolutely. He was willing to do so, but did not wish to force freedom upon them against their will, and therefore gave them their choice, as that case decided he might lawfully do. Ought we now to frustrate his will, and award the slaves unconditionally to those to whom he gave them only on condition that the slaves reject the boon of freedom which he offers them? I think not.

I am also of opinion that the increase of the slaves born during the life of the testator's wife, are entitled to the benefit of the bequest. All the residue of his property, including negroes, is loaned to the wife for life. The issue of these negroes born during her life, are part of his property
213 and part of the negroes loaned *to her for life. The choice of being emancipated or sold is given to "the negroes loaned his wife, at her death," embracing of course, I think, the said issue. This construction seems to be sustained by many decisions of this court, which I need not cite.

I do not think that the clause directing his executor to sell any of the slaves loaned his wife, if they should prove refractory or hard to manage, affects the case in regard to such of the slaves as remained unsold at her death. This clause was inserted for the benefit of the wife, and to insure the good conduct of the slaves. Any of them might have been sold for misconduct during her life, and such would of course have been excluded from the number of those to whom the choice was to be offered at her death. But as to those who then remained unsold, the clause had performed its function, and they stood as if it had not been inserted in the will.

In regard to the other questions involved in this case, I concur with the majority of the court.

ALLEN, P., and LEE, J., concurred in the opinion of Daniel, J.

SAMUEL, J., concurred in the opinion of Moncure, J.

Judgment reversed.

214 *Tyler & als. v. Nelson's Adm'x.

January Term, 1858, Richmond.

1. **Chancery Jurisdiction—Settlement of Accounts—Case at Bar.***—A court of equity has jurisdiction in a suit by a high sheriff against his deputy and the sureties of the deputy to have a settlement of the accounts of several administrations upon estates committed to the high sheriff, and which went into the hands of the deputy. And the suit may be maintained though the deputy had settled the administration accounts before the probate court; and though the bill does not allege and it is not proved that the high sheriff had paid the balances reported to be due on the settled accounts, or any part of them.
2. **Revival of Suits—Case at Bar.**—Upon the death of the high sheriff the suit should be revived in the name of his personal representative, and not in the name of the personal representatives of the different estates, it being his suit against his agent.
3. **Deputy Sheriff—Liability of Sureties to High Sheriff.†**—The bond of the sureties for the deputy which was given during the first year of the sheriffalty, bound them to indemnify the high sheriff for the acts of his deputy during the continuance in office of the high sheriff. Their liability does not extend to indemnify the high sheriff for the acts of the deputy in relation to an estate committed to the sheriff during his second year of office.
4. **Same—Same.‡**—The sureties of the deputy are liable for the amount of bonds taken by the first administrator on the estate, and after his death

*Chancery Jurisdiction—Settlement of Accounts.—In Lafever v. Billmyer, 5 W. Va. 39, 40, after quoting at some length from the principal case as to the jurisdiction of equity courts in the case of accounts, the court said: "It seems to me that the views, thus given at length, of such eminent jurists, cannot be ignored, and that they conclusively settle the doctrine that courts of equity have jurisdiction of matters of account (1) where there are mutual demands, and *a fortiori* when complicated, (2) where the accounts are on one side and a discovery is sought that is material to the relief, and (3) equity having taken jurisdiction for discovery, will, to avoid multiplicity of suits, administer suitable relief. The reason for the doctrine is, not that the law affords no remedy, but that it is more complete and adequate in equity."

In Petty v. Fogle, 16 W. Va. 514, 518, the court, in its discussion of the jurisdiction of equity courts in matters of accounts, after citing among others the principal case and Lafever v. Billmyer, 5 W. Va. 39, said that the propositions above quoted from Lafever v. Billmyer, are in the main correct but that they do not embrace all matters of account of which equity should take jurisdiction. See also, the principal case cited along this line in Penn v. Ingles, 82 Va. 71; Yates v. Stuart, 39 W. Va. 130, 19 S. E. Rep. 425; *foot-note* to Coffman v. Sangston, 21 Gratt. 263. In this note there are many cases collected.

†See Munford v. Rice, 6 Munf. 81.

‡**Administrator De Bonis Non—Right to Bonds Taken by Executor for Property Sold.**—Bonds taken by an executor or administrator for property belonging to the estate of his decedent and lawfully sold by

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delivered by his administrator to the sheriff in the first year of his sheriffalty, as a part of the unadministered assets, after the estate had been committed to the sheriff.

5. **Same--Same.**§—Where an estate has been committed to the sheriff in the first year of his sheriffalty, the sureties of the deputy will be responsible for assets received by him after the end of the year.

6. **Evidence—Collection of Bonds by Deputy Sheriff.**—What sufficient evidence that deputy had collected the bonds which had been delivered to him.

This was a bill filed in the Circuit court of Charles City county by Nathaniel Nelson, late high sheriff of the county, against John C. Tyler, his deputy, and three others, his sureties. The plaintiff qualified as high sheriff of the county of Charles City in March 1837, and also in March 1838;
215 and John C. Tyler *qualified as his deputy in both years. In 1837 said Tyler executed his bond in the penalty of fifteen thousand dollars, with John Tyler, Henry Curtis and Henry L. Jones as his sureties, with the condition that John C. Tyler should faithfully perform and discharge the duties of the office of deputy sheriff in the said county of Charles City during the continuance in office of the said Nathaniel Nelson as sheriff, and should indemnify and save harmless the said Nelson from all loss or damage he might sustain in consequence of the actings and doings or omissions to act of the said John C. Tyler in the office of deputy sheriff. In the year commencing March 1837 the estates of John Bell and William E. Barrow were committed to the sheriff of Charles City for administration, and went into the hands of the deputy sheriff Tyler; and in May 1838 the estate of Samuel B. Parker was in like manner committed to the sheriff, and went into the hands of Tyler. Subsequently Tyler settled the accounts of administration on these estates before the court of probate, and there was found due to the estate of Bell seven hundred and sixty-two dollars and ninety-two cents, with interest on seven hundred and seventeen dollars and ninety-seven cents, part thereof, from the 15th of June 1839 until paid; to the estate of Parker, the sum of five hundred and ninety-two dollars and forty-two cents, with interest on five hundred and four dollars and twenty-one cents from the 17th of May 1842; and to the estate of Barrow, the sum of ninety-seven dollars and ninety-eight cents, with interest on sixty dollars and forty-one cents from the 1st of July 1840.

The bill contained the foregoing facts, and charged that Tyler had not paid over the said several sums of money either to the parties entitled as representing said estates, or to the plaintiff. And in an amended bill it was charged that they
216 had been demanded of *the plaintiff. The prayer was for the payment over of the moneys due on account of said estates to the plaintiff; that all proper accounts should be ordered; and for general relief.

In November 1844 the bill was taken for confessed as to all the parties, and there was an order for an account of Tyler's transactions as deputy sheriff of Nelson on the estates of Bell, Parker and Barrow, and the accounts theretofore settled by Tyler were to be taken as prima facie correct. This report was made in 1846, based upon the settlements before the court of probate: and the commissioner reported that Tyler had declined to attend him, saying that he had no other settlement to make but the one on record; and was willing that should stand as it was. The report was excepted to by the securities of Tyler, on the ground, 1st. That Tyler was charged in the account of Bell's and Parker's estate, with the amount of bonds taken by a former administrator, and after his death delivered by his personal representative to Tyler as unadministered assets. 2d. That Tyler was charged with some of these bonds which had not been collected; and among these was a bond of Mary Bell, a distributee of the estate of John Bell, for three hundred and fifty-six dollars and fifty-five cents. 3d. That he was charged with moneys which were received by him more than twelve months after his qualification in March 1837. These defendants afterwards filed their answer, putting the same questions in issue.

The plaintiff having died, the suit was revived in the name of his administratrix; and the cause came on to be heard in November 1854, when the court having had a statement made excluding the bond of Mary Bell from the charges against the administrator, overruled all the exceptions, and made a decree against John C. Tyler and his three sureties, for nine hundred and thirty-five dollars and thirty-six

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him and remaining uncollected at the time of the death of such executor may be claimed in equity by the administrator *de bonis non*. This proposition, laid down by GREEN, J., in Wernick v. McMurdo, 5 Rand. 90, is approved in the principal case (p. 224); Heffernan v. Grymes, 2 Leigh 523; Clarke v. Wells, 6 Gratt. 475; Hinton v. Bland, 81 Va. 596; the last case citing the principal case as authority. The reason is that, though the act of the executor may amount to a conversion at law, equity, looking at the *quo animo*, will follow the property and consider it still unadministered. Heffernan v. Grymes, 2 Leigh 523.

§**Sheriff—End of Term—Continued Liability.**—Where the statute makes no provision for transferring an estate committed to a sheriff for administration to his successor in office, he must proceed with the administration till completed, whether his official term has ended or not, and for an abuse of the trust, his securities, as well as himself, will be liable. This is well settled. Tunstall v. Withers, 89 Va. 895, 11 S. E. Rep. 565, citing the principal case and Dabney v. Smith, 5 Leigh 13. See also, Douglass v. Stumps, 5 Leigh 396; Mosby v. Mosby, 9 Gratt. 601; Cocke v. Harrison, 3 Rand. 494.

As to the liability of the sureties of the deputy to the high sheriff for the acts of the deputy after the end of the year, see Miller v. Jones, 9 Gratt. 584, 610.

See also, monographic *note* on "Official Bonds" appended to Sangster v. Commonwealth, 17 Gratt. 124.

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217 cents, with interest *on eight hundred and thirty-seven dollars and nineteen cents, a part thereof, from the 17th of May 1842 till paid, on account of Parker's estate; for the sum of four hundred dollars and seventy-five cents, with interest on three hundred and seventy-eight dollars and seven cents, from the 15th of June 1839, on account of Bell's estate, with liberty to ask further relief as to Mary Bell's bond; and for the sum of ninety-seven dollars and ninety-eight cents, with interest, on account of Barrow's estate; and also for the costs of the plaintiff. And it was ordered that no execution should issue upon the decree against the sureties, until one had been first issued against Tyler, and had been returned "no effects," either in whole or in part. From this decree the three sureties applied to this court for an appeal, which was allowed.

Lyons, for the appellant, insisted:

1st. That the sureties of the deputy sheriff were only responsible for his acts for the first year of the sheriff's term; the bond limiting it to that term. That this was the case as to the bond of the high sheriff, because his term of office is for a year only; Commonwealth v. Fairfax, 4 Hen. & Munf. 208; and so the bond of the deputy, when by its terms limited, as in this case, to the continuance of the sheriff in office, binds his sureties only for one year. Munford v. Rice, 6 Munf. 81.

2d. That the deputy sheriff had no authority to collect bonds payable to the first administrator, and therefore his sureties were not bound for the payment of the amount to the proper parties. Wernick's adm'r v. McMurdo, 5 Rand. 51; Cheatham v. Friend, 9 Leigh 580.

3d. That it was no where alleged in the bill that the plaintiff had been compelled to pay any thing on account of the moneys in the hands of Tyler; and 218 *therefore he could not aver any damage, so as to subject the sureties. Ray v. Clemens, 6 Leigh 600. And if he had any redress against them, his remedy was at law, and therefore the court of equity had no jurisdiction.

4th. That the suit should have been revived in the name of the representative of the intestate's estate, and not in the name of Nelson.

Nance and Johnson, for the appellee, insisted:

1st. That the bond of the sureties covered the transactions of both years in which Nelson was sheriff and Tyler was his deputy. Royster v. Leake, 2 Munf. 280. And that where an administration has been commenced by a sheriff, he is bound to complete it, even after his term of office expires. Mosby's adm'r v. Mosby's adm'r, 9 Gratt. 584. And if his deputy has formed the office, he is bound to complete it, and his sureties are bound for him. Id. 584; Dabney's adm'r v. Smith, 5 Leigh 13; Douglas' ex'or v. Stump, Id. 392.

2d. That though it is true that an administrator de bonis non cannot sue the prior administrator to recover assets which have been converted by the latter, he may sue where the assets are not so converted, for the recovery of them. But however this may be, the bonds having been transferred to Tyler, and he having received them, his sureties are liable. Mosby's adm'r v. Mosby's adm'r, 9 Gratt. 584.

3d. That it was not necessary that the plaintiff should have been compelled to pay the money before filing his bill. Mosby's adm'r v. Mosby's adm'r, 9 Gratt. 584; Cox v. Thomas' adm'x, Id. 323.

4th. That the suit was properly revived in the name of Nelson's administratrix. This suit was not brought as administratrix of any or all of the estates committed to him, but in his own right, to recover from his agent moneys for which he 219 was responsible, and for which *he was the proper person to account to the persons interested in these estates.

LEE, J. Of the questions raised in this case the first to be considered is that of the jurisdiction of the Court of chancery.

The case is one essentially for an account. It involves the transactions of the deputy as the acting administrator of three several estates. The settlement of the accounts was of course to be made upon the same principles which would govern if the settlement were made in a suit by creditors or distributees against the sheriff himself as administrator, because the deputy and his sureties would be liable to the sheriff in the same amount for which he was liable to those entitled to call him to account. And that the sheriff might have had a remedy by an action on the bond should not in this case exclude the equity jurisdiction. The remedy at law could not be as ample and complete as in equity. The accounts could not be as well settled by a jury as by a commissioner in chancery; and although there had been an ex parte settlement made in each case, yet it might still be shown upon a settlement under the order of the court, that the amounts really due and for which the high sheriff would be liable, were greater or less than those ascertained upon those ex parte settlements. In point of fact the court did forbear at the time of its decree to charge the parties with a large portion of the amount appearing to be due to the estate of John Bell upon a suggestion by the deputy that he had never collected the bond of Mary Bell which constituted a part of the assets supposed to have come to his hands. Moreover it might turn out (as indeed, it will appear in the sequel, it did turn out), that whilst the deputy might be liable upon all three accounts as claimed, the sureties might be liable for part only. But the law court could of course 220 *only give one judgment in the case and that for the amount due from those jointly bound; whilst the court of equity could adjust the several liabilities and decree against the deputy separately

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as well as against him and his sureties jointly, according to the ascertained liabilities; and thus to a certain extent multiplicity of suits by the sheriff for the short comings of his deputy would be avoided.

In these views I think the jurisdiction of the court is sufficiently vindicated.

But it is said that if the court could entertain the bill, yet that upon Nelson's death the suit was improperly revived in the name of his administratrix, and could only have been properly revived in the names of the administrators de bonis non of the several decedents Barrow, Bell and Parker. This suit however was not brought by Nelson as administrator of those parties, but in his own right, individually. It was not to recover specific chattels belonging to those estates nor assets still in the hands of the acting administrator and unconverted, but it was to obtain indemnity from the deputy and his sureties against the default of the former by holding him to an account of his transactions as acting administrator for which the sheriff was responsible to those interested in the several estates. I think it clear therefore that the suit was well revived in the name of Nelson's administratrix.

Another ground of error assigned is that a large portion of the moneys for which the sureties were held responsible was received by the deputy after the expiration of the year during which they became bound for his acts, and it is urged that they should not be charged with moneys received by him during the second year of Nelson's shrievalty.

It appears that the assets of the estate of the decedent Bell that came to the hands of the deputy sheriff, were received by him in the year 1837 which was the
221 *first year of Nelson's shrievalty; but that those of the estates of Barrow and Parker did not come to his hands until after the commencement of Nelson's second term. But the estate of Barrow was committed to the sheriff during the first year of Nelson's shrievalty and whilst Tyler was his deputy for whom as such the sureties had become bound to the sheriff. It was of course the duty of the sheriff to complete the administration whether before or after the termination of his office; and the deputy who had undertaken the duty of the acting administrator within the year was authorized and it was his duty to do what the sheriff himself could do after the expiration of the term, to bring the affairs of the estate to a close. The sheriff and his sureties are answerable for the deputy's administration as well before as after the expiration of his office, just as they would be for the acts of a deputy in relation to an execution levied by him during his term of office. Dabney's adm'r v. Smith, 5 Leigh 13; Douglas' ex'or v. Stump, Id. 392. And as the sheriff and his sureties would thus be answerable for the deputy's acts after the year, it would seem very clear that the sureties of the latter would be responsible for the same to the sheriff upon their bond. Miller v. Jones, 9 Gratt. 584, 610.

But although in this view the sureties of Tyler must be held responsible for the assets of the estates of Bell and Barrow that came to his hands whether before or after the expiration of the term commencing in 1837, I can see no ground on which they can be held liable for the assets of the estate of Parker which was not committed to Nelson as sheriff to be administered until after the expiration of the term for which they had become bound. The appointment of the sheriff was for one year and the term of the deputy under his appointment would not extend beyond that of his
222 *principal. The words therefore of the bond descriptive of the term for which the sureties of the deputy had become responsible for his acts to the sheriff, to wit "during the continuance in office of the said Nathaniel Nelson" must have reference to the actual duration of the office under which the bond was given and which was for the year beginning in March 1837. If this could be otherwise at all doubtful, it must now be regarded as settled by the decisions of this court. Commonwealth v. Fairfax, 4 H. & M. 208; Munford v. Rice, 6 Munf. 81. In the former case it was held that upon the construction of the act, the sheriff was to be annually appointed and commissioned, and should annually give bond conditioned for the faithful discharge of the duties of the office; and accordingly that where a sheriff had been commissioned for one year only, and had acted the second year without a new nomination and commission and without having renewed his bond, the sureties in his bond were not liable for taxes collected by him during the second year, notwithstanding the condition of the bond was for the faithful performance of his duties during his continuance in office. In Munford v. Rice it was held that the sureties of a deputy sheriff who had given bond (as in the case before us) to indemnify the sheriff were only liable for the transactions of one year and not for those of a second year during which the deputy had acted as such although the bond was conditioned for the faithful performance of his duties "during his continuance in office;" the court distinguishing this case from that of Royster v. Leake, 2 Munf. 280, in which a bond dated 15th November 1802 and conditioned for the faithful performance of the duties of the deputy during his continuance in office until November court 1804, was upon its particular phraseology held binding upon the sureties for the year
223 ending at *November court 1804 as well as the previous year, and until the winding up of the business lawfully committed to him as deputy.

This case falls clearly within the principles established by these cases and in its material facts is not to be distinguished from the case of Munford v. Rice.

As another ground of error the appellant insists that Tyler the deputy, had no authority to receive and collect bonds payable

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to the former administrators of Bell and Parker and therefore that his sureties were not liable for the amounts thus received.

This question is of no importance so far as it affects the estate of Parker, because as we have seen, the sureties are not to be charged with any thing received by Tyler on account of that estate, but it is important as it respects the estate of Bell because all the assets of that estate that came to Tyler's hands consisted of bonds turned over to him by the administratrix of Ladd the former administrator.

I think the position contended for by the counsel on this head cannot be maintained. It is true that an administrator de bonis non cannot sue the representative of a former executor or administrator either at law or in equity, for assets wasted or converted by him; such waste or conversion is an administration of the assets and the suit to recover them must be brought by creditor's legatees or distributees. Wernick's adm'r v. McMurdo, 5 Rand. 51. But all the assets not altered or converted by the former executor or administrator, are to be regarded as unadministered, and these pass to the administrator de bonis non and not to the representative of the first executor or administrator. 4 Bouvier's Bac. Ab. (ed. 1846) title "Executors and Administrators," B. 2, p. 24; Wankford v. Wankford, 1 Salk. R. 299, 306; Rutland v. Rutland, 2 P. Wms. 210; Attorney General v. Hooker, 2 P. Wms. 338. And choses in action may pass as unadministered assets to the
224 *administrator de bonis non. Thus if a bill of exchange be endorsed generally and delivered to an administrator for a debt due the estate of his decedent, and the administrator die after the maturity of the bill, the bill vests in the administrator de bonis non of the first decedent, and he may sue thereon. Catherwood v. Chabaud, 1 Barn. & Cress. 150, 8 Eng. C. L. R. 45. So a promise to an administrator will be a sufficient foundation for an action on behalf of the administrator de bonis non. Hirst's adm'r v. Smith, 7 T. R. 182. And upon a judgment recovered by an executor as such, the administrator de bonis non of the first decedent may maintain debt on a scire facias. Dykes & Co. v. Woodhouse's adm'r, 3 Rand. 287. Sometimes too where there might be said to have been a conversion at law it will not be so regarded in equity: as if the first administrator were to invest money of his intestate in the public funds or to transfer it from one fund to another. This as it showed no intention to make the money his own, would not be considered in equity a conversion. Per Carr, J., Wernick v. McMurdo, 5 Rand. 51, 57. And bonds taken by an executor or administrator for property belonging to the estate of his decedent and lawfully sold by him and remaining uncollected at the time of the death of such executor or administrator might be claimed in equity by the administrator de bonis non. Per Green, J., Ibid. 90. And this doctrine has been affirmed in a recent case in which it was held that where it is not necessary that the bonds should be retained by the representative of the first executor or administrator for the indemnity of the estate of his decedent, they might be confided as unadministered assets to the administrator de bonis non. Clarke v. Wells' adm'r, 6 Gratt. 475.

Now the bonds turned over to Tyler as the acting administrator de bonis non of Bell were taken payable to Ladd in his character of administrator of Bell; they
225 *were it is to be presumed for the proceeds of property of the estate properly sold; they were kept separate and treated as the assets of that estate; it was not necessary they should be retained by the administratrix of Ladd to indemnify her estate, and she accordingly turned them over to Tyler as administrator de bonis non to be administered by him. In such a case Judge Green would seem to be of opinion that such a delivery of the assets would discharge the estate of the deceased executor or administrator from any claim by creditors, legatees or distributees for the assets so turned over. Wernick v. McMurdo, 5 Rand. 51, 94. And where an administrator de bonis non has the right to recover unadministered assets of the first executor or administrator and actually receives them, certainly the payment of them would be good and would protect the estate of such first executor or administrator from any further liability for them.

The question discussed in the cases above referred to was as to the right of the administrator de bonis non to recover by suit assets in the hands of the previous executor or administrator. But if the assets have been voluntarily paid over to the administrator de bonis non and received by him colore officii as assets of the estate of his decedent, there can be no doubt of his liability to account for them. The intention to convert or not to convert is regarded as a criterion by which to determine the fact of conversion, and payment by the representative of the first executor or administrator to the administrator de bonis non, is to be taken as an admission that the assets had not been converted. Per Judge Green as above cited, p. 51, 94. And the question here is not whether the administrator de bonis non could recover of Ladd's administratrix, nor whether the latter was discharged by turning over the bonds to Tyler, but whether Tyler and his sureties are liable for the assets thus received. In
226 Mosby's *adm'r v. Mosby's adm'r, 9 Gratt. 584, administrator de bonis non of an estate was committed to a sheriff, and his deputy the acting administrator received the rents and profits of the real estate of the decedent; and it was held that whether the high sheriff was authorized to receive the rents and profits of the land or not, yet as the estate had been committed to him and his deputy had taken possession of the land and received the rents and profits, the high sheriff was bound to account for them; and that the deputy and his sureties were liable to the high sheriff for all rents and

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profits for which he was liable to those interested in the estate; the liability of the obligors in the deputy's bond as well sureties as principal, says Judge Moncure, "seems to follow as a necessary consequence." Ibid. 584, 610.

The case just cited I think covers in principle the whole ground of the present case, and more, for I think the reasons for holding the sureties responsible in this case are even stronger than those in the former.

Another ground of error assigned is that there is no proof that the bonds received from the former administrator had been paid to or collected by Tyler. The bonds were turned over to him by the administratrix of Ladd in July 1837 and were all due on the 1st of August in that year. They were delivered to him for the purpose of being collected as assets of the estate of Bell and it was his duty to proceed to collect them without unnecessary delay. He settled the account of the administration on the 27th July 1843, in which he charged the administrator with the whole amount of these bonds as of the day on which they fell due. He made no suggestion that any of them had not been or could not be collected. He never at any time surrendered or offered to surrender any of them to Nelson, nor did he produce them before the commissioner when he settled the account in 1843 or
227 afterwards under the *order of the court in this cause in 1846; and when called on by the commissioner when he was about to make the last settlement, he stated that he had no other settlement to make than the one of record and was willing it should stand as it was. And when the decree was about to be pronounced, he made no objection to being charged with any of these bonds except the one on Mary Bell which he then for the first time alleged he had not collected. That bond was accordingly reserved by the court by its decree. I think the proof that he had collected all the rest was most satisfactory if not conclusive.

The last objection to be noticed is that there is neither allegation nor proof that any recovery had been had of the sheriff, and therefore he had no right to recover of the sureties of the deputy. It is true it is not alleged that any judgment or decree had been rendered against the sheriff, nor that he had paid the amount due. Nor was it necessary it should be. It was sufficient if it was alleged and proved that by the transactions of the deputy as the acting administrator, the high sheriff had been rendered liable to those interested in the estates. That this is sufficiently done seems clear. It is alleged and proved that Tyler settled the accounts of the estates as required by law, in obedience to the orders of the County court of Charles City, and those settlements were returned to the court and ordered to be recorded as the law directs. They showed the balances due from Nelson the administrator and rendered him liable for the same to those entitled to the assets. That the true amounts might have been shown by proper proceedings, to be greater or less than those ascertained by the settlements did not impair their legal effect. Unless and until so shown, those amounts were to be taken as they stood, and the settlements constituted a sufficient basis of recovery by those entitled against the
228 high sheriff, and by *him against the deputy and his sureties. That it is not necessary the sheriff should have actually paid the amount for which he is liable in such a case sufficiently appears from the case of Miller v. Jones, 9 Gratt. 584, 609, in which the sheriff was permitted to maintain his action against the deputy and his sureties although he had not paid any part of the amount for which he had been rendered liable by the default of the deputy. The condition of the bond in that case as stated by Judge Moncure in his opinion, was perhaps somewhat different from that of the bond in the present case. Still I apprehend that as Tyler had by his acts, as deputy, rendered Nelson liable to a recovery of the amounts appearing due on the accounts stated, there was a sufficient breach of the bond to sustain his right to seek the indemnity which it was intended to provide.

I think therefore there was no error in the decree except in charging the sureties of Tyler with the amount ascertained to be due to the estate of Parker; and am of opinion to reverse so much as makes them liable for that amount, and in lieu thereof, to render a decree for the same against the deputy, John C. Tyler alone, and in all other particulars to affirm the decree.

The other judges concurred in the opinion of Lee, J.

Affirmed in part, and reversed in part.

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229 ***Andrews v. Avory & als.**

January Term, 1858, Richmond.

[73 Am. Dec. 355.]

1. **Administration Granted—Wrong Exercise of Jurisdiction—Effect.***—Administration granted where the deceased lived and died out of the state, and left no estate within it, is not void.

***Administration Granted—Wrong Exercise of Jurisdiction—Effect.**—The principal case is directly in keeping with Fisher v. Bassett, 9 Leigh 119. In that case (Fisher v. Bassett) a corporation court granted an administration of the estate of a foreigner, who died abroad, and who had no residence in the corporation at the time of his death, and had no estate of any kind there, so that, in truth, the *state of facts* were not such as to give the court jurisdiction to grant administration in *that particular case*. But the court held, as it did in the principal case, that such a grant of administration was not a *void* but only a *voidable* act.

This decision and that of the principal case were approved in Holmes v. Oregon, etc., Ry. Co., 5 Fed. Rep. 530.

The ground upon which these decisions are based is that, where a court has general jurisdiction

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2. **Administrator—Liability of Sureties—Case at Bar.**†—An administrator appointed in Virginia, whose intestate lived and died in North Carolina, and left no estate in Virginia, goes to North Carolina, and without qualifying there, takes possession of the assets, and brings them to Virginia. His sureties in Virginia are liable for his faithful administration of these assets.

3. **Same—Acting as Commissioner—Liability of Sureties.**‡—The intestate owing few debts, and the administrator having paid them, without selling the slaves, a suit is brought in the County court in the name of some of the next of kin against G, the administrator, not as such, but as one of the next of kin, and two others, infants, stating that the debts are paid, and that from the number of the slaves and of the next of kin, the slaves cannot be divided, and asking that they may be sold. The defendants answer, admitting the facts, and G is appointed a commissioner to sell the slaves, and divide the proceeds among the next of kin. He does sell at public auction, but he does not distribute the proceeds. His sureties are not responsible for the proceeds of the sale of the slaves; he having sold them as commissioner of the court, and not as administrator.

This was a suit instituted in the Circuit court of Mecklenburg in April 1847 by Rebecca Avory, the mother, and others, the brothers and sisters of William T. Avory deceased, against George W. Avory as administrator of William T. Avory, and in his own right, and Henry M. Spencer and Robert Andrews, his sureties in his official bond, for an account of George W. Avory's administration, and for payment of what might be found due to the plaintiffs.

William T. Avory died in the county of Granville, North Carolina, in the early part of the year 1840, intestate and unmarried. He appears to have moved to
230 *that county from the county of Mecklenburg, in the state of Virginia, about a year before his death, and all his next of kin (except perhaps one) lived in Mecklenburg: and in March 1840, George W. Avory qualified as his administrator in the County court of Mecklenburg, and executed a bond in the penalty of four thousand dollars, with Spencer and Andrews as his sureties.

At the death of William T. Avory, his whole property, so far as this record shows, was in the county of Granville, North Carolina, and consisted of two slaves, some personal property, and debts. The personal property was sold by George W. Avory in Granville county, and the proceeds and debts collected amounted to four hundred and fifty-five dollars and thirty-six cents of principal, after paying the debts due from the estate, which were few in number and small in amount. There was one debt alleged to be due to the intestate, but the only proof of its existence was by one of the distributees, who was excepted to as an incompetent witness.

At the May term 1840 of the county court of Mecklenburg, the same persons who were plaintiffs in the above mentioned suit, were plaintiffs in a friendly bill and answer, in which they state that William T. Avory

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in regard to probates and the granting of administrations, though it may err in taking jurisdiction of a *particular case*, yet, since it has jurisdiction of the whole subject-matter, its order in *that case* is generally not *void*, but only *voidable* on citations or appeal and can never be questioned collaterally. This principle of law is established by Fisher v. Bassett, 9 Leigh 119; Burnley v. Duke, 2 Rob. 129; Schultz v. Schultz, 10 Gratt. 378 *et seq.*; Cox v. Thomas, 9 Gratt. 328; Hutcheson v. Priddy, 12 Gratt. 90; and approved in the principal case.

This specific proposition recognizes, and naturally and legitimately grows out of, the broad general rule—which seems established beyond controversy, in this state at least—that where a court has jurisdiction of a given subject-matter, *i. e.* jurisdiction of cases *ejusdem generis*, and of the parties, though the *facts* do not give it jurisdiction of a *particular* case, yet its judgment in that case is not void, but is conclusive until set aside by some proceeding in the same or an appellate court; it cannot be impeached in any collateral proceeding. For a collection of the Virginia and West Virginia cases upholding this doctrine, see *foot-note* to Gibson v. Beckham, 16 Gratt. 321, and the *foot-notes* there referred to. See also, in accord, the cases cited in the last preceding paragraph; Smith v. Henning, 10 W. Va. 597; Hall v. Hall, 12 W. Va. 1; Patton v. Merchants' Bank, 12 W. Va. 607; Northwestern Bank v. Hays, 37 W. Va. 475, 16 S. E. Rep. 561; Withrow v. Smithson, 37 W. Va. 757, 17 S. E. Rep. 316; First Nat. Bank v. Hyer, 46 W. Va. 13, 32 S. E. Rep. 1000; Miller v. White, 46 W. Va. 67, 33 S. E. Rep. 332. See 17 Am. & Eng. Enc. Law 1047 *et seq.*; 12 Enc. Pl. & Pr. 114 *et seq.*

Same—On Estate of Living Person—Effect.—In laying down the proposition in the second paragraph of this *foot-note*, it was said that the order is "*generally* not void"; for there are—as laid down in the principal case—a few exceptions to this rule. In Scott v. McNeal, 14 Sup. Ct. Rep. 1111, 154 U. S. 34, the principal case is cited as authority for one of these exceptions *i. e.* that administration granted on the estate of living person is *void* and *not voidable*.

Foreign Administrators—Suits by and against.—In Crumlish v. Shen. Val. R. Co., 40 W. Va. 650, 22 S. E. Rep. 99, it was said: "A foreign personal representative cannot sue or be sued outside the state granting him authority. Hull v. Hull, 26 W. Va. 15; Vaughan v. Northup, 15 Pet. 1; Bart. Ch. Prac. 152; Dickinson v. McCraw, 4 Rand. (Va.) 158; Story, Confl. Law, § 513; Dixon v. Ramsay, 3 Cranch 319; Fenwick v. Sears, 1 Cranch 259; 1 Lomax Ex'rs 121; 1 Rob. Prac. (new) 161; *Andrews v. Avory, 14 Gratt. 229;* 1 Lomax Ex'rs 142; Doolittle v. Lewis, 7 Johns. Ch. 45; Fugate v. Moore, 86 Va. 1047, 11 S. E. Rep. 1063. The fact may be pleaded in abatement or in bar. Noonan v. Bradley, 9 Wall. 394." See also, in accord, Oney v. Ferguson, 41 W. Va. 571, 23 S. E. Rep. 711.

†**Administrators—Liability of Sureties.**—See the principal case cited in Leach v. Buckner, 19 W. Va. 44, as to the proposition laid down in the second head-note.

‡**Same—Acting as Commissioner—Liability of Sureties.**—See the principal case approved in Odell v. Howle, 77 Va. 865.

See monographic *note* on "Executors and Administrators."

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had died leaving two slaves, and other personal property. That George W. Avory qualified as his administrator, and had paid all the debts and liabilities thereof, which was effected without the sale of his slaves. That the plaintiffs and George W. Avory and an infant brother and sister were the next of kin and entitled to the estate; that from the number of distributees and number of slaves, it was impossible to divide the latter, and they therefore pray for a sale, and a division of the proceeds. George W. Avory and the two infant children were made parties defendants.

There was an answer by George W.
231 Avory and the *infant children, by said Avory as their guardian ad litem, specially assigned them by the court, in which they admit the statements of the bill, and are willing that the court shall decree according to its prayer.

The cause was heard at the same term, when the court made a decree, by which George W. Avory was appointed a commissioner, and was directed to sell the slaves to the highest bidder, upon a credit of twelve months, collect the money when due, and after defraying the expenses attending the same, divide the balance into seven equal parts, and pay one to each of the distributees; and make report to the court in order to a final decree.

No other proceeding in the court seems to have been taken until May 1847, when there is an entry that, on the petition of Rebecca Avory, and three others, the plaintiffs in the suit, the plaintiff is required to amend his bill and make them party defendants; and the order of May 1840 was set aside, and the cause sent to the rules for further proceedings.

It was at the rules in May 1847 that the bill in the present case was filed. This bill, after stating the death of William T. Avory and the qualification of George W. Avory as his administrator, charged that William T. Avory was not at all indebted at the time of his death, yet the administrator had sold the whole estate, and had appropriated the proceeds to his own use. And it was charged that the slaves were sold by him under some pretended order obtained by him from the County court of Mecklenburg under some false pretext, without the knowledge or consent of the complainants; which order was afterwards set aside by the said court.

George W. Avory was proceeded against as an absent defendant; and it appears that he was insolvent. Spencer and Andrews answered the bill. They say that previous to the qualification of George
232 W. Avory *as administrator of William T. Avory, he had sold the perishable part of the estate of his intestate in North Carolina. They state the proceedings in the suit in the County court, the decree for the sale of the slaves, a copy of the record of which case they file as an exhibit; and insist that George W. Avory sold the slaves as commissioner of the court, in Clarkesville, with the knowledge of all the distributees, and in the presence of a part or all of the plaintiffs, one of whom purchased one of the slaves, gave his bond for the purchase money, and paid it to George W. Avory. And that the plaintiffs never made any objection to the proceeding until George W. Avory had become insolvent and had absconded.

The account was referred to a commissioner, who made a report charging the administrator with the personal property sold and debts collected in North Carolina, also with the price of the two slaves, and with the amount of a debt which one of the distributees who was examined as a witness, stated that he owed to the intestate and paid to the administrator.

The sureties excepted to the first charge, on the ground that these were North Carolina assets sold there, and that William T. Avory having died in North Carolina, and having no property in this state, the qualification as administrator here was void. To the second, on the same ground, and also on the ground that the slaves were not sold by George W. Avory as administrator, but as commissioner. And to the third charge, on the ground that the witness was a distributee, and therefore incompetent from interest to prove the charge: And although he had released his interest since his testimony was taken, that did not remove the objection to the evidence.

The evidence showed, that the personal property except the slaves was sold in North Carolina; and it did not appear whether or not there had been administration
233 *in that state on the estate of William T. Avory. The slaves were brought from North Carolina after the decree was made for their sale, and were sold at public auction in the town of Clarkesville in Mecklenburg county, and one of them was purchased by one of the distributees. It did not appear whether or not any other of the distributees were present.

The cause came on to be heard on the 15th day of September 1854, when the court held that George W. Avory was chargeable as administrator for the proceeds of the sale of the slaves; but that he was not chargeable with the debt testified to by one of the distributees; and therefore overruling the exceptions to the first and second charges, and sustaining the exception to the third charge; the court made a decree for the amount thus ascertained to be due from the administrator against George W. Avory, and his sureties in favor of the several distributees. From this decree Andrews, one of the sureties, applied to this court for an appeal, which was allowed.

Thomas Howard and Grattan, for the appellant, insisted:

1. That the sureties were not liable for North Carolina assets. That the question was not whether a foreign administrator could be sued here, about which there was a diversity of opinion; Story's Conf. Laws, § 513; Vaughan v. Northup, 15 Peters' R. 1; Tunstall v. Pollard's adm'r, 11 Leigh 1;

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Powell v. Stratton, 11 Gratt. 792; but whether the surety of an administrator was liable for assets received abroad, when that administrator was not the original but an ancillary administrator. They referred to 1 Rob. Pr. 160, § 4, 5; Id. 165, § 12, 13; Story's Conf. Laws, § 515, 515a; 1 Rob. Pr. 162, § 7, 164, § 10; Story's Conf. Laws, § 514, 514a, 514b; Doolittle v. Lewis, 7 Jno. Ch. R. 45; Vaughn v. Northup, 15
234 Peters' R. 1; Fletcher's adm'r *v. Sanders, 7 Dana's R. 345; Governor v. Williams, 3 Ired. R. 152; 1 Rob. Pr. 163, § 7; 1 Rev. Code 382, § 29, 386, § 24; 1 Rob. Pr. 170, 173, § 3, 175-76, § 2; Aspden v. Nixon, 4 Howard U. S. R. 467; McBride v. Choate, 2 Ired. Ch. R. 610; Wms. Ex'ors 136; United States v. Giles, 9 Cranch 212; Miller v. Stuart, 9 Wheat. 680; Mothland v. Wiseland, 3 Penn. R. 185; Fay v. Haven, 3 Metc. R. 109; Brodie v. Bickley, 2 Rawle's R. 436; The Attorney General v. Dimond, 1 Cromp. & Jer. 356, 370, note, p. 372; Attorney General v. Hope, 1 Cromp. Mees. & Ros. 530.

2. That there having been no property of William T. Avory in Virginia, the County court of Mecklenburg had no jurisdiction to grant letters of administration on his estate; and they were therefore void. They cited Glenn v. Smith, 2 Gill & John. 493; In the matter of Hemiup, 3 Paige's R. 305; Weston v. Weston, 14 John. R. 428; McCarty v. Gibson, 5 Gratt. 307; Macon's Abr. title Sheriff, letter M; Gwinne v. Pool, Lutwich's R. 935; Griffith v. Frazier, 8 Cranch's R. 9; 1 Rob. Pr. 219, 220, 222, 223; Brittain v. Kinnaird, 5 Eng. C. L. R. 137; Fishwich's adm'r v. Sewell, 4 Har. & John. 393; Carter v. Cutting, 8 Cranch's R. 251; Wales v. Willard, 2 Mass. R. 120; Fisher v. Bassett, 9 Leigh 119; Burnley v. Duke, 2 Rob. R. 102; Kane v. Paul, 14 Peter's R. 33; Slade v. Washburn, 3 Ired. R. 557; Sigourney v. Sibley, 21 Pick. R. 101; Wilson v. Frazier, 2 Humph. R. 30; Toller Ex'ors 120; 1 Wms. Ex'ors 174, 175; 1 Comyn's Dig. title Administration, B. 3, p. 494.

3. That the slaves were never in the possession of George W. Avory in Virginia as administrator, but remained in North Carolina until after the decree of the court appointing him a commissioner to sell them. That a sale of the slaves not having been necessary to pay debts the administrator had no right to sell them. That the administrator is not made a party in
235 that suit. *That there is nothing in the record to authorize any charge of fraud or other impropriety in obtaining that decree. And therefore the sureties of the administrator are not responsible for the price of said slaves. They referred to Carrington v. Didier, 8 Gratt. 260; Boyce's ex'ors v. Grundy, 9 Peters' R. 275; McLaughlin v. Janney, 6 Gratt. 609.

Patton, for the appellees, insisted:

1st. That the decree for the sale of the slaves was procured by fraud; and that no report of the sale having been made or confirmed, the sale itself was not valid; and on either ground it was no protection to the sureties of the administrator, but they were responsible for them. He went into a critical examination of the record to show that no body had any thing to do with the suit but George W. Avory.

2d. That the sureties were liable for assets brought into this state from North Carolina; and especially where there has been no qualification in that state, as there was not in this case. And he asked how such assets were to be recovered if the administrator here was not liable, as it is almost the only settled principle that an administrator cannot sue in another state. Story's Conf. Laws, § 512, 513. And Story holds an administrator cannot be sued out of the jurisdiction within which he qualified; but this court has held that an executor may be sued who comes here with the assets. Tunstall v. Pollard, 11 Leigh 1. And his sureties are liable. Burnley v. Duke, 2 Rob. R. 102. And this case shows that whenever an administrator has received assets, his sureties will be liable for them; and the court will not enquire from whence they have been obtained.

3d. That the County court of Mecklenburg was a court of general jurisdiction over the subject of probates, and its acts
236 though voidable were not void. *That the General court granted administration even where there were no assets in the state, 1 Rev. Code of 1819, 377, 382; and this may be done by the court of the county where the party died, though there were no assets there, and they were abundant elsewhere: And further, that no body could say that there were no assets in the county of Mecklenburg where administration was granted in this case.

MONCURE, J. The first question which, in natural order, comes up for consideration in this case is, Whether the order of the County court of Mecklenburg, granting to George W. Avory administration on the estate of William T. Avory, was a void order, for want of jurisdiction in the court to make it?

It is now well settled, that the County court is a court of general jurisdiction in regard to probates and the grant of administrations; that it has jurisdiction in regard to the whole subject matter; and that though it may err in taking jurisdiction of a particular case, yet the order is generally not void, but only voidable on citation or appeal, and cannot be questioned in any collateral proceeding. Fisher v. Bassett, 9 Leigh 119; Burnley v. Duke, 2 Rob. R. 102; Schultz v. Schultz, 10 Gratt. 358; Cox, &c., v. Thomas' adm'x, 9 Id. 323; Hutcheson v. Priddy, 12 Id. 85. I say the order is generally not void; for there are one or two exceptions to the rule, if exceptions they can be called. As where the supposed testator or intestate is alive; or where, if dead, he has already a personal representative in being when the order is made, granting administration on his

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estate. If he be then alive, the order is of course void. And so also if he has already a personal representative, who stands in his place and is invested with all his rights of personal property in the state. Griffith v. Frazier, 8 Cranch's R. 9. There must be an office, and that office must be
237 vacant, in *order to a valid appointment of a personal representative. Until then there is in fact no "subject matter," to be within the jurisdiction of the court. That subject matter is, the appointment of a personal representative to a decedent who has none, and whose personal estate is therefore without an owner. The validity of an order making an appointment, must depend on the existence of that state of things. And though the court must enquire into these preliminary facts, and in some sense adjudge them, in every case in which it makes an appointment; yet the judgment, to that extent, is incidental and inconclusive. If in fact there be a decedent without a personal representative, an order of a court of general jurisdiction on that subject, appointing one, is as conclusive on the question of jurisdiction of the particular case, as on any other question arising in the case.

I do not understand the counsel of the appellant as denying the correctness of these principles in their application to a case in which some court in the state has jurisdiction, though not the court making the appointment. But I understand them as contending that they are not applicable to a case in which no court in the state has jurisdiction; and that this is such a case. They say the intestate resided and died in North Carolina, leaving no estate in Virginia, and therefore no court in Virginia had power to appoint an administrator. Suppose it to be true, that he did reside and die in North Carolina, leaving no estate in Virginia: would it follow that no court in Virginia had power to make the appointment? Had not the General court power to grant administration in such a case? As the law stood when the order in question was made, the General court had power to grant administration on the estate of any decedent who had not a personal representative in the state; no matter where he resided or died, or whether he left any estate in
238 the commonwealth *or not. 1 Rev. Code 1819, p. 377, § 12, 382, § 32. Therefore, as some court in the state had power to make the appointment, it would follow, if that were the test, that the order of the County court of Mecklenburg is not void.

But I consider these principles as applicable to every case of a decedent who is without a personal representative in the state; without regard to the question, whether any court in the state has jurisdiction of the particular case or not. The subject matter being within the jurisdiction of the court, to wit: the appointment of a personal representative to a decedent who is without one; the court making the appointment will be considered as having adjudged the question of jurisdiction in the particular case; and the order will not be void. Whether the court had jurisdiction in the particular case or not, may depend upon a variety of facts: as, whether the decedent resided in the county whose court made the order; or had land there; or died there; or had estate of any kind there. If, after passing upon these facts, and taking cognizance of the case, the order of the court could at any after period, in any collateral proceeding, be avoided by evidence that the decedent did not reside, or die, or leave estate in the commonwealth; all the inconvenience and other evils would be produced which are referred to in Fisher v. Bassett, and other cases before cited, and which are designed to be prevented by the principles laid down in those cases. In this case, the order was made in March 1840, the suit was brought in May 1847, no issue was raised by the pleadings in regard to the validity of the order, and the only evidence relied on to invalidate it is, that of a witness whose testimony was taken in 1849, and who states that the decedent lived and died in the county of Granville in the state of North Carolina, and that all his property was in that county. How
239 *could he know that all the decedent's property was there? that he had not a particle of property, nor a dollar due to him any where in Virginia? How could any body be expected to know, or be able to prove at that remote period, what were the facts on which the County court of Mecklenburg took jurisdiction of the case? Can the judgment of a court of general jurisdiction over the subject matter be overthrown by testimony like this, taken nine years after the judgment, and in a collateral proceeding?

While great evils would result from holding an order appointing an administrator of a decedent who lived and died out of the state and owned no property therein to be void; none whatever would result from holding the contrary. There can be no evil in appointing an administrator of a decedent who has no property. Indeed, nothing is more common; and it is often convenient if not necessary to do so, to carry on a suit to which he may be a proper party. That the decedent lived and died out of the state, makes no difference. If a non-resident owning no property happen to die here, the court of the county in which he dies is expressly authorized to appoint an administrator.

I therefore think the order in question was not a void order.

The next question to be considered is, Whether the sureties of the administrator are responsible for assets of the intestate which were situated at his death in the county of Granville in North Carolina, but after his death were brought to the county of Mecklenburg in Virginia, and there treated and held as assets by the administrator.

It is now well settled that a grant of administration has no legal operation out of the state from whose jurisdiction it was

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derived; and that an executor or administrator appointed in one state, is not, in virtue of such appointment, entitled
240 to sue, nor is he liable *to be sued, in his official capacity, in any other state or country. Story on Confl. Laws, § 514. There are some apparent exceptions to this rule, though they are not really so. In equity, an executor or administrator is sometimes liable to be sued in another state or country, under the peculiar circumstances of the case; as in Powell v. Stratton, 11 Gratt. 792; and sometimes to avoid a failure of justice; as in Tunstall v. Pollard's adm'r, 11 Leigh 1, and other cases cited in 1 Rob. Pr. (new) p. 178 and 192. In these cases it cannot be said that the suit is against him in his official capacity, but on the ground of a personal trust, which makes him liable, under certain circumstances, to account in a court of equity, where he may be found, to those entitled to the estate, wherever it may be situate. Governor v. Williams, 3 Ired. R. 152. So also, if an executor or administrator reduce property of his testator or intestate into possession, he may afterwards sue for it in another state, even at law; but the suit must be brought in his own name, and not in his official capacity. He is, to all intents and purposes, the legal owner of the property, though for the benefit of other persons. Story's Confl. Laws, § 516; 1 Lomax on Ex'ors, 341, marg.

In order, therefore, to reduce the assets into possession, and close the administration and distribution of a decedent's estate, it is generally necessary that there should be a personal representative in every state in which the assets may be situate. They are subject to the payment of debts according to the law of the situs, but to distribution according to the law of the domicil. It is therefore a matter of convenience that the surplus of the assets remaining in the hands of a local administrator after the payment of debts, should be sent home, that is, to the domiciliary administrator, for distribution. And this seems to be the course generally pursued; though
241 the distribution may be made *by the local administrator. Whether the one course or the other will be pursued in any particular case, depends upon the local law and the judicial discretion of the local court. If the surplus be paid over to the domiciliary administrator, it is matter of national comity and not of right. Every state is bound, to the extent of its power, to take care of the rights of its own citizens. And therefore it will see that the estate of a decedent within its jurisdiction is properly applied to the satisfaction of their rightful claims, whether as creditors, legatees or distributees of the decedent. But those claims being satisfied, it has no longer any motive to retain the fund, and will not, unless it be more convenient to dispose of the subject fully and finally, than to send it home for that purpose. If none of the citizens of the state have any claim upon the fund, either as creditors, legatees or distributees, and the aid of its courts be not invoked by a foreign claimant, it will have no motive to interfere with the fund, or prevent the domiciliary administrator from obtaining possession of it if he can. Of course he cannot sue for it, and if he cannot obtain possession otherwise, he or some person else must become local administrator. He will be preferred to any person else, as he will have the ultimate receipt and distribution of the fund.

But it very often happens, and especially in the United States, where there are so many states adjacent to each other, separated only by an imaginary line, and where there is so much commercial and social intercourse between the citizens of different states, and such frequent changes of residence from one state to another, that an administrator in one state receives property or money belonging to his intestate in another, without any administration being taken there, and holds it in his own state as assets of his intestate. And it sometimes, if not very often, happens that
242 property *of a decedent is carried, or one of his debtors removes, from a state in which there is no administrator, to another in which there is one, and the property or debt is received and held as assets by the administrator there. Can it be contended that the sureties of the administrator are not liable for property or money so received and held by him as assets? Does it lie in their mouths any more than in his, to deny that they are what he, by his act has affirmed them to be? Is it enough for them to say that their principal could not have recovered the property or money, if the person having possession had refused to deliver or pay to him? that such person may be liable to deliver or pay it over again to a local administrator, if one should be hereafter appointed? that the grant of administration, and the condition of the administration bond are confined to property which actually belonged to the decedent, and was situated at the time of his death within the limits of the jurisdiction which made the grant? I think not. The terms of the administration bond expressly apply to all the goods, chattels and credits of the decedent which shall come to the hands of the administrator. We have seen that a domiciliary administrator generally receives any surplus remaining in the hands of a local administrator on the settlement of the account of the latter. And if the same person be, as he often is, both domiciliary and ancillary administrator, while he is first accountable in either character according as he receives assets in one or the other, it is his duty to pass over the surplus remaining in his hands as ancillary, to his hands as domiciliary administrator. Are not his sureties as domiciliary administrator liable for the surplus so received or passed over? In Adams' heirs v. Adams' administrator, 11 B. Monr. 77, the sureties of a person as ancillary administrator were discharged from liability for assets received in that character, on the ground that

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243 he should be regarded as *holding them as domiciliary administrator. If they were properly discharged, his sureties as domiciliary administrator were of course chargeable. See 1 Rob. Pr. (new) 189, § 4, and cases cited. There is no difference between the form of the grant and bond in the case of a domiciliary, and in the case of an ancillary administration. And if the former may operate upon assets received and held by the administrator as such within the state, though situated abroad at the decedent's death, why may not the latter? In the case before stated, of property of a decedent being carried, or one of his debtors removing, from a state in which there is no administrator, to another, in which there is one, I do not see how the estate of the decedent could ever get the benefit of the property or money, unless it could be recovered by the administrator in the state to which it is removed, because there is no other administrator; and if one should be appointed, he could not, as we have seen, sue as such in another state. I know of no exception to that rule. It is true that the title of an administrator relates back to the death of his intestate, so as to enable him to sue for causes of action arising between that period and the date of his appointment. But he must in such a case, I think, sue in his capacity of administrator, and not in his own right. When he has once acquired actual possession of the property, he has then a legal title to it, which he can thereafter assert in his own name. Story's Confl. Laws, § 516. He must of course sue in his capacity of administrator for cause of action accruing in the lifetime of his intestate.

It would hardly be contended that where, in an ordinary case, an administrator as such sues for, recovers and receives, or demands and receives without suit, property or money, and holds it as assets of his intestate, the sureties of the administrator could exonerate themselves from liability therefor, merely by showing

244 *that it did not in fact belong to the intestate. A fortiori, it would seem they could not, merely by showing that though such property or money did in fact belong to the intestate, yet it ought to have been received by some other administrator in some other state, who may never have been appointed; or, if appointed, may never have claimed it, or even been entitled to sue for and recover it. In Burnley v. Duke, 2 Rob. R. 102, it was held, that though an administrator de bonis non cannot recover of a former administrator assets converted by him (because they are not unadministered assets, and therefore not within the scope of the commission of the administrator de bonis non), yet if he actually receive them, he and his sureties are accountable therefor. In that case, if the sureties of the administrator de bonis non had not been responsible, the sureties of the original administrator would have been. The question was, which of two sets of sureties was responsible? One or the other certainly was; and in either aspect, those entitled to the estate had an ample and effective remedy. It would seem to be still more reasonable to hold the sureties of an administrator responsible for assets received by him as such, when those entitled to the estate would otherwise have no security whatever. The bond of an administrator de bonis non is expressly limited to the assets which are unadministered, while the bond of an original administrator is unlimited in its terms, and extends to all the assets which may come to the hands of the administrator. If the sureties of the former are liable for assets received by their principal, though derived from a subject not embraced by the limited terms of their bond, why are not the sureties of the latter liable for assets received by their principal, and therefore embraced by the general terms of their bond, though derived from a subject at one time situated out of the state? I think that wherever an ad-

245 ministrator *receives or holds within the state in which he was appointed, property or money as assets of his intestate, he and his sureties are accountable therefor as assets, unless it be clearly proved that such property or money belongs to some other person to whom the administrator, personally, has accounted, or will have to account for the same.

I have examined, I believe, all the cases referred to in the argument on this branch of the case, and I am not aware that there is one of them in conflict with the conclusion to which I have come; though there are dicta in some of them which may be so. Without undertaking to review them, I will notice only the case of Fletcher's adm'r v. Sanders, 7 Dana's R. 345, which is perhaps the strongest case cited by the counsel of the appellant in support of their view. In that case it was held, that the surety of an executor to whom letters testamentary were granted in Kentucky (which however was not the place of the testator's domicil at the time of his death), was not responsible for assets received in a foreign state and never brought to Kentucky. Upon the ground that they were never brought to Kentucky, the opinion of the court was expressly placed. And even in that opinion, one of the three judges who composed the court, did not concur. Most of the cases on this subject, and no doubt all that are material, are cited and commented upon in Story's Confl. Laws, § 507–529; and in 1 Rob. Pr. (new) p. 159–194.

I have stated my opinion as to the principles of law which seem to be applicable to this case; and it now only remains, so far as this branch of it is concerned, to apply them to the facts of the case; which can be easily done. In 1840 William T. Avory died in Granville county, North Carolina, intestate, unmarried and without issue, leaving a small personal estate in that county, and no estate, so far as the

246 record shows, any *where else. He left seven distributees at law, who were his mother, brothers and sisters; all

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of whom (except perhaps one sister, who may have resided with her husband in North Carolina), seem to have resided in Mecklenburg county, Virginia, which adjoins Granville county, North Carolina. His debts were very few in number and small in amount, and most of them were probably due in Virginia. He had lived in Granville county but a year before his death, and doubtless had removed to that county from Mecklenburg, Virginia, where the rest of the family resided. His brother, George W. Avory, who lived with his mother at the time of his death, and for several years thereafter, and was guardian of several of the distributees, who were infants, qualified as his administrator soon after his death, to wit, in March 1840, in the County court of Mecklenburg, giving the usual bond with surety in the penalty of four thousand dollars. He immediately took possession of the property in North Carolina, and held it, or its proceeds, in Virginia, as assets of his intestate. The perishable property was sold by him in May 1840, about two months after he qualified, on a credit of twelve months, the bonds being taken payable to himself as administrator. Whether the sale was in Virginia or North Carolina does not appear. The slaves were sold in Virginia in July 1840, under a decree of the County court of Mecklenburg, made in May 1840. He received a debt due to his intestate, but whether he received it in the one state or the other, does not appear. It does not appear that any person ever administered in North Carolina, or had any interest in having administration granted there. It is extremely probable, from all the circumstances, that the contrary is the fact, and that it was deemed to be best by the parties concerned, to have but one administration, and to have that in Virginia, where all, or nearly all, the distributees and
247 creditors *resided. Upon this state of facts I have no difficulty in coming to the conclusion that the sureties of the administrator became responsible for the assets so received and held by him in Virginia, though situate, at the death of his intestate, in North Carolina.

The next question to be considered is, Whether the sureties of the administrator have been discharged from that liability as to the slaves belonging to the estate of the intestate, by reason of the decree of the County court of Mecklenburg, made in May 1840, appointing George W. Avory commissioner to sell the said slaves, divide the proceeds among the distributees, and by reason of the sale made under that decree and the other circumstances of the case?

I think this question must be answered in the affirmative. The slaves were not required for the payment of debts, and the administrator had therefore no right to sell them. He was willing at once to surrender them to the distributees for partition, and did in effect do so. He was himself a distributee, and was guardian of two others. The slaves could not be divided in kind, and a sale was therefore necessary for the purpose of division. But some of the distributees were infants, and a decree for a sale was therefore obtained. That decree was made in a suit to which George W. Avory and his two wards were defendants, and all the other distributees were plaintiffs. George W. Avory was not a party to the suit as administrator, thus showing that he had, in effect, surrendered the slaves to the distributees for partition. The bill alleges that he had paid all the debts of his intestate without a sale of any of the slaves, and prays for a decree for a sale of the slaves and division of the proceeds. The defendants answered the bill, admitting its allegations, and expressing their willingness that the court should decree according to the prayer thereof. And a decree was accordingly made. Shortly after
248 *the decree, to wit, on the 1st of July 1840, the sale was made by George W. Avory as commissioner, at public auction, on a credit of twelve months, as prescribed by the decree; at which sale he purchased one of the slaves, and another distributee the other. No report of the sale was made, and no other order appears to have been made in the suit until May 1847, about the time of the institution of this suit, when, on the petition of the plaintiffs, the order of sale made seven years before was set aside. The record does not contain a copy of the petition, if it was in writing, nor show the grounds of it. Nor does it appear that the administrator or his sureties had any notice of the petition or motion to set aside the order of sale. The bill in this suit, which was filed by the same persons who were plaintiffs in the suit for the sale of the slaves, alleges that "the slaves were sold by the administrator under a pretended order obtained by him from the County court of Mecklenburg, under some false pretext, without the knowledge or consent of the complainants, and which order was afterwards set aside by the said court." The administrator, being a non-resident of the state, and it seems insolvent also, never answered the bill. The sureties in their answer rely upon the suit and decree for the sale of the slaves, and the proceedings under the decree, for their exoneration from any liability on account of the slaves. There is no proof in the record to sustain the vague allegation contained in the bill of fraud on the part of the administrator in obtaining the order of sale. It devolved on the plaintiffs to prove it. The sureties do not admit it in their answer, though they do not in terms deny it, doubtless because they had no information on the subject. But the circumstances of the case strongly tend to disprove the allegation. The sale was made at public auction, in the neighborhood of the distributees, one of
249 whom (besides the commissioner *him self) was a purchaser at the sale, and none of whom complained of it until seven years after, when the commissioner had become insolvent and left the state. There

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is no such irregularity, if any, on the face of the proceedings as avoids the decree for the sale of the slaves. It must be regarded then as a valid decree at the time it was made; and the effect of it was, to take the slaves out of the hands of George W. Avory as administrator, and place them in his hands as commissioner of the court. The sureties of the administrator were thereby as completely discharged from liability as they would have been if the administrator and commissioner had been different persons, and the former had delivered the slaves to the latter under the decree. That liability being once discharged, was not revived by the order made seven years thereafter setting the decree aside; whether that order was regularly made, or was itself valid, or not; a question which it is therefore unnecessary to determine.

The only other question which it will be necessary to notice is as to the propriety of charging the administrator and his sureties with the amount of the bond of Henry W. Avory to the intestate for two hundred and fifty-four dollars and twenty-eight cents, due 1st March 1839. I concur in the opinion of the Circuit court upon that question, and for the reason expressed in the opinion, to wit, "the payment of the same having been proved by one of the persons interested therein as distributee, and his deposition never having been taken in the cause, since the release of said interest, to prove said payment."

The result of my opinion is, that the administrator is chargeable to the distributees in the sum of six hundred and sixty-seven dollars and eleven cents, with interest on four hundred and fifty-five dollars and thirty-six cents, part thereof, from
250 September 1, 1848, being *the balance due on his administration account, without charging him with the proceeds of the sale of the slaves. The decree should therefore be reversed with costs, and a decree entered in conformity with this opinion.

ALLEN, P., and LEE and SAMUELS Js., concurred in the opinion of Moncure, J.

DANIEL, J., dissented.

Judgment reversed.

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251 *Dunlop & als. v. Harrison's Ex'ors & als.

January Term, 1858. Richmond.

Wills—Bequest of Slaves in Trust for Free Negroes—Case at Bar.—Testator having given by his will a large real estate and also annuities to certain free negroes, then says, "It is my will and desire that my executors hold all the residue of my estate, as trustees for the support and maintenance of Frankey Miles, Laurena Anderson and Ann Maria Jackson, and the children of Ann Maria and Laurena," &c. "And should it be necessary in carrying out this clause of my will to sell my slaves, I desire my executors to sell them privately or publicly as may seem best, selecting them good homes and good masters." The three legatees are free negroes, and about eighty slaves are included in this residue of testator's estate. HELD:

1. **Same—Same—Effect.***—That the slaves included in the residue cannot be held in trust for the free negroes, as they cannot be held directly by them.
2. **Same—Alternative Provision—One Illegal—Effect on the Other.**†—That though the provision that the slaves shall be held in trust by the executors for the free negroes is illegal, the provision that if necessary the slaves shall be sold, is not invalidated by the illegal provision; but is legal and valid: and the free negroes shall take the proceeds of the slaves.
3. **Same—Bequest of Residue—Words Denoting Object of Bequest—Effect.**‡—The whole property in the residue being given to the executors in trust, the addition of the words, "for the support and maintenance of the beneficiaries," does not limit the bequest to that object, but the whole beneficial interest passes to the free negroes.

This was a bill filed in the Circuit court of Amelia county by the heirs and next of kin of Nathaniel Harrison deceased, against his executors, devisees and legatees, seeking to set aside certain provisions of his will, and to have him declared intestate as to the subjects embraced in these provisions.

Nathaniel Harrison died intestate and unmarried, in the summer of 1852, having made a will which bore date in July of that year, and which was duly admitted to probate in the County court of Amelia. The executors therein named, William H.
252 Harrison and *Samuel S. Weisiger, qualified as such, and took upon them the burden of the administration.

By the first clause of the will the testator directs his debts to be paid. By the second, third and fourth clauses he gives to Frankey Miles, to Ann Maria Jackson and Laurena Anderson, each, a tract of land by metes and bounds; and by the fifth clause he gives a tract of land to Edwin Harrison's four youngest children, then in being, and any others that might be born after the date of his will. By the sixth clause of his will he gives to his executors in trust for the support and maintenance of Edwin Harrison's four youngest children, or any other after-born child of his, the sum of one hundred dollars for each child; and if the legislature should pass a law requiring said children to leave the state, he directs his executors to pay each of said children one hundred dollars. By the seventh clause he directs his executors to pay Frankey Miles six hundred dollars a year as an annuity during her life; and by the eighth and ninth clauses he directs his executors to pay to Laurena Anderson and Ann Maria Jackson each the sum of two

*See the principal case cited in Shue v. Turk, 15 Gratt. 273.

†See a case of alternative provisions in Literary Fund v. Dawson, 10 Leigh 147.

‡See Rowlett v. Rowlett, 5 Leigh 20, 28; Young v. Vass, 2 P. & H. 167, 177.

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hundred and fifty dollars a year during their lives: and if they should be required to leave the state, the executors were to pay each of them two hundred and fifty dollars in lieu of said annuity. By the tenth clause he gives to these three women all his household and kitchen furniture, to be equally divided among them. The eleventh clause of the will, which was the great subject of controversy, is in these words:

"Item 11th. It is my will and desire that my executors hold all the residue of my estate, as trustees, for the support and maintenance of Frankey Miles, Laurena Anderson and Ann Maria Jackson, and the children of Ann Maria and Laurena, free from all debts and liabilities of the husbands of said Ann Maria and Laurena; and in the event of their being required to

253 *leave the state, I desire the said residue of my estate to be equally divided amongst Frankey Miles, Laurena Anderson and Ann Maria Jackson. And should it be necessary in carrying out this clause of my will, to sell my slaves, I desire my executors to sell them privately or publicly, as may seem to them best, selecting them good homes and good masters."

The estate of the testator consisted of about twenty-five hundred acres of land, eighty-four slaves, the usual amount of stock, crops and perishable property found on estates of that size, and about eighteen thousand dollars in money and bonds. He owed about from three to five thousand dollars; and as executor of his brother he was indebted to his testator's estate from eight to ten thousand dollars. Of the devisees and legatees Frankey Miles was a free woman of color, Laurena Anderson and Ann Maria Jackson were her daughters, and the others were her grandchildren by one of her sons. Laurena Anderson and Ann Maria Jackson were the reputed children of the testator; and the slaves disposed of in the eleventh clause of the will were neither husbands, wives or parents of the said legatees.

The cause came on to be heard on the 5th of April 1855, when the court dismissed the bill with costs. Whereupon the plaintiffs applied to this court for an appeal, which was allowed.

Jones and C. Robinson, for the appellants, insisted:

1st. That by the statute the free negroes could not take the slaves. Code, ch. 103, § 4, p. 458.

2d. That the bequest to trustees was on the same footing as a bequest to the free negroes, and was equally void. Commonwealth v. Martin's ex'ors, 5 Munf. 117, 143; Bass v. Scott, 2 Leigh 356; Trotter v. Blacker, 6 Porter's R. 269; Craig

254 v. Leslie, 3 Wheat. *R. 563; Leggett v. Dubois, 5 Paige's R. 114; Hubbard v. Goodwin, 3 Leigh 492; Smith's adm'r v. Betty, 11 Gratt. 752; Hill on Trustees 172; Davenport v. Coltman, 35 Eng. Ch. R. 516.

3d. That it being clear that the bequest of the slaves to the free negroes, whether directly or in trust, is void; the provision for a sale in the last clause in the 11th item of the will, does not render the bequest valid. Because, 1st. It does not authorize a sale for a general conversion, but only in the event that the legatees should be compelled to leave the state. And 2d. Because it could only be valid on the doctrine of conversion; and, on the principles of that doctrine, it is necessary that the sale should be required to take place certainly and under all circumstances, which was not the case here. They referred to Curtis v. Hutton, 14 Ves. R. 537; 2 Story's Eq. Jur. § 1214; Smith v. Claxton, 4 Madd. R. 484; Barker v. May, 9 Barn. & Cress. R. 489, 17 Eng. C. L. R. 426; Heth v. Rich. Fred. & Pot. R. R. Co., 4 Gratt. 482; 2 Lomax Ex'ors 169; Tazewell v. Smith's adm'r, 1 Rand. 313; Evans v. Kingsberry, 2 Id. 120; Ferebee v. Procter, 2 Dev. & Bat. 439; Newby v. Skinner, 1 Id. 488; Clay, &c. v. Hart, 7 Dana's R. 1; Stoner v. Zimmerman, 21 Penn. R. 394; Blight v. Manuf. & Mechanics Bank, 10 Barr's Pa. R. 131; Wright v. Trustees of Methodist Church, 1 Hoffman's Ch. R. 202; Arnold v. Gilbert, 3 Sandf. Ch. R. 531; Davenport v. Coltman, 35 Eng. Ch. R. 516.

4th. That the residuum having been given for the support and maintenance of the legatees, the extent of the bequest was limited by its object; and therefore an enquiry should have been directed to ascertain whether the whole property was necessary. They referred to Dinsmore v. Biggert, 9 Barr's P. R. 133; Liptrot v. Holmes, 1 Kelly's R. 381.

255 *Macfarland, Davis and Patton, for the appellees, insisted:

1st. That though it were true that the bequest of the slaves to the free negroes either directly or to trustees for their benefit is null and void; yet this testator contemplating that such might be the case, had provided in express terms, for a sale of the slaves, if that should turn out to be the case, for the purpose of carrying into effect his intention in favor of his legatees: And they examined the will to show that this was the real object of the last clause of the 11th item. They denied that the doctrine of election had any application to the case; and insisted that it was a case of alternative provisions in which the testator looking to the possibility that the provision which he preferred was not legal, had provided for that event by another provision, of the legality of which there could be no doubt. To show that such an alternative provision is valid, they referred to Foone v. Blount, 2 Copp. R. 464; Hubbard v. Goodwin, 3 Leigh 492; The Commonwealth v. Selden, 5 Munf. 160; 2 Wms. Ex'ors 915; Craig v. Leslie, 3 Wheat. R. 563; Inglis v. Trustees of Sailor's Snug Harbor, 3 Peters' R. 99, 116, 117, 118; Literary Fund v. Dawson, 10 Leigh 147.

2d. That though the property is given for the support and maintenance of the lega-

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tees, the whole property is given, and obviously the intention was to give the whole; and where that is the case, it is well settled that the whole passes. Paxton v. McLemore, 2 Dev. & Bat. Equ. R. 285; Webb v. Kelly, 16 Eng. Ch. R. 1st part, 470; 2 Roper Leg. 1438 to 1443, 1474, 1477; 3 Bacon's Abr. 796, title Papist; 2 Lomax Ex'ors 71, 73.

LEE, J. The doctrine of "constructive conversion" which has been somewhat discussed by the counsel has, I think, no application to the present case in the
256 *sense in which it is usually accepted and applied by courts of equity, and with the incidents which attend it in the view of those courts. The will in question here does not direct lands to be converted into money nor money into lands, but provides only for the conversion of a particular kind of personal property into money upon a supposed contingency which it specifies. Nor, as I shall endeavor to show hereafter, have the legatees for whom the benefit of that property is intended, any election in regard to the form in which they shall enjoy it. If they can only take it, supposing that they can take it at all in the form of money, no right of election to take it in any other can be cast upon them. The decision of the cause must depend upon the construction which is to be placed upon the provisions of the will, and from this their legal operation and effect is to be deduced. To determine the construction then which the will is to receive we are to enquire what was the meaning and intention of the testator, and whether that intention, if the same can be ascertained, was lawful in any form which it might be made to assume consistently with the terms of the will. If the intention of the testator is sufficiently indicated, and if it can in any way under the provisions of the will be reconciled with the law and its policy, it must be fully effectuated. And although a particular mode which the testator may have pointed out for carrying his wishes into effect be found impracticable or illegal, yet if he have also indicated another and alternative mode which is practicable and legal, his intention shall be carried into effect by means of the latter. And where the general intent of the testator can be seen, it must be carried into effect as far as it can be if it cannot take effect to the full extent; and this though it may be at the expense of the particular intent which cannot be effectuated because the testator has attempted to give it effect in a way not
257 *permitted by the law. Ram on Wills, ch. 13; 2 Lomax Ex'ors 6, 11; 2 Jarm. Wills 528; Pitt v. Jackson, 2 Bro. C. C. 51; Thelusson v. Woodford, 4 Ves. R. 227, 325; Humberston v. Humberston, 1 P. Wms. 332; Chapman v. Brown, 3 Burr. R. 1626; Finday v. Riddle, 3 Binn. R. 139, 162; Barlett v. King, 12 Mass. R. 537; Inglis v. The Trustees of Sailor's Snug Harbor, 3 Peters' R. 99; Literary Fund v. Dawson, 10 Leigh 147.

Now in this case the general intent of the testator is perfectly apparent and unmistakable. It was that the three free negro women, Frankey, Ann and Laurena should have the benefit of his whole estate real and personal including his slaves, excepting the piece of land given to the children of Edwin Harrison and so much more of his estate as would be necessary for their support and maintenance. He gives to each of these women a tract of land described in the will; to the woman Frankey an annuity of six hundred dollars during her life, and to Laurena and Ann, each, an annuity of two hundred and fifty dollars, during their lives respectively, unless they should be required by some law to leave the state; and in that event they were to receive, each, the sum of two hundred and fifty dollars in lieu of the annuities. He gives to them also all his household and kitchen furniture. He then directs that his executors shall hold all the residue of his estate as trustees for the support and maintenance of the same three women and the children of Ann and Laurena, free from liability for the debts of the husbands of the two last named; and in the event of their being required to leave the state, he directs the residue to be equally divided amongst the same three women. And the next clause of the same item (to which I shall advert more particularly hereafter) shows that he expressly designed his slaves to be embraced in the devise of the residue, and that the
258 women *named should have the benefit of that species of property belonging to him as well as of the real estate and annuities previously given.

It is very manifest then that the testator intended the three women named should have the enjoyment of his whole estate (excepting the portion set apart for the children of Edwin Harrison), including his slaves. This was the general intent. Coming to the particular intent and the mode in which it was to be enjoyed, it was his will and desire that it should be held by his executors as trustees for their support and that of the children of Ann and Laurena. Now by our statute it is expressly provided that no free negro shall be capable of acquiring (except by descent) any slave other than the husband, wife, parent or descendant of such free negro. Code, ch. 104, § 4, p. 458. And I cannot concur with the counsel who has argued that although a free negro may not take slaves by devise directly, yet that he may take the use of slaves the legal title to which is devised to a white person in trust for his benefit. What the free negro cannot take directly he cannot be permitted to take indirectly; and I consider that it would be as much in violation of the spirit and policy of the law to permit the free negro to have a property in the trust in such a case as it would be against its letter for him to hold the slaves in his own right under a direct bequest. Such a trust would be equivalent to the legal ownership governed by the same rules and subject to the same charges. Per Roane,

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J., Commonwealth v. Martin's ex'ors, 5 Munf. 117, 143; Bass v. Scott, 2 Leigh 356. And per Tucker, P., Hubbard v. Goodwin, 3 Leigh 492, 515. The disability of the free negro in this respect may be likened to that of the slave to acquire property in any thing; and the latter can no more acquire a property by way of trust than he can take the legal estate in the subject. Trotter v. Blocher, 6 Port. R. 269. See also
259 *Smith's adm'r v. Betty, &c., 11 Gratt. 752. And it somewhat resembles that of an alien as to real estate who cannot take by devise whether made directly or by way of a trust. Hubbard v. Goodwin, 3 Leigh 492. And if the case rested here, I should feel little hesitation in saying that the gift of the trust in the slaves to the three free negroes was of no more validity than a direct gift of the slaves themselves, and that the bequest must therefore fail, and the testator be declared intestate as to the slaves. But this is not all. The testator proceeds in the same (the 11th) item of his will to declare that "should it be necessary in carrying out this clause of my will, to sell my slaves, I desire my executors to sell them privately or publicly as may seem to them best, selecting them good homes and good masters." Now although the legatees because of their status could not take the slaves either directly or by means of a trust, there is nothing in the law or its policy to forbid their taking their value in money. They are permitted to acquire and hold all other kinds of property, and may take even slaves by descent, or by purchase where the purchaser stands in one of the relations to the slave specified in the statute. To deny the general power to acquire slaves was as far as the legislature thought proper to go. It was never intended to forbid the free negro to take the value of slaves in money or other property. We have then the case of an alternative provision in a will by which the testator has taken care that his general intent shall be carried into effect in some form if that which he had already indicated, and which he no doubt preferred, should for any cause be found impracticable. To this surely there can be no just objection. Alternative provisions in wills to provide for the failure of the principal bequests are of very common occurrence. We have an instance in the case already cited of the Literary Fund v. Dawson, 10 Leigh 147. There
260 the *testator provided for the failure of the devise contained in the sixteenth clause of his will, by directing in the seventeenth another and different disposition of the same property devised in the sixteenth. And the sixteenth clause being declared void by reason of the uncertainty of the beneficiaries, the seventeenth was set up and the disposition of the subject made thereby directed to be carried into effect. So in the case of Inglis v. The Trustees of Sailor's Snug Harbor, 3 Peters' R. 99, already cited, it was held that although the intention of the testator could not be carried into effect in the mode first contemplated, yet that there was an alternative provision which with the aid of an act of the legislature, would remove the difficulty and give effect to the general intent. In this case the beneficiaries cannot take the subject intended for them in the form of slave property, either directly or by way of trust. But the testator has also provided that if a sale of the slaves shall be necessary in order to give effect to his intention, they shall be sold. Why then shall his intention not be effectuated by a sale of the slaves and a division of the proceeds, in a form in which they can take, among the objects of his bounty? It is said that it would be violative of the policy of the law to divide the proceeds of the sale of slaves amongst free negroes; and it might be contended I presume with equal force that the annuities given by the will would also be void because the estate would be insufficient to pay them without a resort to the slaves. I cannot concur in this reasoning. I do not see how the policy of the law is interfered with by suffering the free negroes to take the money arising from the sale of the slaves. The object of the law is probably to keep slaves as far as possible under the control of white men only, and prevent free negroes from holding persons of their own race and color in personal subjection to themselves. Perhaps also
261 it intended *to evince the distinctive superiority of the white race. To forbid free negroes from taking money by bequest because it may have come from a sale of the slaves of the testator could not, that I can see, promote the object had in view, nor can I see any such prohibition in the law or its policy. The case decided by Judge Robertson as stated by the counsel differed materially from the case before us. There was a devise of slaves directly to a free negro, but there was no alternative provision in case the former could not be carried into effect. The devise was simply and absolutely void, and the free negro could take nothing under it whatever; and therefore although the slaves were sold for payment of debts and there was a surplus, the free negro could not claim under a void devise. Here, the right to the proceeds does not depend upon a void provision, but upon one which is rendered fully effectual as to the slaves by the plain direction to the executors to convert them into a form in which the beneficiaries may lawfully take the benefit of the devise.

But it is said that the necessity to sell which the testator had in mind, was not to overcome the disability of the free negroes to take the slaves as such, but that which might be found to exist for the purpose of paying debts or to make an equal division of the property among the three women in the event of their being required to leave the state. It could hardly have been to provide for a deficiency to meet the debts. The testator could scarcely have been ignorant that it was unnecessary to give authority to his executors to sell his slaves or a part of them, if the debts rendered it necessary,

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and the direction is not for sale of such part of the slaves as might be necessary to meet a deficiency of the other assets; the language is "to sell my slaves," evidently meaning the whole. The sale he was
262 contemplating was a sale *that might be found necessary "in carrying out this clause" of the will, and in that clause no allusion whatever is made to his debts. Nor is there any sufficient reason for restricting the meaning of the testator to the necessity of a sale for the purpose of making partition if the free negroes should be required to leave the state. In point of fact there would be no absolute necessity for a sale if those persons did leave the state, because their respective shares might still be held by the trustees for their benefit and the profits accounted for to them, though in that event it certainly would have been much more convenient, and the testator may have designed that they should be sold. But he did not mean only in that event. If he had so intended why not say "And should said women be required to leave the state, then I desire my executors to sell my slaves &c." His language is "And should it be necessary in carrying out this clause of my will &c." He did not mean by the term "clause" only that sentence in which he spoke of the women being required to leave the state, but evidently meant the whole eleventh item or article of his will. That such was the sense in which he used that word is I think perfectly clear, and it is of little importance to enquire what may be its exact philological signification.

The act forbidding the acquisition of slaves by free negroes passed in 1832, and the testator may or may not have known there was such a law. That he bequeathed his slaves to trustees for the benefit of the three women instead of giving them directly is not conclusive that he knew of this law or meant to evade its provisions. For he gave all the residue of his estate as well as the slaves to the trustees for the same purpose, and the slaves are given as part of the residue. But if, as is most probable, he did know there was such a law, he might have supposed that although
263 *he could not give the slaves directly, yet that the law did not intend to prohibit a gift to white persons as trustees who should hold the legal title to the slaves and have the personal control of them but should give to the free negroes designed to be the objects of his bounty, the benefit and profits of their labor. Nor can it be a matter of surprise if he should have so thought, when as we have seen, counsel learned in the law have argued with earnestness and ingenuity that such is the true construction of the statute. He might very well have had doubts upon this point, and surely it may be permitted to a testator under such circumstances to guard against his possible mistake or ignorance of the law by providing some other mode in which those who were the objects of his bounty might enjoy what he desired to give if that which he preferred should prove to be impracticable or illegal. Indeed the most unbounded indulgence has been shown by the courts to the ignorance, unskillfulness and negligence of testators, and judges have even shown themselves astute in averting their effects. A testator is regarded as inops consilii, and every allowance will be made for his want of better knowledge of the rules of law as well as those of grammar and orthography. Where he may have obscured his meaning by conflicting expressions, his intention is to be sought rather in a rational and consistent than an irrational and inconsistent purpose. And if the will may admit of more than one construction that is to be preferred which will render it valid and effectual, ut res magis valeat quam pereat. 1 Jarm. Wills 318; Jenkins v. Herries, 4 Madd. R. 67; Ram. on Wills (8 Law Lib.), ch. 4, p. 422; 2 Jarm. Wills 522, 526.

But whether the testator knew of the existence of this law and attempted to evade its provisions, or not, or whether he had in mind the possibility of a sale being necessary to enable the free negroes to en-
264 joy his *bounty or not, are matters of very little importance. That he might have attempted to dispose of his property in a mode not sanctioned by the law, is no reason why he should not be allowed to dispose of it in a manner that the law will sanction if he has taken care to insert a provision which may have that effect. Nor is it material what may have been the necessity for a sale that crossed his mind when he made the provision in question, or whether he may have thought such necessity might arise from different causes, or whether in fact it may exist for more reasons than one. He has used language broad enough and strong enough to embrace the necessity for such a sale arising from the total and absolute disability of the beneficiaries to take the bounty intended for them by any other means or in any other mode. And certainly there could be no more urgent and imperious necessity for a sale than that arising from such disability; and although the will does not say in totidem verbis that in case of such necessity the executors shall sell and divide the proceeds amongst these residuary legatees, yet such is the necessary and inevitable implication from the language employed, and no express provision to that effect could render the intention clearer.

But it is asked who is to judge of the necessity and when and how it is to arise? And it is said the executors might collude with the free negroes to evade the law by holding the slaves on the pretence that they were converted into money and that there will be no one interested to sue and carry out the policy of the law.

It is the duty of the executors to construe the will and carry out the intention of the testator by selling the negroes and applying the proceeds as he has directed, as they cannot lawfully do so in any other mode. They were authorized and it was their duty to sell the slaves at once as the will in

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265 effect required *an immediate sale in order to carry the intention of the testator into effect. But to meet the exigencies of the will equity will if necessary regard the slaves as absolutely converted into money and will deny to the legatees any election in the matter. The doctrine is inapplicable to the case because the free negroes are incapable of taking the slaves and no election is to be forced on a party for the purpose of creating a forfeiture. Foone v. Blount, Cowp. R. 464; Walker v. Denne, 2 Ves. jr. R. 170; Commonwealth v. Martin's ex'ors, 5 Munf. 117, 127, per Coalter, J.; Hubbard v. Goodwin, 3 Leigh 492, 513, Judge Tucker's opinion; Craig v. Leslie, 3 Wheat. R. 563. The first of these cases involved the right of a creditor who was a papist to have payment of his debt against the testatrix out of the proceeds of real estate directed to be sold by the will for payment of debts, and the last three concerned the rights of aliens in respect of real estate, but they furnish an illustration by analogy bearing strongly upon the rights of the legatees under the will in this case. If the executors entertained doubts as to the true construction of the will it was their right and their duty to apply to the proper court to construe the will for them and direct them in the discharge of their duties. If they have failed in their duty in this respect it should not impair the rights of the legatees who could themselves demand that a sale be made if improperly delayed by the executors. That the executors might continue to hold the slaves in violation of the policy of the law would certainly be a breach of duty on their part but it will not help the argument here. The most it would prove is that the legislature had failed to provide adequate sanctions to enforce its prohibition to free negroes to acquire this species of property. It does not furnish any reason why the will of the testator should be defeated when he has plainly pointed out a mode by which it may

266 *lawfully be carried into effect, because the executors choose to violate their duty.

Following then the rational and well settled rules to which reference has been already made, and looking to the manifest general intent of the testator, I think that the sentence of the eleventh item in question should be interpreted as if it read, "and should it be necessary in carrying out this clause of my will, to sell my slaves because my said legatees cannot lawfully have the benefit of them except by means of a sale and conversion of the same into money, or for any other cause, I desire my executors to sell them publicly or privately, &c.;" and that the residuary devise in the will was good to pass to the legatees the proceeds of the sale of the slaves after providing (if necessary to apply the same or part thereof to that purpose) for the debts due and the annuities previously given.

The only remaining question relates to the interest or quantum of estate that the legatees take in this subject. It is said that after providing for debts and the annuities and for the support and maintenance of the legatees, there will be a surplus not disposed of and which will pass to the next of kin.

It is to be observed that the eleventh item or clause of the will is a residuary clause by which the whole residue of the estate is given to the executors as trustees for the benefit of the parties named; and it is a well settled rule that where a residue is given every presumption is to be made that the testator did not intend to die intestate as to any part of his estate. Philipps v. Chamberlaine, 4 Ves. R. 51; 2 Rop. Leg. 1461. And where the interest or profits of the subject are given to or in trust for a legatee or for the separate use of a legatee, without limitation as to continuance, the principal or corpus will be considered as bequeathed also unless from the na-

267 ture of the subject or *the context of the will, the interest or produce only was plainly intended. 2 Lomax Ex'ors 71; Elton v. Sheppard, 1 Bro. C. C. 532; Philipps v. Chamberlaine, ubi sup.; Rawlins v. Jennings, 13 Ves. R. 39; Adamson v. Armitage, 19 Ves. R. 411. In the case last cited Sir William Grant said, "In the case of personalty words of qualification are required to restrain the extent and duration of the interest. Prima facie a gift of the produce of a fund is a gift of that produce in perpetuity, and is consequently a gift of the fund itself." But the expression of a particular purpose for which the gift is made will not operate as a condition or limitation of the bequest. The fund being appropriated to the benefit of the legatee the particular mode in which it is to be applied is but a secondary object and does not enter into the substance of the gift. 2 Lomax Ex'ors 73; 1 Rop. Leg. 430; Barlow v. Grant, 1 Vern. R. 255; Newill v. Newill, 2 Vern. R. 431; Barton v. Cooke, 5 Ves. R. 461. Per Carr, J., Rowlett v. Rowlett's ex'ors, 5 Leigh 20, 28. So by Sir Lancelot Shadwell where there was a gift for the maintenance and education of the legatee, it was held to be an absolute gift. Webb v. Kelly, 9 Simons R. 470. And if the interest of a fund be directed to be applied to the education of legatees and there prove to be a surplus beyond the expenses of education, that surplus will belong to those for whose education it was intended to be applied. Rowlett v. Rowlett's ex'ors, ubi supra.

Now we have here the case of a residuary bequest for the support and maintenance of the legatees, and there is nothing either in the nature of the subject or in the context of the will to show that the gift was intended to be restricted to the interest or produce of the fund. On the contrary the plain implication is that the whole is intended to be given to the legatees. That the purpose was avowed to be for mainte-

268 nance *and support is as we have seen but a secondary consideration and does not enter into the substance of the gift. And I think it clear that it must be regarded as an absolute gift of the entire estate, sub-

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ject of course to debts and the annuities previously given. Whether the children mentioned take along with their mother or in remainder after her death, whether children after born or only those living at the death of the testator were to take and whether the testator intended by the clause in which he looked to the event of the legatees being required to leave the state to create any new or different estate from that which he had intended in the previous clause, are all questions with which the appellants here have no concern, and which it is neither necessary nor proper should be decided in this case. Whatever may be their solution the estate is equally given away from the next of kin.

I think that the Circuit court did not err in dismissing the bill, and am of opinion to affirm the decree.

The other judges concurred in the opinion of Lee, J.

Decree affirmed.

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269 *Southall's Adm'r v. Taylor & als.

January Term, 1858, Richmond.

1. **Executors—Failure to Collect Debts through Negligence—Liability.***—Testator directs all his property, real and personal, except his slaves, to be sold, and the proceeds of the sales, together with what money might be due to him, to be put and kept at interest for the benefit of his wife and children, until the children should arrive at the age of twenty-one years or be married. He had in his lifetime taken the bond of two men who were partners, for a partnership debt, and it was unpaid at his death. They were reputed to be wealthy men, and the executor permitted the debt to remain uncollected until one of them died, and the firm as well as its members proved to be insolvent. The executor is bound to account for the debt.

2. **Same—Same—Same.**—In this case one of these partners purchased property at the public sale made by the executor, and executed his bond with his partner as his surety. The executor having failed to collect the money when he might have collected it, and the obligors having failed, the executor is bound to account for the amount of the debt.

3. **Same—Right to Accept One Partner as Surety for Another.**—One partner is not such security for the other, as an executor is authorized to take in selling the property of his testator.

This was a bill filed in June 1852 in the Circuit court of the city of Williamsburg and county of James City by the widow and children of Henley Taylor deceased against Robert Anderson as the administrator of George W. Southall deceased, who was the executor of Henley Taylor, for the settlement of his administration account. All the children but one, were infants, and sued by their next friend.

Taylor by his will which bore date on the 18th of September 1848, appointed George W. Southall his executor, and directed that all his property real and personal, except his slaves, should be sold, and the proceeds of the sales, together with what money might be due to him, should be put and kept at interest, for the benefit of his wife and children, until his children
270 *should each arrive at the age of twenty-one years or be married. And he directed that his wife should receive one-third of the profits of his estate, and that the other two-thirds should go to his children. And by a codicil dated December 4th, 1848, he directed that the funds of his estate should remain in the hands of his executor, as trustee, during the minority of his children or until they should marry; the income therefrom to be applied to their maintenance and education, and he to have the control and management of them. This will was admitted to probate on the 26th of March 1849.

It appears that the executor Southall, soon after his qualification, viz: in November 1849, sold a tract of land belonging to the estate of his testator, to James W. Curtis,

*Executors—Failure to Collect Debts through Negligence—Liability.—In Anderson v. Piercy, 20 W. Va. 324, it was said: "If when he (an executor) settles his account, he has not received a debt, and it appears, that it has been lost through his negligence or want of proper diligence, he should be charged with such debt as of the time, when he ought to have received it, had he used due diligence. The mere want of proper diligence on his part or his negligence does not make debts due his testator the property of the executor, and therefore, if when he settles his accounts, he can show, that a particular debt included in the inventory and not returned as worthless or doubtful was nevertheless a debt, which could not have been collected by the use of diligence either because of the actual insolvency of the debtor, or because he had a substantial defense, or because though when the inventory was made the debt was believed to be due, yet if it turns out, that it was not actually due, he ought not to be charged with such debt. For it remained the debt of his testator, though the administrator was negligent in not attempting its collection or in not bringing suit upon it with the promptness, which he ought to have exercised. See Cavendish v. Fleming, 3 Munf. 198; Reitz & Co. v. Bennett, 6 W. Va. 417."

On the subject of the liability of a personal representative for failure, through negligence, to collect debts owed the estate of a decedent, see Crouch v. Davis, 28 Gratt. 62, and *foot-note*; Tanner v. Bennett, 33 Gratt. 251, and *foot-note*; monographic *note* on "Official Bonds," appended to Sangster v. Com., 17 Gratt. 124; Mills v. Talley, 83 Va. 361, 5 S. E. Rep. 368.

In Cogbill v. Boyd, 77 Va. 459, it was said: "A loss incurred to the trust estate through the negligence of the trustee must be borne by him. Perry on Trusts, section 914; 2 Lomax on Ex'ors, p. 482-3-4; 2 Story's Eq. Jur., section 1274; Miller v. Holcombe, 9 Gratt. 665; Southall v. Taylor, 14 Gratt. 269."

As to the duties and liabilities of fiduciaries, the principal case is cited in Watkins v. Stewart, 78 Va. 115; Davis v. Chapman, 83 Va. 71, 1 S. E. Rep. 472.

See generally, monographic *note* on "Executors and Administrators."

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and that he sold the personal property, except the slaves; but he returned no inventory, appraisement or sale bill.

In the progress of the cause Anderson was directed to settle his intestate's account as executor of Henley Taylor before one of the commissioners of the court. And on the report of the commissioner, three questions were raised by exceptions to it, which were passed upon by this court. As to the first of these the commissioner reported, that on the 12th of January 1848, Jacob C. Sheldon and John M. Maupin executed their bond to Henley Taylor for the sum of two thousand two hundred and sixty-two dollars and eighty-two cents, which was wholly unpaid at the time of Taylor's death. That Taylor died the 13th of March 1849, and Southall qualified as his executor on the 26th of March of the same year. This bond came into the hands of Southall a few days after his qualification along with other papers of his testator; and no steps were taken to enforce its payment until the 5th of April 1851, when suit was instituted thereon in the Circuit court of Williamsburg, and judgment was ob-
271 tained *at the May term 1851. On this judgment three executions were issued, which were returned "no effects;" and no part of the bond has been paid. Maupin died insolvent on the 26th of December 1850, and on the 2d and 3d days of May 1851, Sheldon made conveyances to and for certain creditors, which rendered it impossible to make the debt or any part of it out of him. The commissioner further reported that had said bond been sued on and judgment obtained at the fall term of 1850 of the said court, the money could have been made out of either Maupin or Sheldon, who were possessed of ample property to pay the same. Maupin and Sheldon had been merchants and partners for many years, and enjoyed the general confidence of the community, and were regarded as wealthy men; though several judicious persons had for some years before Maupin's death, entertained the impression that said Sheldon & Maupin were not in thriving circumstances, but rather on the decline; but by such persons they were thought to be solvent. Maupin was regarded by several persons as a reckless man in his business transactions. The commissioner submitted to the court the question whether the executor was to be charged with this debt.

As to the second question, the commissioner reported that Maupin had executed a bond to Southall for one thousand and twelve dollars and ninety-five cents, with Sheldon as his surety, for purchases made by Maupin at the sale of Taylor's property made by Southall. And that it was proved that Sheldon was for many years previous to the death of Maupin and up to that time considered by the community at large as a man of large property and a wealthy man, and would have been taken by the best business men of that community as ample security for purchases at the sale of a decedent to the amount of the aforesaid sum
272 *of one thousand and twelve dollars and ninety-five cents; and that the money might have been recovered if suit had been brought on the bond to the fall term of the Circuit court of Williamsburg for 1850. That Southall had ample time and opportunity to have sued and obtained judgment thereon at the said fall term 1850, but he did not sue until April 1851, and he obtained judgment at the next May term; on which executions were issued and returned "no effects." That the executions were rendered unavailing, by the conveyance by Sheldon on the 2d and 3d of May of all his own property and all the property of Sheldon & Maupin.

The third question was as to the commissions of the executor. The commissioner allowed commissions on the receipts of the year 1851, that being the year before the institution of the suit, but disallowed the commissions upon the amount received in 1849 and 1850, though a part of that then received was for real estate. Of this real estate, a large portion of the purchase money was permitted to remain in the hands of the purchaser; and was paid into bank by him under an order in this cause.

The cause came on to be heard on the 27th of December 1854, when the court held, among other things, that the executor was liable for the amount of the two bonds above mentioned, and was not entitled to the commissions, which had been disallowed by the commissioner, expect for so much of the estate, real and personal, as had been sold by Southall, and which remained unpaid at the time of his death. And the court then made a decree directing certain sums of money to be paid by Southall's administrator out of the assets of his intestate in his hands to be administered, to each of the children of Henley Taylor, though all of them but one were in-
273 fants. And the cause was *sent back to the commissioner, for a further report. From this decree Southall's administrator applied to this court for an appeal; which was allowed.

Peachy, for the appellant.
Bowden, for the appellee.

DANIEL, J. The liability of Southall's estate for Sheldon and Maupin's bond of two thousand two hundred and sixty-two dollars and eighty-two cents, is, I think, free from serious doubt. The testator by his will directed that all his property, real and personal, except his slaves, should be sold, and that the proceeds of sale, together with whatever money might be due to him, should be put and kept at interest till his children should each marry or attain the age of twenty-one years. That his wife should receive annually one-third of the profits of his estate, and that the remaining two-thirds should go to his children; and by the second and third codicils to the will the testator declares it to be his intention that each of his children shall receive his or her portion of his estate as they respectively arrive at age or marry; that the

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funds of his estate shall remain in the hands of his executor as trustee during the minority of the children, or till they respectively marry; that the income is to be applied to their maintenance and education; and that the executor is to have the control and management of the children.

Independent of the general obligation (arising out of the very nature of his office) requiring the executor to proceed with due diligence to the collection of the debts due to the estate, the duty of so doing (if the directions of the testator are to receive a literal interpretation) is specially imposed upon the executor, in plain and unmistakable terms.

In this aspect of the case, the duty
274 of the executor *was obvious, and admitting of the exercise of little or no discretion. The bond was due, being payable on demand, and if Southall regarded it as one of the debts which he was required under the will to call in and put at interest, it was plainly his duty, at an early period after his qualification, independent of any considerations respecting the solvency of the debtors, to have looked about and made enquiries for a proper investment of the debt; and to have demanded its payment, or at least to have notified the debtors to hold themselves in readiness to respond to his call, whenever a suitable opportunity should arise of putting the money at interest, in compliance with the terms of the will. Yet, though he took out letters of administration in March 1849, there is nothing in the record from which even an inference can be drawn, of a demand having been made of the debt, or of any communication whatever having taken place between Southall and the debtors in relation to it, till April 1851 (a space of more than two years) when, after the death of Maupin, suit was instituted on the bond against Sheldon, the surviving obligor. Surely, if the terms of the will are to constitute the rule by which the conduct of the executor is to be adjudged, such a delay, wholly unaccounted for, cannot be treated as otherwise than unreasonable and unpardonable.

The death of Southall (in November 1851) before the institution of the suit by the appellees, it is true, is a circumstance presenting an appeal in behalf of a lenient view of his conduct. The suggestion arises, that had he lived it might perhaps have been in his power to furnish some excuse for his apparent want of attention to the interests confided to his care. The force of such an appeal, however, is greatly impaired by the opposing consideration that he wholly failed to make out any inventory, or to have any appraisement of the estate, or to return any account of sales.

275 *These evidences of a neglect of duty on the part of the executor, admit, obviously, of no explanation, and their presence, in the cause, is naturally calculated to repress any feeling, on the part of a court of equity, to hunt after explanations, at the best conjectural, of other conduct of his, indicating a loose administration of the estate. Viewing his conduct, however, in the most favorable light, it would be difficult to believe that with the exercise of ordinary diligence he could not have found a suitable investment for the money, in the interval between the date of his qualification as executor and that of the institution of the suit brought by him, or to conceive of any satisfactory reason why, if he contemplated a change of the debt, he did not institute legal proceedings for its recovery at an earlier period.

It is suggested, however, that, giving to the will a more enlarged and liberal interpretation, it was not necessarily the duty of Southall to call in all the debts of his testator; that if the testator left any of the debts, due to him, safely secured, the executor, though offending against the letter of the will, would be acting in accordance with its spirit, and the true intentions of the testator, in leaving such debts to remain undisturbed, seeing, that the real object of the testator was to keep his money at interest till his children should come of age or marry: the interest, in the mean time to be applied to their maintenance and education.

I think we should allow to Southall the benefit of this suggestion to the extent of holding that if he found any portion of his testator's money out at interest upon such loans or investments as he, in the exercise of a sound discretion, might have properly made himself, out of the testator's funds which might have come into his hands as executor, he would have been justified in suffering such loans or investments to
276 *stand, observing, however, the same watchfulness and vigilance in looking after their continued safety, that would have been needful in respect to investments of his own making. It would savor of too close a sticking to the mere letter of the will, and of harshness to the executor, to visit him with the consequences of a devastavit for failing to essay the needless, if not hazardous process of changing one safe investment for another productive of no greater income to the estate.

We are thus led to enquire whether the bond in question is such an investment of the testator's funds as a court of equity could properly sustain the executor in making. And were we to follow the rule of the English chancery upon the subject, we should be compelled to answer the enquiry at once in the negative, without any regard to the solvency of the obligors to the bond at the time of the qualification of the executor. For though, in one of the earlier cases, Harden v. Parsons, 1 Eden. R. 145, the lending of trust money on private bonds or notes, was held not to amount to a breach of trust, without other circumstances of negligence, it is now firmly established in England, that all investments of trust money by executors and other trustees, in mere personal securities, are at their own risk. In all cases of the kind, unless express power to put out the money on per-

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sonal security is given by the cestuis que trust, or conferred by the instrument under which they are acting, trustees are held, by the courts of equity there, to account for all losses arising from loans of the trust funds, except when the loans have been secured by liens on real estate, or some other thing of permanent value. Where the executor has invested the moneys of the estate in such loans (on mortgages), or in such stocks as the court itself is in the habit of directing funds in its own possession to be laid out in (generally the "three per cents"), and loss arises from the insolvency of the debtors and depre-
277 ciation *in the value of the mortgaged property, or from fluctuation in the stocks, the executor is excused: but in all other cases of putting out the trust funds at interest (except where authorized as before mentioned by the will or the beneficiaries), the executor is now required by the English chancery to make good all losses and deficiencies. Wilkes v. Steward, Cooper's Ch. Cas. 6; Adye v. Feuilleteau, 1 Cox R. 24; Holmes v. Dring, 2 Cox R. 1; Powell v. Evans, 5 Ves. R. 839, and notes; Story's Eq. Jur. § 1274, and note; 2 Lomax on Ex'ors 484.

Chancellor Kent, however, in the case of Smith v. Smith, 4 John. Ch. R. 281, whilst expressing his belief in the wisdom of the rule, as a general one, that trustees loaning money should be required to take adequate real security, or resort to the public funds, gave very strong intimations of opinion that there might be circumstances which would exonerate trustees in taking personal security, when they had exercised proper discretion and caution in the selection of such security. And I do not think that the English rule, or one like it, can be said to have been, as yet, adopted generally in this country. Certainly no such rule has as yet been declared by this court. Indeed it seems to me that until a very recent period it would have been extremely difficult, if not wholly impracticable, to have carried out a rule of the kind, to its full extent, in this state. It is only within a few years past that we have had public stocks in such quantity as to make it generally convenient, if possible, for executors and other trustees, especially those situated in parts of the state remote from the cities, to procure them. This fact, taken in connection with the well known reluctance of our people to fetter and encumber their estates with mortgages or deeds of trust (the giving of which even for loans, at the time, are generally esteemed as impair-
ing to a greater or less extent the
278 *credit of the grantors), affords, as it seems to me, a sufficient reason why, hitherto, there should not have been any intimation of a purpose on the part of our courts to apply a like rule here. Whether, in the greatly increased facility which now exists of purchasing certificates of state stock, and in the well established policy of having, where practicable, a fixed rule on the subject, the court may not, hereafter, when passing on the recent transactions of trustees, find sufficient reasons for declaring some rule of the kind, is a matter about which I deem it unnecessary to go into any speculation or conjecture. At present I do not feel called upon to declare an executor or other trustee liable for loss, simply on the score of his having made, or allowed to stand, an investment of the trust funds in personal securities.

In the absence of any directions by the testator as to the character of the security on which his money was to be put out, I think that the executor would have been guilty of no breach of duty, in making loans to solvent borrowers, taking their own bonds or notes with one or more sureties of undoubted ability. But I do not think that he had a right (without accountability for loss) to make or continue a loan on the bond or note of the borrower alone, however ample his estate, or free from suspicion his solvency might be. Such conduct is out of the usual course pursued by prudent capitalists. To require on the one hand and to give on the other, security, in dealings of the kind, is, among men of business habits and experience, very much a matter of course.

In the case of Miller v. Holcombe's ex'or, 9 Gratt. 665, the trustees were clothed with a very broad discretion by the deed under which they acted; yet this court held that a sale by one of them, with the consent of the other, of a portion of the trust subject,
to a solvent firm, on the credit of the
279 firm alone, constituted, *of itself, a breach of trust for which both trustees should be responsible. And the general views on the subject taken in the opinion of the court delivered by Judge Lee, would seem to me to apply with their full force to the case of a loan of his testator's funds by an executor, or of an unreasonable indulgence extended by the latter to persons indebted to the estate for moneys borrowed of the testator in his lifetime.

As I have already intimated, we cannot look to the mass of the English decisions on the subject as a guide in this case, inasmuch as they condemn all loans by trustees on personal securities. There is, however, a class of cases arising under wills, in which the executors are clothed with the power of lending on personal securities—which, as I conceive, are directly in point. These cases expressly forbid the lending by executors on the sole credit of mercantile concerns. Of this class of cases, Langston v. Olivant, Cooper's Ch. Cas. 33, is a marked and leading one. In that case the executors were empowered by the will to place out a specific pecuniary bequest "upon real or personal security, as should be thought good and sufficient;" and it was declared that they should not be answerable for any loss which might happen without their willful neglect or default. The executors loaned out the amount of the legacy, together with a greater amount of their own private funds, "to a trader" "in good credit and

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circumstances'' at the time, who failed some years thereafter. The security taken was the bond of the borrower. It was argued that the power conferred on the executors did not extend to the lending of the money on the mere credit of a man in trade, thus making the trust property liable to all the contingencies of trade; and the executors were held to answer for the loss: the court observing that the authority of the executors did not extend to such an accommodation. And in the case of
280 Sadler v. Hobbs, *2 Brown's Ch. Cas. 114, in which the executors were held liable for failing to call in a fund with due diligence, the fact that the party in whose hands the money was allowed to remain, was a tradesman, was one of the prominent grounds on which the court placed its action. And it is also to be observed that Chancellor Kent, in the case of Smith v. Smith, already cited, whilst intimating the opinion that trustees should not be held liable merely for lending on personal security, very plainly disavows any disposition or purpose to extend the indulgence to cases ''where the borrower or his surety is engaged in mercantile or other hazardous pursuits.''

I am aware that there are dicta to the effect that the executor ought to be less severely dealt with in cases where he has merely continued a credit originating with the testator; it is said that blame is not to be imputed to the executor for trusting persons in whose integrity and ability the testator himself confided. Yet I recollect no case in which considerations of the kind were allowed to have any material influence on its decision. And indeed it seems to me that in passing on the conduct of a fiduciary such considerations ought to be counted as of little or no value. Otherwise we should have to abandon all idea of any thing like a general rule on the subject, and to allow every executor to have a separate standard, by which to regulate his conduct, higher or lower, dependent upon the greater or less degree of prudence which his testator may have displayed in the management of his pecuniary affairs. The allowance of any serious weight to such considerations is further opposed by the obvious argument drawn from ordinary observation and experience, that the most prudent of men are often governed in their business transactions by motives at war with their pecuniary interests. Loans may have been prompted by feelings of
281 friendship, or debtors *indulged in a spirit of neighborly kindness and forbearance. How far these or motives of the like kind may have governed a testator in managing his affairs, his executor cannot well undertake to say. Any surmises, consequently, which he might form as to the degree of confidence which the testator had in the ability of his debtors, would necessarily be, generally, of the most vague and unreliable character.

The general rule for the guidance of executors in the administration of their trusts is thus clearly and succinctly stated by Judge Stanard, in delivering the opinion of this court in the case of Kee's ex'or v. Kee's creditors, 2 Gratt. 116, 128. ''The duties of the executor (he says) are to be performed under the obligations of sound judgment, acting on those considerations of worldly prudence which affect the safety of the pecuniary interests confided to his care. When such judgment, so governed, is fairly exercised (and tested by the facts existing and known at the time it is exercised), is such as would probably be formed by a judicious man managing his affairs with reference to considerations of mere worldly prudence, the executor is justified in acting on such judgment; and, so acting, is not responsible for alleged losses resulting from his conduct.'' Under such a rule, I apprehend that the creditors and legatees of an ignorant, improvident or careless testator would have a right to expect just as great a degree of prudence in the administration of his estate as could be properly required of the executor of a person who had managed his affairs with the utmost wisdom and prudence. And it is difficult to conceive of any good reason for saying that an executor, who, after having had a reasonable time to survey the facts on which to form his judgment, should neglect to call in a loan of an exceptionable character or doubtful safety, should not be held to the same responsibility that would have attached to his making (under
282 an authority *to lend) a loan of the like character, under a like state of facts and circumstances.

The commissioner, in his report of the substance of the testimony taken before him, states that, whilst it was proved that Sheldon & Maupin enjoyed the general confidence of the community (Williamsburg) in which they resided, and transacted their business, and were regarded as wealthy men, several judicious persons, who thought the firm solvent, had, nevertheless, for some years before the death of Maupin, entertained the impression that the firm was not in thriving circumstances, but rather on the decline; and that Maupin was regarded by several persons as a reckless man in his business transactions. This statement is well calculated to create the belief that if Southall had used due diligence in instituting proper enquiries, he would have found that the debt was in a very precarious condition. And upon a view of the whole case, I see no reason why we should struggle to except it from the operation of those decisions which, even irrespective of special proofs touching the safety of the debt, would hold Southall responsible for having allowed the money of his testator to stand out on the obligation alone of a mercantile firm, and thus to remain exposed to the well known uncertainties and hazards of trade.

I am also of the opinion that the Circuit court has decided rightly in charging Southall with the bond of Maupin & Sheldon for one thousand and twelve dollars and ninety-

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five and a half cents. Much of what has been said in respect to the debt just disposed of, is applicable also to this. The former, it is true, grew out of a transaction between the testator and the firm, and the latter out of a sale by the executor to one of the members of the firm in his individual capacity. The character of the obligation taken for the debt, however, is, in each case, the same, to wit, the joint
283 *and several bond of the two members of the concern. It is argued (it is true) that there is no good reason why a party should not be received as surety for another in his private dealings merely because the two happen to be associated in a mercantile firm. But of this I am not satisfied. On the contrary, the close and intimate relation which subsists between the members of such a partnership, and which confers upon each, whether prudent or reckless, an almost complete power over the pecuniary interests of all the members, presents to my mind a very strong argument why one of them, when contracting to give security, should be expected to tender some person whose credit and fortune are not thus blended with and dependent upon his own.

So far as the matter of security is concerned, the difference would seem to be one of form rather than of substance, between selling to a firm composed of two members, and taking their bond without security, and selling to one of the members, and taking his bond with the other as security.

I believe, too, that with the mercantile portion of the community, if not with business men generally, in transactions of loans of money, sales on credit, and negotiations of the like kind, when a surety or endorser is required, it is the common usage not to offer or accept one member of a mercantile firm as surety or endorser for the other.

Passing by these matters, however, without further intimation of opinion respecting them, it seems to me that Southall is clearly bound for the amount of the bond in question, on the ground that he did not use ordinary diligence in respect to it after it fell due. He suffered nearly twelve months to elapse after its maturity without (so far as the record shows) making any demand for its payment. And even after the death of Maupin, the principal in the bond, he suffered three
284 *months to pass before he brought his suit. The debt was one on which the debtors had no reason for expecting indulgence. When Maupin bought at the sale he no doubt expected that he would be required to pay when his bond should fall due. And the testimony is ample to show that the debt would in all probability have been paid if payment had been demanded and insisted on.

The case of Johnston's Estate, 9 Watts & Sergt. 107, is in point to show that after the debt became due the burden was with Southall to account for it, or to show, in case of its loss, that he had used due diligence in the effort to collect it. In England (as is said in that case) such sales are required to be for cash, and the executor is chargeable immediately after the sale with the price. But in Pennsylvania (as with us) the rule is to sell on short credits, taking bond with security. If the executor takes bond with sufficient security, he is not immediately chargeable, but on the maturity of the bond he becomes chargeable, and to discharge himself must show that the debt was lost without any default or neglect on his part. In that case the note was allowed to stand about six months, when the principal and surety, apparently before in good circumstances, both failed, and the administrator was charged with the debt.

There is nothing in the evidence more immediately applicable to the debt in question, to explain away the prima facie case made against Southall; and when we take into view his whole conduct in the management of the estate, his negligence and consequent liability are only made the more apparent.

The 6th section of the 132d chapter of the Code does not define the "negligence or improper conduct" which subjects an executor to liability for a lost debt, and I have not regarded it, therefore, as affecting in any manner the questions which I
285 have been considering. *The true object of the section is, as I conceive, to settle any question which might otherwise arise as to the propriety of charging the fiduciaries and other persons therein mentioned with the interest as well as the principal of debts lost by their negligence or improper conduct.

Upon the whole, I think that the decree of the Circuit court, in respect to both of the bonds of Maupin & Sheldon (viz: the bond for two thousand two hundred and sixty-two dollars and eighty-two cents, and the bond for one thousand and twelve dollars and ninety-five and one-half cents), is right. It seems to me, however, that the court erred in so much of its decree as relates to Southall's commissions on his receipts. On the 1st of July 1850, when the Code went into operation, he had not incurred any forfeiture of commissions under the provisions of the act of 1825, only sixteen months having then elapsed since the date of his qualification as executor. The effect of the Code was to repeal the act of 1825, in such case, and there being no longer, in existence, any law declaring a forfeiture of commissions on moneys received by him prior to the 1st of July 1850, for failing subsequently to settle his accounts within two years after his qualification, he was I think entitled to such commissions. And as he died before the expiration of six months after the end of the year commencing on the 1st of July 1850 he did not incur a forfeiture of commissions, on such of his receipts as were subsequent to that date, under the 8th section of chapter 132 of the Code. Boyd's ex'ors v. Boyd's heirs, 3 Gratt. 113.

I perceive no other error in the principles of the decree. It seems to me, however,

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that before executions should be allowed to go out for the sums decreed to the infant appellees respectively, some person should be designated by the Circuit court to
286 receive the *money in trust for the infants. When this shall have been done, executions can issue in the names of the infants, with an endorsement that the money is to be paid to the person so designated.

I am of opinion to reverse the decree to the extent of the error indicated in respect to Southall's commissions, and to affirm it in all other respects: and to remand the causes to the Circuit court for further proceedings, &c.

MONCURE and LEE, Js., concurred in the opinion of Daniel, J., except that Moncure, J., was not prepared do say that one partner would not be a proper surety for the other in a transaction wholly unconnected with the partnership.

ALLEN, P., dissented as to the bond given to the testator, but concurred in the opinion as to the one given to the executor; he being of opinion that a partner is not a sufficient surety for his copartner.

SAMUELS, J., dissented as to both bonds. Reversed in part, and affirmed in part.

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287 *Hunter v. Humphreys.

April Term, 1858, Richmond.

1. **Slaves—Suit for Freedom—Wrong Exercise of Jurisdiction—How Advantage Taken.***—In a suit for freedom there is a special verdict which finds that the defendant took possession of the plaintiff in the county of Prince Georges, Maryland, and has since retained her in his possession down to the institution of this suit; but it does not state that the plaintiff was detained as a slave in the county where the suit was brought.—Though detention of the plaintiff where the suit is brought is necessary to give the court jurisdiction, yet as the court has general jurisdiction over the subject matter of controversy, the objection to the exercise of jurisdiction in the particular case, for this cause, is matter in abatement of the proceeding, and should be pleaded, or brought to the notice of the court by rule or motion before the jury is sworn in the cause.
2. **Special Verdicts—When Not Defective.**†—In a special verdict, if the facts found make a case upon which the court may render a judgment upon the merits, the verdict is not defective because other facts exist which might have been found, and which would have made a different case requiring a different judgment.
3. **Wills—Construction of—Emancipation of Slaves—Case at Bar.**—In July 1829 Mrs. H of P. G. county, Maryland, made her will, and emancipated certain of her slaves at her death. She then gave as follows: I give to my brother B, during his life, all the rest of my slaves; and at his death, those above the age of fifteen years to be immediately free and fully emancipated; and those under the age of fifteen years to be bound out in P. G. county in the state of Maryland, until they shall arrive at the age of eighteen years, when they and their increase shall be free and fully emancipated. A child of one of the female slaves left to B for life, born during the life of B, is emancipated by the will.

At the January term 1857 of the County court of Alexandria county, Harriet Humphreys, a negro, filed her petition for leave to sue for her freedom: and at the same term Robert W. Hunter appeared by his counsel, and claimed to be the owner of said negro. And, by consent of parties, the court made an order directing the sheriff of the county to hire out the petitioner
288 *until final judgment should be rendered in the case.

At the next May term of the court the jury found a special verdict, in which they stated, that Mary Green Hardy, of Prince Georges county, Maryland, in July 1829 made her will, which is set out in full; and that it was duly admitted to probate in said county in the year 1830. By the first and second clauses of her will Mrs. Hardy emancipated certain slaves by name and the children of one of them, at her death. The fourth clause is as follows: "I give and bequeath unto my brother Basil Hatton, during his life, all the rest of my slaves; and at his death, those above the age of fifteen years to be immediately free and fully emancipated, and those under the age of fifteen years to be bound out in Prince Georges county in the state of Maryland, or in the district of Columbia, until they shall arrive at the age of eighteen years, when they and their increase shall be free and fully emancipated." The residue of the testatrix's estate was given to Basil Hatton; and he was appointed sole executor of the will.

The special verdict further found that among the slaves embraced in the residuary bequest of negroes to Basil Hatton, was a woman named Marietta, of whom the petitioner Harriet was born about the year 1836, and more than a year prior to the death of Basil Hatton. That Hatton died in August 1840, in the county of Prince Georges, Maryland, where he resided before and at the time of his death. That the defendant Hunter took the petitioner into his possession in the county of Prince Georges, where he had obtained letters testamentary on the estate of Basil Hatton; and has since retained possession of the petitioner down to the time of the institution of this suit.

After the finding of the special verdict, the cause was at the same term re-
289 moved to the Circuit court of *Alexandria county. And by consent of parties the verdict was amended, and an

*See Ratcliff v. Polly, 12 Gratt. 528.

As to the effect of a judgment where there is a wrongful exercise of jurisdiction, see *foot-note* to Andrews v. Avory, 14 Gratt. 229.

†**Verdicts—When Not Defective.**—It is no objection to a verdict that enough is not found to answer the purpose of one of the parties, provided what is found be clearly stated. Scott v. Alexander, 1 Wash. 335.

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act of the state of Maryland passed in 1809, was agreed to be considered as incorporated in it; and it was further agreed that the said act was in force at the date of the will of Mary G. Hardy, and ever had been since and is still the law of Maryland. This act, after reciting that by the law of Maryland slaves may be emancipated either by last will and testament or by deed of manumission; and that as to slaves liberated at a future day or on a contingency, the state and condition of the issue of such slaves was not settled with sufficient legal precision, it was enacted, § 2. "That from and after the first day of February eighteen hundred and ten, if any negro or mulatto female slaves, by testament or last will or deed of manumission, shall be declared to be free after any given period of service, or at any stipulated age, or upon the performance of any condition, or on the event of any contingency, it shall be lawful for the person making such last will and testament or executing such deed of manumission, to fix and determine in the same the state and condition of the issue that may be born of such negro or mulatto slave during their period of service." By section 3 it was provided that if in such cases, such persons did not in their will or deed of manumission, fix or limit the state or condition of the issue that might be born of such negro or mulatto female slave, then the state and condition of such issue should be that of a slave.

The Circuit court rendered a judgment upon the special verdict in favor of the petitioner: And thereupon Hunter applied to this court for a supersedeas, which was allowed.

Brent, for the appellant, insisted:

1st. That this case having occurred in Maryland, must be governed by the
290 law of Maryland; and that *from a very early period, it had been held in that state, that the issue of slaves conveyed or bequeathed by deed or will for life or years, born during the existence of the particular estate, belong absolutely to the owner of the life or particular estate, unless such issue shall be otherwise disposed of by the deed or will. Scott v. Dobson, 1 Har. & McH. 160; Somerville v. Johnson, Id. 348; Standiford v. Amos, 1 Har. & John. 526; Hamilton v. Cragg, 6 Har. & John. 16; Chew v. Gary, Id. 526; Bohn v. Headley, 7 Id. 257; Sutton v. Crain, 10 Gill & John. 458; Holmes v. Mitchell, 4 Maryl. R. 532. That by the act of 1809 the grantor or testator had authority to confer freedom on such issue; but if that was not done, they were slaves. That the act was in accordance with the case of Maria v. Surbaugh, 2 Rand. 288, and was to be construed and applied upon the principle of that case. And he insisted that this will made no disposition of the issue of the slaves given to Hatton for life; and therefore they were slaves.

2. That the special verdict did not find that the appellant Hunter held the slave in the county of Alexandria, which was necessary to give the court jurisdiction; but on the contrary, finds that he took possession of the petitioner in the county of Prince Georges, Maryland, and had since retained possession of the petitioner down to the institution of this suit. Code, ch. 106, § 1, p. 464; Ratcliff v. Polly & als., 12 Gratt. 528.

3. That the special verdict was too uncertain and defective for the court to render judgment thereon. That it was not sufficient to find the act of 1809; but it was an established rule of law in Maryland, that the legatee for life of slaves, was entitled to the issue of the female slaves born during the existence of the life estate: and this had not been found. 1 Rob. Pr. 184.

4. The special verdict has not found
291 whether Basil *Hatton ever qualified as executor of his sister; and as such assented to the bequest of freedom: and this assent was necessary. Tucker, P., in Nicholas v. Burrus, 4 Leigh 289; Sutton v. Crain, 10 Gill & John. 458; Bolling v. The Mayor of Petersburg, 3 Rand. 563.

Funsten and Carrington, for the appellee, insisted:

1. That the act of 1809 recognized the distinction drawn between, on the one hand, the case of Maria v. Surbaugh, and cases of that class, and on the other, the cases of Elder v. Elder's ex'ors, 4 Leigh 252; Erskine v. Henry, 9 Id. 188; Lucy v. Cheminant's adm'rs, 2 Gratt. 36, and Osborne v. Taylor's adm'r, 12 Id. 117. That whilst the statute established the principle of Maria v. Surbaugh, yet whether a case came within the operation of the statute was to be ascertained in the same way and by the same criteria, as we ascertain in Virginia, whether a case falls within the principle of Maria v. Surbaugh or Erskine v. Henry. For this they referred to Hamilton v. Cragg, 6 Har. & John. 16. And applying the principle of the cases to the construction of the will of Mrs. Hardy, they insisted that she intended to emancipate all her slaves, and all their issue.

2. That the question of jurisdiction could not be taken in this court. The act, Code, ch. 169, § 1, p. 641, authorized a suit to be brought in any county wherein the defendant resided; and the County and Circuit courts of Alexandria county being courts of general jurisdiction, the objection could only have been taken by plea in abatement, or by motion to the court to dismiss the petition on the ground of want of jurisdiction. Bradley v. Welch, 1 Munf. 284; Monroe v. Redman, 2 Id. 240; Ratcliff v. Polly and als., 12 Gratt. 528.

3. That it was too late to object in this court that it did not appear that Hat-
292 ton had qualified as executor *of Mrs. Hardy. But if the objection might be taken here, the time for which he had held the slaves must be conclusive to show, either that he qualified as executor and assented to the bequest in his favor, or that some one else had qualified and had assented

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to the legacy. And if assent had been given to the legacy for life, it operated in favor of the legatee in remainder.

ALLEN, P. Upon the petition of the appellee that she was unlawfully detained as a slave in the county of Alexandria, in the possession of the appellant, she was permitted to institute a suit for her freedom; the appellant appeared and claimed to be the owner of the negro, and, by consent of parties, the court ordered the appellee to be hired out by the sheriff of said county until final judgment. At a subsequent term a jury was sworn to try whether the appellee was free or not. A special verdict was found, which by consent was afterwards amended; and by further consent the cause was removed to the Circuit court, which rendered judgment on the special verdict as amended for the appellee.

One of the errors assigned in the petition is, that it is found by the special verdict that the appellant took possession of the appellee in Prince Georges county, Maryland, and still retains possession of her there, and the court of Alexandria county had therefore no jurisdiction to try the cause. The special verdict finds that the appellant took the appellee into his possession in said county of Prince Georges, where he administered on the estate of Basil Hatton, and has since retained her in his possession down to the time of the institution of this suit. But it is not found, as the petition states, that he retained possession of her in Prince Georges county.

The verdict does not find that she was detained as a slave in Alexandria
293 county; and detention as a slave *in the county or corporation where the suit is brought, is necessary to give the court jurisdiction. The court, however, has general jurisdiction over the subject matter of the controversy, and the objection to the exercise of the jurisdiction in the particular case for the cause alleged is matter in abatement of the proceeding, and should be pleaded, or brought to the notice of the court by rule or motion before the jury was sworn to try whether the petitioner was free or not. No such motion or suggestion was made in this case. The detention of the petitioner as a slave in Alexandria county, instead of being controverted, seems to have been conceded in previous stages of the proceedings. It was so alleged in the petition. The appellant appeared at the same term, and without controverting this allegation, consented that the sheriff of Alexandria county should hire her out until final judgment. It thus appeared she was detained as a slave within the county. In Polly v. Ratcliff, 12 Gratt. 528, Judge Daniel observes, "that it is hardly to be supposed that the legislature, in dispensing in these suits for freedom, with the rules and declaration and pleadings, designed that questions of jurisdiction should be litigated before the jury without notice to the petitioner." Still less can it be supposed that it was ever contemplated that such questions, though not litigated before, and therefore never passed upon by the jury, should for the first time be raised in the appellate tribunal.

Another error assigned in the petition is, that the verdict is too uncertain and defective for the court to render judgment thereon. The law of Maryland is not found or stated by the jury with sufficient certainty, and being a foreign law should have been found as a fact by the jury. After the verdict was found, certain facts were agreed between the parties, which by their consent were to be considered as in-
294 corporated *in and to form part of the special verdict. In this agreement of facts an act of the general assembly of Maryland is set out in full, and it is agreed that this act was in force at the date of M. G. Hardy's will, under which this controversy arises; and that said act has ever been since and still is the law of Maryland.

It does not appear on the face of the verdict, nor is there a suggestion in any part of the record, that there was any other law of Maryland bearing upon the case. There is no uncertainty in this respect on the face of the verdict. In the absence of a finding of any other law in Maryland affecting the questions in controversy, the court must act on the presumption that the law of Maryland in other respects is similar to the laws of Virginia. Harper v. Hampton, 1 Har. & Johns. 623, 710; and 1 Rob. Pr. 230, and the cases there referred to.

A third objection though not assigned as error in the petition, has been taken in the argument here. The verdict, it is argued, has not found that Basil Hatton ever qualified as the executor of his sister, and as such assented to the bequest of freedom. The verdict finds the will, the probate, the birth of the appellee about a year before the death of B. Hatton the residuary legatee and executor, the death of the said B. Hatton, and that the appellant took possession of the appellee, having administered on B. Hatton's estate, and that he has since retained possession. The will was admitted to probate in 1830, B. Hatton died in 1840, and this suit was instituted in 1857.

The verdict shows that the appellant took and held possession of the appellee in his representative character as part of B. Hatton's estate. If B. Hatton did not qualify as the executor of his sister, it would seem from the facts found that he held the slaves; and therefore after such a length of time the reasonable presumption is that the
295 administrator with the will *annexed did assent to the legacy. The claim of the appellant and his taking possession of the appellee as part of B. Hatton's estate, is an affirmation on his part of an election by B. Hatton to hold as legatee for life under the will, if he qualified as executor, or that there was an assent so as to perfect his title as residuary legatee, and that so he became entitled to the increase born during his life estate. I think that there is no valid objection to the finding of the special verdict, upon either of the grounds

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relied on; and that the question whether the appellee under the will of Mary G. Hardy is entitled to her freedom, which alone was intended to be presented and was decided by the court below, fairly arises upon the record.

The testatrix had her domicil in Maryland; the property was in that state; and there her will was published and admitted to probate. The will must, therefore, be considered with reference to the laws of that state. The act of the general assembly of Maryland incorporated by agreement in the special verdict, after reciting in the preamble that slaves may be liberated by the laws of that state either by last will and testament or by deed, and that when female slaves were declared to be free at a future time, the condition of the issue born before that time seemed not to be settled with sufficient legal precision, proceeds in the first section to enact that it shall be lawful for the person making such last will or deed to fix and determine in the same the state and condition of the issue that may be born of such negro or mulatto female slave during the period of her service. The second section provides that if the state and condition of such issue shall not have been so fixed and limited, that then the state and condition of such issue shall be that of a slave. The effect of these provisions is to establish by positive enactment the principle recognized by this court
296 in Maria v. Surbaugh, 2 Rand. 228, confirmed by many *subsequent cases, and the established law of this state until it was modified by the Code, ch. 104, § 10, p. 458, which provides that such issue of any female emancipated by deed or will thereafter made, shall be free when the mother's right to the enjoyment of her freedom arrives, unless the deed or will otherwise provides.

It has been averred in argument, and the cases referred to prove, that in Maryland the increase of slaves conveyed or bequeathed by deed or will for life, born during the existence of the particular estate, belong absolutely to the owner of the particular estate, unless such increase shall be otherwise disposed of by the deed or will. This proposition, as between the owner of the particular estate and the remainderman, was decided in Maryland as early as 1749, in Scott v. Dobson, 1 Har. & McH. p. 160. It was reaffirmed and acted upon between similar parties in Somerville v. Johnson, 1 Har. & McH. 348. In that case the opinion of Daniel Dulany, a member of the proprietary's council, is published, who though he disapproved of the principle, considered himself bound by Dobson v. Scott, and gives the two principal reasons which governed the court in that case:

1st. That unless the owner of the particular estate took the increase, he might have no interest worth regarding, to take care of the issue.

2nd. That in such cases a bounty was intended; but if the issue went over, instead of a benefit there might be a loss. The principle established in these cases seems still to be adhered to in Maryland. See Holmes v. Mitchell, 4 Maryl. R. 552. A different rule prevails in Virginia; the slaves born during the particular estate constitute a part of the testator's estate, unless otherwise disposed of; Erskine v. Henry, 9 Leigh 183; and the owner of the particular estate is entitled to their services
297 during the existence of that estate, and no *longer. As has been already observed on another error assigned, this law of Maryland, as gathered from judicial decisions, is not referred to in the special verdict, and there is nothing in the record indicating that it was relied on or brought to the notice of the court below. If it constituted a material part of the appellant's case, it should have been proved as a fact on the trial; and a mere suggestion in the appellate court that other facts existed which might have been proved and found, ought not to avail the party, if the facts as proved make out a good case.

But the interpretation of the will would not be affected, whether construed with reference to this rule of the Maryland courts, or the law of Virginia only. The law of Maryland, and the principle established in Virginia in Maria v. Surbaugh, equally recognize the right of the testator to fix and determine the state and condition of such issue born during the existence of the particular estate. It resolves itself at last into a question of intention. In the construction of wills we are to find out the meaning, the intention, the will of the testator; and unless it violates some provision of law, it must be carried into effect. Anderson's ex'ors v. Anderson, 11 Leigh 616. And in Holmes v. Mitchell, 4 Maryl. R. 532, the judge observes, "that in the interpretation of wills the intention of the testator is to be gathered from the entire instrument, and prevails, unless it violates some established principle of law; and where there is a general intent and a particular minor intent, the latter must give place." In Virginia, as such increase, if not otherwise disposed of, are the slaves of the testator's estate, any words showing an intention to emancipate all his slaves, will embrace the after-born. Thus, in Pleasants v. Pleasants, 2 Call 270, "respecting my poor slaves all of them as I shall die possessed with shall be free." In Elder v.
Elder's ex'ors, 4 Leigh 252, "the
298 remaining part of my negroes." *In Erskine v. Henry, 9 Leigh 188, "all his negroes to be free and at full liberty." In Binford's adm'r v. Robin, 1 Gratt. 327, "that all my negroes be liberated." In Lucy v. Cheminant's adm'r, 2 Gratt. 36, "all the rest of my slaves." In Osburne v. Taylor's adm'r, 12 Gratt. 117, the testator bequeathed in trust for the benefit of another for life, the whole of his negroes not before disposed of or devised; and provides that at the death of the beneficiary for life, "it is further my will and direction that the slaves embraced in this item be emancipated." In all these cases these general

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terms of description were held to embrace the after-born issue. The last is a peculiarly strong case, because it was contended that as the slaves undisposed of were given in trust for life, and the clause emancipating referred to the slaves embraced in this item, it was equivalent to a bequest emancipating slaves by name. As, however, the life tenant was entitled to the issue during the existence of the particular estate, the clause emancipating was descriptive of the class, and embraced all.

In Maryland it was decided, before the passage of the law made part of the bill of exceptions, that under a will leaving certain slaves who were named, and their increase, to his wife for life, and at her death he left all the above negroes free, and also left his lands after her death to be divided amongst them, that the increase were emancipated. Jack v. Hopewell, cited in a note to 6 Har. & John. R. 2.

And in the case of Hamilton v. Cragg, 6 Har. & John. 16, the clause was in these words: "Item. I give to my sister five negroes by name Frank, Joe, &c., to possess and enjoy during her natural life them and their increase; and my will is that after the death of my sister the above named negroes be free." There, as in this case, there was no limitation over of the increase, and it was decided that such
299 increase became free at *the death of the life tenant, because though not directed to be free and the emancipation was confined in terms to the above named negroes, it was merely descriptive of the persons who were to take their freedom. That the will made no difference in the condition of the mother and children during the life of Mrs. T., none at her death was intended, but all were equally the objects of the benevolence of the testatrix.

The will in the case under consideration, shows an intention to dispose of all her property; and the leading intent is to emancipate all her slaves. By the first and second clauses referring to her slaves, she emancipated certain slaves named, with their children, to take effect immediately at her death. By a third clause she bequeaths to her brother B. Hatton, during his life, all the rest of her slaves; and at his death, those above the age of fifteen years to be immediately emancipated, and those under the age of fifteen to be bound out in Prince Georges county until they arrive at the age of eighteen years, when they and their increase shall be free and fully emancipated.

The rest and residue of her estate, real, personal and mixed, she gives to her brother Basil Hatton; and appoints him sole executor. The will interpreted with reference to the decisions in this state, would emancipate the after-born issue; and construed with reference to the rule established in Maryland, the terms used are stronger to manifest the intention to fix the state and condition of the increase than the terms used in the cases of Jack v. Hopewell, and Hamilton v. Cragg. No difficulty arises from certain slaves named being bequeathed, and declared to be free on the death of the legatee for life. Here the bequest is of all the rest of her slaves, treating them as a class. That she intended to embrace issue as well as parents, is evident from the whole context of the will.
300 In *two clauses she gives freedom immediately at her death to certain slaves who are named, and she takes care in each case to declare that the children shall also be free. In the clause in regard to the rest of her slaves, after dividing them into those above and those under fifteen, and directing the latter to be hired out until they attain the age of eighteen; considering that some of the last class might have issue after the death of the legatees for life, and before arriving at the age of eighteen, she takes care to provide for such increase.

In the various provisions concerning the slaves and their emancipation, the testatrix had reference not so much to the time when the will would legally take effect, the period of her death, as to the time fixed for the actual enjoyment of freedom. When the emancipation was to be immediate, she provides for the children of the females so immediately set free. When after the termination of the particular estate, emancipation was conferred after a limited servitude, the increase if any in this interval are provided for. She could not foresee the duration of the life estate. If it continued more than fifteen years, all the negroes under fifteen years of age when it ended, would have been born during the existence of the particular estate. But looking to the termination of the life estate as the period when emancipation was to take effect as to the slaves included in the general bequest of the rest of her slaves, she divides the whole class into those above and those under fifteen, without reference to the period of their birth, thus including all parents and issue; and to one set she gives immediate freedom; to the other and their after-born issue, freedom at eighteen. I think the general intent to fix the state and condition of all, is sufficiently apparent from the whole context of the will,
301 and that the descriptive *terms used, when interpreted with reference to what precedes and follows, show that the testatrix intended to embrace all living at the termination of the particular estate, the increase as well as the mothers, in the two classes of negroes above and those under the age of fifteen.

I am for affirming the judgment.

The other judges concurred in the opinion of Allen, P.

Judgment affirmed.

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302 *Condon v. South Side R. R. Co.

April Term, 1858, Richmond.

Contracts with Railroads—Agreement to Submit Future Disputes to Engineer.—The agreement between a railroad company and a contractor pro-

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vides: And whereas the above work must be inspected and received, it is hereby agreed that the engineer of the company or some one appointed by him, shall be the inspector of said work, shall determine when this contract is complied with according to its just and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same; and his decision shall be obligatory and conclusive between the parties to this contract, without further recourse of appeal. HELD:

1. **Same—Same—Decision of Engineer Conclusive.***—The decision of the engineer is conclusive upon the parties: And this in relation to the price of a species of excavation not mentioned in the specifications.

2. **Same—Same—Contract Binding.**†—Such a contract is legal and binding on the parties.

This was an action of assumpsit in the Circuit court of the city of Petersburg, brought by David Condon against the South Side Rail Road Company. The plaintiff had been a contractor to execute the work on a section of the road of the company; and the only question was, Whether, under the contract between the parties, the action of the engineer in determining the character and fixing the price of removing certain rock, was conclusive upon the parties? The case is stated in the opinion of Judge Moncure. There was a judgment for the defendant in the Circuit court: and thereupon Condon applied to this court for a supersedeas, which was allowed.

J. Alfred Jones, for the appellant, referred to Harrison v. The Great Northern R. Co., 8 Eng. L. & E. R. 469; Wilson v. York & Maryland Line R. R. Co., 11 Gill & John. 58; United States v. Robeson, 9 Peters' R. 319; Mansfield & Sandusky R. R. Co.
303 v. Veeder & *Co., 17 Ohio R. 385; 2 Tuck. Com. 30-35; 2 Story's Equ. Jur. § 1053-1056.

Joynes, for the appellee, cited Scott v. Avery, 20 Eng. L. & E. R. 327; S. C. 36, Id. 1; United States v. Robeson, 9 Peters' R. 319; Morgan v. Birnie, 23 Eng. C. L. R. 414; Milner v. Field, 1 Eng. L. & E. R. 531; Glenn v. Leith, 22 Eng. L. & E. R. 489; Grafton v. Eastern Counties R. Co. Id. 557; Northampton Gas-Light Co. v. Parnell, 29

*__Contracts with Railroads—Agreement to Submit Future Disputes to Engineer—Decision of Engineer Conclusive.__—In Norfolk, etc., R. R. Co. v. Mills, 91 Va. 643, 22 S. E. Rep. 556, JUDGE BUCHANAN, in a dissenting opinion, said: "In order, therefore, that the interests of neither party might be placed in peril by disputes as to any of the matters covered by their agreement, or in reference to the work to be done, or the compensation to be paid, it was expressly stipulated that the engineer's determination of those matters should be 'final and conclusive on all parties.' That such was the effect of the provision of the contract referred to is settled by the decisions of this court and of the Supreme Court of the United States, and by the great weight of authority in this county. Kidwell v. B. & O. R. R. Co., 11 Gratt. 676; *Condon v. Southside R. R. Co., 14 Gratt. 302*; Baltimore & O. R. R. Co. v. Polly, Woods & Co., 14 Gratt. 447; James River and Kanawha Co. v. Adams, 17 Gratt. 441 (note); Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549."

Again, in Newman v. United States, 81 Fed. Rep. 126, it was said: "By the terms of the contract the work was to be under the charge of an engineer or other officer designated by the government, and all materials and work were subject to his inspection, and to his acceptance or rejection. All materials were to be measured in excavation, and all cases where classification should be doubtful were to be decided by the engineer in charge. These contractors, in view of their stipulations with the government, are conclusively bound by the estimates of the engineer, and cannot recover beyond what he has allowed them, in the absence of fraud or of such gross error or mistake in judgment as would imply bad faith on the part of the engineer. Kihlberg v. U. S., 97 U. S. 398; Railway Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290; Railway Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343; Railroad Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035; Ogden v. U. S., 9 C. C. A. 251, 60 Fed. 725; Mundy v. Railroad Co., 14 C. C. A. 583, 67 Fed. 633; *Condon v. Railroad Co., 14 Gratt. 302*."

In Norfolk, etc., R. R. Co. v. Mills, 91 Va. 639, 22 S. E. Rep. 556, KEITH, P., in a concurring opinion, said: "The case of *Condon v. Southside R. R. Co., 14 Gratt. 302*, is a memorable judgment. It settled the law in this state upon a most interesting question, and has been frequently cited with approval in the courts of other states. It was followed in the case of the James River & Kanawha Co. v. Adams, 17 Gratt. 441, and we do not question nor doubt the law as thus established."

See also, the principal case cited in Mills v. N. & W. R. R. Co., 90 Va. 530, 19 S. E. Rep. 171.

†__Same—Same—Contract Binding.__—In Kinney v. Baltimore & O., etc., Ass'n, 35 W. Va. 385, 14 S. E. Rep. 8, the first point of objection made by the appellant to the decree was that the plaintiff could not sue because of a certain article of the constitution of the association which read thus: "Should any difference arise between any claimant for the benefits herein set forth and the committee of management, it shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two thus chosen, whose decision shall be final."

The question arose therefore, whether this article forbade the plaintiff from resorting to a court of justice to inforce her demand, and limited her to arbitration. In dealing with the question, BRANNON, J., delivering the opinion of the court, said: "Indeed, a mere agreement to refer, without an actual consequent reference, is no bar to an action in any case. 2 Pars. Cont. 707 states: 'Both in this country and England it has long been considered that the parties to a contract are not bound by an agreement, whether in or out of the contract, to refer questions under the same to arbitration: because they cannot oust the courts of their jurisdiction by any agreement that these claims shall be submitted to arbitration.' Same doctrine in Morse, Arb. 91. Many American cases are cited for this proposition. It will be seen in *Condon v. Railroad Co., 14 Gratt. 314*, that JUDGE MONCURE, and in Scott v. Avery, 36 Eng. Law & Eq. 1, that COLERIDGE, J., criticise the doctrine as standing on no solid reason, but say it is law too long settled to be disturbed. In the case of Condon v. Railroad Co., the Virginia court, following the English case, feeling the unreasonableness of the rule, as I myself do, drew a distinction, which, however clear

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Id. 229; Worsley v. Wood, 6 T. R. 710; Mason v. Harvey, 20 Eng. L. & E. R. 541; Leadbetter v. Etna Ins. Co., 13 Maine R. 265; Kidwell v. Baltimore & Ohio R. R. Co., 11 Gratt. 676; Phil. Wilm. & Balt. R. R. Co. v. Howard, 13 Howard's U. S. R. 307; Delaware & Hudson Canal Co. v. Dubois, 15 Wend. R. 87; Ranger v. Great Western R. R. Co., 27 Eng. L. & E. R. 35; Sherman v. Mayor, &c. of New York, 1 Comstock's R. 316; Boston Water Power Co. v. Gray, 6 Metc. R. 131, 181; Kleine v. Catara, 2 Galli. R. 61; Head v. Muir & Long, 3 Rand. 122; Hollingsworth v. Lupton, 4 Munf. 114; Pollard v. Lumpkin, 6 Gratt. 398; Bassett's adm'r v. Cunningham's adm'r, 9 Gratt. 684; Underhill v. Van Cortlandt, 2 John. Ch. R. 339; Pleasants, &c. v. Ross, 1 Wash. 156; Taylor's adm'r v. Nicolson, 1 Hen. & Munf. 67; Butler v. Mayor, &c. of New York, 1 Hill's R. 489.

MONCURE, J. This is a supersedeas to a judgment of the Circuit court of Petersburg, rendered in an action of assumpsit brought by the plaintiff in error, David Condon, against the defendants in error, the South Side rail road company, on a contract between them, whereby the said Condon agreed to excavate, embank and construct sections Nos. 38 and 40 of the South Side rail road, according to certain specifications, and the said company agreed to pay for the work at certain rates, and in a certain manner, prescribed by the
304 *contract. The main, if not the only, object of the action, was to recover eighty cents per cubic yard for twelve thousand six hundred and sixty-two cubic yards of excavation, instead of the price allowed therefor in the final estimate of the engineer of the company, to wit, eighty cents per yard for two hundred and sixty cubic yards, thirty-five cents per yard for five thousand seven hundred and ninety-six cubic yards, and forty cents per yard for the remaining six thousand six hundred and six cubic yards thereof. The declaration contains three counts, all of which are special counts. There is little material variance between them. There was a general demurrer to the declaration, which was sustained by the court, and judgment thereupon rendered for the defendants: to which judgment the supersedeas in this case was awarded.

The contract is set out in totidem verbis in each count of the declaration. It embodies the specifications according to which the work was agreed to be done, but which it is unnecessary to detail. Under the head of "Items to be estimated and mode of estimating," is the following among other statements:

"All materials necessarily excavated for the road way, ditches or common road, will be estimated and paid for by the cubic yard, under the following heads, viz: Common excavation, Loose rock, Solid rock, and Slate that requires blasting.

"Common excavation will include sand, clay, gravel, soft rock, loam, and all other earthy matter, also detached rock intermixed, which do not contain more than three cubic feet each.

"Loose rock will include all detached rocks containing more than three and less than twenty-seven cubic feet each.

"Solid rock will include all rock in masses containing more than one cubic yard, which requires blasting.

"Slate—all slate which requires blasting."

305 *The contract then proceeds:

"And the South Side rail road company covenant and agree to pay to the said party of the second part when the above contract shall have been faithfully complied with, at the following rates, to wit:

Section No. 38, 9¼ cents per cubic yard for common excavation.

Section No. 38, 9¼ cents per cubic yard of embankment.

At the engineer's estimate for loose rock.

Section No. 38, 80 cents per cubic yard for every yard solid rock.

At the engineer's estimate for slate rock.

Section No. 38, $3 per cubic yard of every yard of dry stone drains.

And they will make their payments in the following manner, that is to say: On or about the 1st day of every month during the progress of this contract, the company aforesaid will pay 80 per cent. of the relative value of such work as may be done, to be judged of by their engineer, and at such places as their said engineer may appoint, until the whole of the work herein contracted for shall have been finished agreeably to contract, and shall have been accepted by their said engineer as so finished and completed, when the balance due shall be forthwith paid to the said party of the second part."

Then follow sundry other provisions, of which the last is the following:

"And whereas the above work must be inspected and received, it is hereby agreed that the engineer of the South Side rail road company, or some one appointed by

in words, is not in principle; as JUDGE MONCURE admits that parties may by contract lawfully make the decision of arbitrators, or of any third person, a condition to a right of action, and that then such decision is a part of the cause of action; and until such decision is made the courts have no jurisdiction, and therefore cannot be said to be ousted of their jurisdiction, and they can only be said to be so ousted when an independent cause of action does or will exist which itself is referred to arbitration; and the Virginia court held that where a contract provided that work in construction of a railroad should be inspected and received by the engineer, and the amount of the work and all disputes touching the same should be determined by him, and his decision should be final, without further appeal, the contract was obligatory. But both the Virginia and English courts say that such a contract as this under said article 25 does not prevent suit in a court. So the first point made by appellant cannot be sustained."

See generally, monographic *note* on "Arbitration and Award."

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him, shall be the inspector of the said work, shall determine when this contract has been complied with, according to its just and fair interpretation, and the amount of the same, and all disputes
306 *and difficulties arising under the same, and his decision shall be obligatory and conclusive between the parties to this contract, without further recourse of appeal."

After setting out the contract, it is, among other things, averred in the first count of the declaration, that section No. 40 had been transferred to another contractor, with the consent of the engineer of the defendants, and been completed and accepted; that in consideration of the agreement aforesaid, the plaintiff entered upon section No. 38, and excavated, embanked and constructed the same according to the agreement; and the same was on the 30th day of March 1852, accepted by the said engineer as so completed; that he did on said section a certain quantity of work stated in detail, one item of which is "twelve thousand six hundred and sixty-two cubic yards of rock in masses containing more than one cubic yard which required blasting;" that the chief engineer of the defendants, C. O. Sandford, appointed one B. H. Gordon to inspect and receive the work; that said Gordon, after he was so appointed, declared that the said twelve thousand six hundred and sixty-two cubic yards of rock excavation were in masses of more than one cubic yard, and required blasting, and could not be classified as "common excavation," yet refused to classify the same (except two hundred and sixty cubic yards) as "solid rock;" but adopting an arbitrary and unauthorized mode of classification, put down five thousand seven hundred and ninety-six cubic yards thereof at thirty-five cents, and six thousand six hundred and six yards at forty cents, instead of the whole at eighty cents per cubic yard; claiming that, under the contract aforesaid, the chief engineer or person appointed by him to inspect and receive the said work, had authority to classify the said rock as "soft rock," although it was in masses of more than one cubic yard and required blasting, and
307 although it could not be classified *as common excavation; that the said Gordon, governed by this mistake and illegal view of his authority, proceeded to make the classification (which is set out in the said count) of the work done on said section 38; three of the items of which classification are,

"260 cubic yards solid rock, worth 80 cents per yard;
5,796 cubic yards soft rock, worth 35 cents per yard;
6,606 cubic yards soft rock, worth 40 cents per yard;"

making the whole amount to the sum of ten thousand four hundred and thirty-eight dollars and sixty-one cents; and that the determination and classification of the said Gordon were adopted and adhered to by said Sandford, the chief engineer of the defendants: whereupon the plaintiff says that the said classification is contrary to the terms of the contract, and illegal and void, and that he is entitled to demand of the defendants eighty cents per cubic yard for the said twelve thousand six hundred and sixty-two cubic yards of excavation.

The second count, substantially, agrees with the first. The third differs in substance from the first and second only in the assertion of an additional demand for expense alleged to have been incurred by reason of the lowering of the grade of said section 38, and not estimated by the engineer. But this additional demand seems not to be relied upon, and no special notice need be taken of it.

If the classification, or final estimate, as it may be called, of the engineer of the defendants, or his appointee, be final and conclusive between the parties, the demurrer to the declaration was properly sustained, and the judgment must be affirmed. For that estimate is set out in each count of the declaration, and shows how the rock in question was classified, and at what price it was estimated by the engineer; and the plaintiff seeks in this action to estab-
308 lish a different *classification, and to recover a different and higher price.

Then the questions to be considered are: 1st. Whether by the terms, or the true intent and meaning of the agreement, the final estimate or decision by the engineer or his appointee of the matter in controversy, is made final and conclusive between the parties? And if so, 2ndly. Whether such agreement is lawful? I will consider these questions in their order. And

First. Does the agreement make the final estimate conclusive?

The agreement does not, as most agreements for the construction of rail roads do, expressly declare that when the work is completed there shall be a final estimate of the amount due to the contractor, which estimate shall be conclusive between the parties. But such is, I think, the effect and meaning of the agreement. It gives to the engineer of the defendants a general superintendence and direction of the work, and confers upon him very extensive powers in regard to it. He is, monthly, during the progress of the work, to judge of its relative value, and appoint the places at which eighty per cent. thereof is to be paid to the contractor. He is to make such a deduction from the stipulated price as he may deem fair and right, if any portion of the work be constructed in an inferior manner. He is to estimate and adjust the increase or decrease of expenses occasioned by any change which may be made in the line of the rail road, or the width or the level of the road way, or the plan of the works contracted for. He may object to the transfer of the contract to any person to whom the contractor may propose to transfer it; may require the discharge of any overseer, workman or laborer employed by the contractor: and if, in his opinion, a sufficient force shall not be placed and

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309 retained upon the *work to insure its completion by the time stipulated, he or his assistant, after giving notice as required by the contract, may, at his option, either place a sufficient force upon the work at the expense of the contractor, or declare the whole or any portion of it abandoned. And finally, it is agreed that he, "or some one appointed by him, shall be the inspector of the said work, shall determine when this contract has been complied with, according to its just and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same; and his decision shall be obligatory and conclusive between the parties without further recourse of appeal." Under these provisions of the contract, I do not perceive how there can be any question as to the intention of the parties, that at the completion of the work a final estimate should be made by the engineer or inspector, for the purpose of ascertaining the amount due on the contract, that all disputes and difficulties arising under it should be determined by him, and that his decision should be final and conclusive between the parties. Indeed, by express stipulations of the contract, portions of the work were to be paid for, not at agreed prices, but "at the engineer's estimate." He was to make reasonable deductions from agreed prices of work done in an inferior manner; and was to estimate and adjust the increase or decrease of expressed expenses occasioned by changes of the plan of the work, &c. Without a final estimate by the engineer, therefore, it was impossible to ascertain the balance due upon the contract. It was an entire contract, and on its complete execution there could be but one demand upon it. Not one demand for that part of the compensation which was fixed by the contract, and another for that part to be fixed by the estimate of the engineer. The making of a final estimate, therefore, was a condition precedent to the right of action.

310 *It now only remains, under the head of the subject we are now considering, to enquire, Whether the estimate made by the engineer in this case was such a one as the contract authorized? Did the engineer exceed his authority in making the estimate? If he did, then by analogy to the case of an award, and according to a principle of law which governs this case alike with that (if in fact there be any difference, in this respect, between the two cases), the estimate is void. The parties intended that all questions, whether of law or of fact, which might arise under the contract, should be determined by the engineer; and that intention is, I think, plainly expressed therein. It is expressly declared that he "shall determine when the contract has been complied with, according to its just and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same;" and that "his decision shall be obligatory and conclusive between the parties without further recourse of appeal." He cannot set aside or disregard the contract of the parties. That contract must furnish the law of the case. He cannot alter the prices thereby ascertained, even though he may consider them too high or too low. If it should appear that he did so, his act would, undoubtedly, be void. He must decide "according to the just and fair interpretation" of the contract. But of that interpretation he and he alone is the judge, as he is of any other question arising under the contract. And he is not a judge whose decision may be reviewed like the judgment of an inferior tribunal; but he is a judge of the parties' own choosing, and in the last resort; as to whom they have expressly agreed that "his decision shall be obligatory and conclusive, without further recourse of appeal." If he do not keep within the bounds of his authority, his act will, of course, be void. But if he keep within those bounds, his act will be valid, however erroneous

311 *in law or in fact it may be, and however plainly the error may appear. The court cannot set aside his act merely because it differs in opinion with him, whether on a question of law or of fact; for all questions arising under the contract, whether of law or of fact, were referred by the parties to his decision, and not to that of the court. His act may be set aside on the ground of fraud, and perhaps of palpable mistake. But it is unnecessary to state that ground of relief more fully, or to enquire whether it is available at all or not in a court of law, as it does not exist in this case. The only question here is, Did the engineer exceed his authority? It is contended by the counsel for the plaintiff in error that he did, because the contract requires all excavation done under the same to be estimated under four certain heads, and at prices therein respectively prescribed; whereas he estimated twelve thousand four hundred and two cubic yards of said excavation under a head and at prices not prescribed by the contract. It is contended that, according to the contract, this quantity of rock should have been estimated as "solid rock," at eighty cents per cubic yard; or, if not, at least as "common excavation," at nine and one-fourth cents per cubic yard; whereas it was estimated as "soft rock," at thirty-five and forty cents per cubic yard; there being no such head of classification and no such prices as these last prescribed by the contract. The stipulated price for common excavation is nine and one-fourth cents per cubic yard; and "soft rock" is expressly enumerated, among other substances, under the head of "common excavation." So that if the engineer has committed any error, so far as appears on the face of the estimate, it would seem to consist in allowing thirty-five and forty cents, instead of nine and one-fourth cents, per cubic yard for twelve thousand four hundred and two cubic yards of excavation. In could hardly be contended

312 that this *would be an error of which the contractor could complain. But

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it is averred in the declaration that the engineer declared that the "soft rock" in question was "in masses of more than one cubic yard and required blasting," and could not be classified as "common excavation;" and it is therefore contended that the said rock should have been estimated as "solid rock;" the contract providing that "solid rock will include all rock in masses containing more than one cubic yard which requires blasting." If this alleged declaration of the engineer were part of his estimate; or, being matter dehors the estimate, could be relied on as a ground to invalidate it, I think it is insufficient for that purpose. At most, it only shows that in the opinion of the engineer, the "soft rock" in question was a substance not falling under either of the four heads of classification enumerated in the contract; and therefore he allowed such price for its excavation as he deemed reasonable, under that provision of the contract which authorized him to determine "the amount of the same, and all disputes and difficulties arising under it." If this court had the power, could it undertake to say that the engineer's opinion was erroneous? that "soft rock" can be "solid rock" even though it be "in masses containing more than one cubic yard which requires blasting?" Or that "soft rock in masses containing more than one cubic yard which requires blasting," can be "common excavation." If it were necessary that the "soft rock" in question should be classified under one or the other of the two heads of "solid rock" or "common excavation," would there not be at least as much reason in classifying it under the latter as under the former head? But was it not for the engineer to decide under which of the heads enumerated in the contract the said rock should be classified; and, if of opinion that it could be classi-
313 fied under none of them, what *price should be allowed for its excavation? Was not this one of the "disputes and difficulties arising under the contract," which he was expressly authorized to determine, and which it was necessary for him to determine, in order to ascertain the amount due upon the contract? And can this court, even though it may differ in opinion with him, revise and reverse his decision? If it did differ in opinion with him, it could only say, as did Parke, B., in Faviell v. Railway Company, 2 Welsb. Hurl. and Gord. 346, "It is simply the case of an erroneous decision; and if parties choose to refer a matter to a judge of their own selection, they are bound by his decision both in fact and law. The fallacy lies in assuming that the arbitrator has exceeded his jurisdiction." See Russ. on Arbitration, 63 Law Library, marg. p. 113-116, 295-300, 306-313, 455, 516, 632, and the cases cited in the notes. My conclusion on this branch of the subject is, that the engineer did not exceed his authority in making the estimate; and that it is final and conclusive as to the matter in controversy, if the agreement under which it was made be lawful; which brings me to the question next to be considered.

Secondly. Is the agreement lawful?

The only ground on which it can be said to be unlawful is, that in referring all disputes and difficulties arising under the contract to the engineer or inspector, it tends to oust the courts of law of their jurisdiction; and is therefore against the policy of the law and void, according to the principle of the cases of Kill v. Hollister, 1 Wils. R. 129; Thompson v. Charnock, 8 T. R. 139, and others of the same class. That principle is, that wherever a cause of action exists, a right of action in a court of law is incident thereto, and inseparable therefrom, even by the agreement of the parties. So that, if parties enter into an agreement referring a present or future cause of action to
314 the decision of *an arbitrator, even though they expressly stipulate that no action shall be brought in the mean time, the agreement will be no bar to such action. A covenant never to sue, is an implied release, or has the effect of a release, to avoid circuity of action. A covenant not to sue for a limited period, is no release express or implied, nor any bar to the action; though the breach of it is an independent cause of action; as also is the breach of an agreement to refer, by revoking the reference or bringing an action in disregard thereof. The principle in question, it is said, though considered to be now settled, is doubtful in its origin and not to be extended in its operation. It is carefully to be distinguished from another principle with which it is sometimes confounded, and from which it is separated by a line not always easily discernible. That other principle is, that parties by their contract may lawfully make the decision of arbitrators or of any third person a condition precedent to a right of action upon the contract. In that case such decision is a part of the cause of action. Until the decision is made and the cause of action thus becomes complete, the courts have no jurisdiction of the case, and therefore cannot be said to be ousted of their jurisdiction by the contract. They can only be said to be so ousted when an independent cause of action exists, or will exist, which is itself referred to the decision of arbitrators. This principle is commonly applied to building contracts and the like, in which it is stipulated that compensation for the work is not to be paid until the work has been accepted and the amount of compensation ascertained by an architect, engineer, or other referee. Without referring to the many cases which illustrate this principle, I will notice only that of Scott v. Avery, 36 Eng. L. & E. R. 1, decided by the house of lords in 1856. That was an action brought upon three policies of insurance. By the con-
315 tract of *insurance it was provided that the sum to be paid for any loss should first be ascertained by the committee; but in case of difference between the insured and the committee relative to the settling of any loss, or to a claim for aver-

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age, or any other matter relating to the insurance, then arbitrators were to be appointed to decide upon the claims and matters in difference. There was a further proviso, that no member who refused to accept the amount of any loss as settled by the committee, should be entitled to maintain any action at law or suit in equity on his policy until the matters in dispute should have been referred to and decided by arbitrators, and then only for such sum as they should award; and the obtaining such decision was to be a condition precedent to the right to maintain such action or suit. It was held by the house of lords (affirming the judgment of the court of exchequer chamber), that the proviso was not a contract ousting the jurisdiction of the courts, but was legal and binding on the parties, and that it created a condition precedent to the right of action on the contract. The distinction between the two principles before referred to, is well illustrated in the opinion of Coleridge, J., in that case (who also delivered the opinion of the court of exchequer chamber in the same case). "If two parties enter into a contract for the breach of which in any particular an action lies, they cannot make it a binding term that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle or not, may well be questioned, but it has been so long settled that it cannot be disturbed." "But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject matter of decision by the courts. Covenanting parties may agree that in case of an alleged breach the damages to be
316 *recovered shall be a sum fixed, or a sum to be ascertained by A B, or by arbitrators to be chosen in such or such a manner; and until this be done, or the nonfeasance be satisfactorily accounted for, that no action shall be maintainable for the breach." "In settling the amount to be recovered by a builder or a rail way contractor, the architect, or engineer, or whoever may be the preliminary referee agreed on for the purpose, must examine and decide that which may really be the very point in dispute between the parties, namely, the quantity or the goodness of the work, or the quality of materials used; yet no one objects that on this account the stipulation for submission to this previous enquiry is void as ousting the jurisdiction of the courts. I am certainly not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals; and I think the judgment of the court of exchequer chamber stands on a safe distinction between an agreement which would close entirely the access to the courts of law, and that which only imposes, as a condition precedent to the appeal to them, that the parties shall have first settled, by an agreed on mode, the precise amount to be recovered there." Id. 15 and 16. That case seems to be much stronger than this in favor of the validity of such agreements, and if the agreement in that case was valid, so a fortiori is the agreement in this. Indeed I think the agreement in this case is valid according to all the cases I have seen. I mean of course, in the construction I have put upon it, that the estimate of the engineer or inspector ascertaining the amount due upon the contract, is, by the terms and true intent and meaning of the contract, a condition precedent to a right of action thereon. The agreement,
317 in effect, is *not to pay a specific sum, but the amount which the engineer may determine to be due upon the contract: and according to all the cases, such an agreement is valid and binding.

But even if the agreement in this case came within the operation of the principle which prevents parties from ousting courts of law of their jurisdiction, it would not on that account be unlawful, but would only leave the parties at liberty to resort to the courts of law as if no other mode of decision had been agreed upon by them. They would still be at liberty, at their election, to pursue the remedy agreed upon; and having pursued it to a decision, they would be bound and concluded thereby. Now in this case the remedy agreed upon was pursued; the engineer made his final estimate; and the only complaint is that he made it erroneously; that he classified as "soft rock" at thirty-five and forty cents per cubic yard, what he ought to have classified as "solid rock" at eighty cents per yard; and that he persisted in doing so though requested by the plaintiff to make a different and proper classification. Therefore, if the engineer did not exceed his authority in making the estimate, it is final and conclusive; and that he did not, has already, I think, been shown.

I am of opinion that the judgment be affirmed.

ALLEN, P., and LEE and SAMUELS, Js., concurred in the opinion of Moncure, J.

DANIEL, J., dissented.

Judgment affirmed.

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318 *Gedney v. The Commonwealth.*

April Term, 1858, Richmond.

1. **Recognizance—Caption—Name of County Abbreviated—Effect.**—In taking a recognizance, the justice in putting the name of his county in the caption uses a contraction: but the contraction is so used that it is obviously intended for a county, and

*In State v. Lambert, 44 W. Va. 308, 28 S. E. Rep. 930, one objection against the awarding of an execution on a recognizance was that the demurrer to the *scire facias* should have been sustained because the recognizance was several, and the writ of *scire facias* was against both defendants. BRANNON, J., delivering the opinion of the court, said: "I will

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there is no difficulty in ascertaining the county intended. This is not error.

2. **Same—Body of—Designation of County as "Said County"—Effect.**—Though it is not stated in the body of the recognizance, of what county the justice was, yet as it states that he was a justice of the said county, that refers to the county named in the caption, and is sufficient.

3. **Same—Scire Facias—Averment as to Transmission of the Recognizance.**—In a *scire facias* upon a recognizance, a substantive and direct averment that the recognizance was transmitted by the justice to the clerk of the County court, is not necessary. The recital of the recognizance, which purports to be taken by a justice in the county, and the implied averment of the transmission of the recognizance, contained in the *prout patet per recordum*, is sufficient.

4. **Same—Same—Demurrer to—Immaterial Error.**—The mistake of the clerk in stating as by a copy of the recognizance to our said County court transmitted, is not a fatal objection to the *scire facias* upon a demurrer thereto. Code, ch. 171, § 31, p. 650.†

This was a scire facias upon a recognizance, issued from the clerk's office of the County court of Alexandria county, against Esleeck Stearns alias William Slick and Samuel Gedney his surety. The record states that on the 17th day of February 1854

Esleeck Stearns alias William Slick
319 and Samuel Gedney his *surety entered into a recognizance before a justice of Alexandria county, which recognizance is in the following words and figures, to wit:

Alex County, to wit:

Be it remembered, that on the 17th day of February 1854, Esleeck Stearns alias William Slick and Samuel Gedney, of the said county, came before me Robert Hunter a justice of the said county, and severally and respectively acknowledged themselves to be indebted to the commonwealth of Virginia in manner and form following—that is to say, the said Esleeck Stearns alias William Slick in the sum of five hundred dollars good and lawful money of the United States, and the said Samuel Gedney in the sum of five hundred dollars, of like good and lawful money, to be respectively made and levied, &c.

The condition was that said Stearns should personally appear before the county court on the first day of the next term thereof, then and there to answer the commonwealth on and concerning a certain felony by him committed, in feloniously stealing a gold watch and chain of the value of twenty dollars, the property of Stephen P. Wilson, in the county of Alexandria, &c., and should not depart thence without leave of the said court.

At the March term of the County court, three justices only being present, Stearns being called and not appearing, his default was entered of record, and a scire facias was directed to be issued upon his recognizance. Afterwards, at the May term of the court, it was organized as an examining court, with five justices on the bench, and took up the case of Stearns; and he being solemnly called and not appearing, it was ordered that his default be entered of record, and that a scire facias be issued on said recognizance according to law.

320 *The scire facias was in fact issued in April, in pursuance of the first order of the County court; but the parties having agreed to remove the case to the Circuit court, it was agreed between them that no exception should be taken to the date of the scire facias, and that the court might inspect the recognizance and both records of the County court, and decide all questions arising thereon.

The scire facias was against both Stearns and Gedney, and recited the recognizance correctly; but concluded by referring to a copy of the recognizance to our said County court transmitted, and now remaining filed among the records thereof. And further reciting the forfeiture of the recognizance, it commanded the sheriff to summon the said Esleeck Stearns alias William Slick and Samuel Gedney to be before the justices of the County court of Alexandria, at the courthouse thereof, on a day specified, to show if, &c., why the said commonwealth's execution against them the said Esleeck Stearns alias William Slick and Samuel Gedney, of the several sums of money aforesaid, according to the force, form and effect of the recognizance aforesaid, ought not to have, if to us it shall seem expedient, &c.

Gedney appeared and demurred to the scire facias. And the case coming on to be heard, the court rendered a judgment that the demurrer be overruled, and that the commonwealth may have execution against the goods and chattels, lands and tenements of the said defendant Esleeck Stearns alias William Slick, for five hundred dollars; and also may have execution against the goods and chattels, lands and tenements of the said defendant Samuel Gedney, for the five hundred dollars, in the writ aforesaid specified, according to the form and effect of his recognizance therein mentioned. From this

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not here give reasons why one recognizance may be used against two or more cognizors in a several recognizance, but will simply refer to the two cases of Gedney v. Com., 14 Gratt. 318; and Caldwell v. Com., *Id.* 608, pointedly deciding this objection against the defendant."

†Code, ch. 171, § 31, p. 650. "On a demurrer (unless to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading, or not, unless there be omitted something so essential to the action or defence, that judgment according to law and the very right of the cause, cannot be given. No demurrer shall be sustained because of the omission in any pleading of the words "this he is ready to verify," or "this he is ready to verify by the record," or "as appears by the record:" but the opposite party may be excused from replying, demurring, or otherwise answering to any pleading which ought to have, but has not, such words therein, until they be inserted."

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judgment Gedney applied to this court for a supersedeas; which was allowed.

321 *Brent, for the appellant, insisted:

1. That the recognizance did not set forth in what county it was taken, nor did it aver that Robert Hunter, by whom it was taken, was a justice for Alexandria county. The word Alex does not indicate that it is an abbreviation, and if it is an abbreviation, it does not indicate necessarily what it is intended to represent. Wood v. Commonwealth, 4 Rand. 329.

2. That the scire facias was defective, because it does not aver that the recognizance was transmitted to and filed in the office of the clerk of the County court. And it was insisted that the recognizance does not become a record until it is enrolled, or under the Code, transmitted and placed on file in the proper office. Bias v. Floyd, governor, 7 Leigh 640, 649; Code, ch. 211, § 7, 8, p. 785. And it was further insisted, that the scire facias was defective, because it does not show that it was founded on a record; but on the contrary it sets out that a copy of the recognizance was transmitted to and remained on file among the records of the County court.

3. That the County court at its March term, at which the recognizance required Stearns to appear, was not competent to try him as an examining court; there having been but three justices on the bench. And it was therefore incompetent to adjudge and record his default. Dillingham v. United States, 2 Wash. C. C. R. 422, 426; Code, ch. 211, § 8, p. 785; ch. 205, § 8, p. 765.

4. That the action of the court at the May term was unauthorized; and therefore of no legal validity. That the party bound to appear can only be called on the day on which he is recognized to appear, unless the recognizance is respited or regularly adjourned to another term by a court of competent jurisdiction; or at least express notice to appear at another day must be given him. Petersdorf on Bail, part
322 2, ch. 7, *p. 517, 518, 7 Law Libr.; Thruston v. Commonwealth, 3 Dana's R. 224; Goodwyn v. The Governor, 1 Stew. & Por. 465.

5. That the recognizance is several, and not joint and several; and the scire facias is joint; and will not lie on this recognizance. Hildreth v. The State, 5 Blackf. R. 80; Garland v. Ellis, 2 Leigh 555.

The Attorney General, for the commonwealth, insisted:

1. That the recognizance did set out the county in which it was taken. That Alex was stated to be a county, and the word would stand for no other county in the state but the county of Alexandria. That the county in the caption being Alexandria, the other objections stated to the recognizance fell to the ground. In Wood v. The Commonwealth, 4 Rand. 329, no county was stated. As to the abbreviations, he referred to McNeale v. Governor, for, &c., 3 Gratt. 299.

2. That if the recognizance was void if not filed, which is at least doubtful; it appears here that it was filed. And then the question is if it is not cured by the statute. Code, ch. 211, § 11. That the reference to the copy of the recognizance is mere surplusage; and the Code, ch. 171, § 31, shows how little regard is now to be paid to merely technical objections. To show what was necessary to be averred in a scire facias, he referred to Archer's Case, 10 Gratt. 627; People v. Van Eps, 4 Wend. R. 387; People v. Higgins, 10 Id. 464.

3. That it was true that the only court which can record the default is a criminal court. But the County court is competent to record the default; though not to initiate the prosecution. But this is an immaterial question. All the cases now hold that the first day of the term is the first day of the first term at which a court is held competent to try the cause. Cohen's Case,
323 *2 Dana's R. 135. And therefore, if it be true that the March court was not organized so as to authorize the entry of default, then that entry was merely void, and the entry at the May term when the court was for the first time properly organized, is good. And moreover, this objection cannot be taken on demurrer.

4. That the scire facias is not joint, though it is against two; and a separate judgment was properly entered up against each. Adair v. The State, 1 Blackf. R. 200, which case was recognized in Minor v. The State, 1 Id. 236, and in Thompson v. The State, 4 Id. 88.

DANIEL, J. There is, I think, no sufficient ground on which to rest the first assignment of error. The county in which the recognizance was taken (it is true) is not set forth in the body of the recognizance; but this is done with reasonable certainty in the caption; in which the letters Alex are so written, and are used in such a connection, as to show obviously that they were designed as a contraction or abbreviation of the name of the county in which the recognizance was taken. A portion of the name is evidently written in place of the name in full. Alexandria is the only county in the state which answers to, or is susceptible of, such a representation as that employed, and the recognizance ought, accordingly, to be treated as showing with sufficient certainty that it was taken in that county.

This view disposes also of the other question raised in the first assignment of error. The statement that the recognizance was taken before Robert Hunter, "a justice of the said county," being referred, as it should be, to the caption, as understood and explained, becomes, necessarily, a substantial averment that the recognizance was taken by a justice of Alexandria county.

In this aspect of the case, the deci-
324 sion in Wood v. *Commonwealth, 4 Rand. 329, cited by the plaintiff's counsel, can have no bearing upon it. In the report of that case, the copy of the re-

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cognizance on which the questions there decided arose, is not set out, but, on looking to the manuscript record, it will be seen that there was no caption to the recognizance; and in the language of the court, "nothing appears of its being entered into in Albemarle, and therefore that fact (and an important one) does not appear of record." And the court held that this defect (a defect in a record) could not be supplied by averment; and that as the scire facias averred that the recognizance was entered into in the county of Albemarle, the variance was incurable. In the case before us (as has been just shown) the recognizance does, in effect, and with sufficient freedom from ambiguity, state the county in which it was taken, and that it was taken by a justice of that county. The case of Wood v. Commonwealth consequently does not apply to it.

The defect in the scire facias, which is assigned as the second cause of error, seems to me to be met by the 31st section of ch. 171 of the Code, which provides that on a demurrer (unless it be to a plea in abatement) no defect in the declaration or pleadings shall be regarded, unless something be omitted so essential to the action or defence, that judgment according to law and the very right of the cause cannot be given. And that no demurrer shall be sustained because of the omission in any pleading of the words "this he is ready to verify," or "this he is ready to verify by the record," or "as appears by the record;" but the opposite party may be excused from replying, demurring, or otherwise answering, to any pleading which ought to have, but has not such words therein, until they be inserted.

A scire facias upon a recognizance is an action, and the writ in practice very
325 often serves in the double *capacity of process and declaration, and is in many respects amendable. 18 Wend. R. 526.

The counsel for the plaintiff has cited no authority showing the necessity under our laws and practice, of a substantive and direct averment that the recognizance was transmitted by the justice to the clerk of the County court. The scire facias (as is usual) recites the recognizance, which purports to have been taken by a justice in the county. This recital, together with the implied averment of the transmission of the recognizance contained in the prout patet per recordum, when the usual form is pursued ("as by the said recognizance to our County court sent and now remaining in the said County court manifestly appears"), is, according to our practice, received as presenting a sufficient averment that the recognizance had been transmitted by the justice.

The averment was not otherwise made in Wood v. Commonwealth, nor in Bias v. Floyd, governor, 7 Leigh 640; and no objection was made to the scire facias in either case, because of the omission. And in the case of Starr v. The Commonwealth, 7 Dana's R. 243, when the question was directly presented to the Supreme court of Kentucky, it was held that there was no necessity that the fact should be more directly averred.

The clerk in the present case, however, in suing out the writ, has (in the particular out of which the irregularity arises), by mistake, pursued the form of the scire facias which goes out on a recognizance taken in a County court for the appearance of a party before a Circuit court, instead of the form used when the recognizance is taken by a justice out of court, and transmitted to the clerk of the court where the party is to appear. See Robinson's Forms 260-261. In the former case a copy of the recognizance may be used as evidence against the party (Code, ch. 211, § 8), and the verification by a copy is formal and proper. In
326 *the latter case the original recognizance is the only proper evidence, and the prout patet, instead of being (as it is) "as by a copy," &c., should have been as has been already indicated. The mistake, however, does not furnish ground for reversing the judgment. If the plaintiff regarded it as one by which he might be prejudiced, he might have had it corrected by adopting the course pointed out in the section referred to. On a demurrer, the defect cannot be regarded by the court.

In passing upon the third and fourth causes of error, which may be conveniently considered together, it is unnecessary to consider whether the County court held on the 6th of March 1854, composed as it was of three justices only, was so constituted as to be legally authorized to record the default of Stearns, and order a scire facias on the recognizance. For, if it was, the proceedings were all regular. And if it was not, then there being (so far as the record shows) a failure of a proper court to meet at the March term, the recognizance by force of the provisions of section 15, ch. 161 of the Code, stood over to the April term; when again, as the record does not show that there was any court, it was, by force of the same provision, continued to the May term. At that term the presiding justice and four associate justices were regularly organized as an examining court for the trial of Stearns. He was called, and failing to appear, the court again ordered that his default should be recorded; and that a scire facias should go out on the recognizance. As it was agreed by the parties that no exception should be taken to the date of the scire facias, the difficulties suggested are solved by a reference to the provisions of the Code just cited.

The fifth and last cause of error, which would seem to be the one mainly relied on by the plaintiff, remains to be yet considered. It is said that the recognizance is a several one, and not joint and several;
327 and that *the scire facias is a joint one, and therefore will not lie. And the legal proposition thus stated is rested mainly on the authority of Hildreth v. The State, 5 Blackf. R. 80. In that case two parties entered into a recognizance, by

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which they acknowledged themselves to be indebted to the state of Indiana in the sum of one thousand dollars each; and it was held by the Supreme court of that state that the recognizance was several, and that a joint scire facias would not lie against the recognizors. The court bases its opinion and judgment chiefly on one of its own previous decisions (Thompson v. The State, 4 Blackf. R. 188). On referring to the latter case, it will be seen that it was not a case of a scire facias on a recognizance. The facts there were (as appears from the reported opinion of the court) that a Circuit court, for an alleged contempt, had ordered a fine of twenty dollars to be entered against each of the two parties. Upon that order a joint scire facias issued, requiring the defendants to show cause why a capias pro fine should not issue against them. A motion to quash the scire facias and a demurrer were successively overruled, and a judgment entered awarding execution against each defendant severally. The Supreme court reversed the judgment, remarking simply, that there was no privity between the defendants; that the fine was against each severally, and that there was consequently no ground for a joint scire facias.

It is true that in 7 Blackf. R. 417, we have also a brief abstract of the case of Lockwood v. The State, from which it would seem to have been again decided, by the same court, on the authority of Thompson v. The State and Hildreth v. The State, that a joint scire facias will not lie on a general recognizance.

How far these cases of Hildreth v. The State and Lockwood v. The State may have settled the doctrine in Indiana, it would not seem very material to enquire.

328 *So far as they are sought to be used as persuasive authority here, however, it seems to me obvious that their force is much impaired by the consideration that they appear to rest on the authority of a case (Thompson v. The State) which does not, either in express terms or by necessary implication, assert the doctrine contended for; and that they are directly at war with earlier cases in the same court (well considered cases), which, in Hildreth v. The State, and Lockwood v. The State, are passed over without comment or notice.

In the case of Adair & al. v. The State, 1 Blackf. R. 200, three parties entered into a recognizance, by which they acknowledged themselves to owe the state one thousand dollars each. A scire facias was issued against all three of the parties, but was served on two only, against whom there was an award of execution. In the Supreme court the judgment was affirmed.

In the conclusion of its opinion, the court remarked that "it was contended that the recognizance is several, and that there is a joint scire facias against the three, and a joint judgment against two only. Such is not the fact. The terms 'joint and several' are not strictly applicable to these proceedings. The recognizance, although but one instrument, contains three distinct obligations, each for a separate sum of money. Each of the three Adairs acknowledged himself indebted to the state in the sum of one thousand dollars. Each of these obligations has an independent existence, and the discharge of one would have no effect on the others." "There is nothing joint. The one entry of judgment operates as a separate judgment against each for the sum of one thousand dollars. So with the scire facias. It is but one writ, but it operated in requiring each one to show cause why the state should not have execution

329 against him in particular. *The award of execution against two has nothing in it irregular. The execution is not awarded against them jointly. Neither of these two defendants is charged with the demand against the other, nor with the demand against James Adair, junior. Each one is liable on his own obligation only, and is unaffected by the judgment or execution against the others."

The same principles were again asserted by the same court in the case of Minor & al. v. The State, 1 Blackf. R. 236.

A reference to the reports of other states (so far as I have had access to them) has resulted in showing a strong current of authority in accordance with the earlier decisions in Indiana; and, indeed, I have found no case in which the contrary doctrine is maintained, except the two cases of Hildreth v. The State, and Lockwood v. The State. See Smith & als. v. The State, 7 Porter's R. 492; Dean v. The State, 2 Smeedes and Marsh. 200; Madison v. The Commonwealth, 2 A. K. Marsh. R. 136, 565; The State v. Stout & al., 6 Halsted's R. 124.

In the case last cited the whole subject is very ably and fully discussed; and after a thorough examination of the English reports and books of forms and entries, the result is arrived at, that in cases of scire facias on recognizances, the rule applicable to actions on bonds (in the particular in question) does not hold; and that against a plurality of recognizors bound severally in one recognizance, there may be one writ, one judgment and one execution, with this caution only, that each party is made liable for what he has severally undertaken, and for nothing more.

The case of Garland v. Ellis, decided by this court, and reported in 2 Leigh 555, does not apply to this. In that case, in an action of debt by Ellis against H. Ballinger, R. Ballinger and T. Richeson,

330 Garland, *Muse and J. Richeson, by several recognizances, severally undertook as special bail for the defendants, viz: Garland for H. Ballinger, Muse for R. Ballinger, and J. Richeson for T. Richeson. One scire facias went out against the three bails, requiring them to show cause "why the plaintiff should not have execution of the debt against them according to the form and effect of their several recognizances:" And this court affirmed the judgment of the County court sustaining a demurrer to the scire facias. The two cases

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are marked by the difference that in Garland v. Ellis, there was no community among the parties either in respect of the instruments by which they bound themselves, or in respect of the persons for whom they undertook; whilst here the undertaking is by one instrument and for the appearance of the same person, to wit, the principal.

I know of no case in which the precise question has been distinctly presented to, and expressly decided by, this court; but so far as I have been able to ascertain the practice in cases of the like kind, I believe it has been not unusual to embrace the principal and his bail in the same scire facias. Such was the course pursued without complaint in the case of Wood v. The Commonwealth, already cited. The manuscript record shows that the undertakings of the principal and bail, in the recognizance there, were several, to wit, Isaac Wood the principal, in the sum of one thousand dollars, and John Wood his bail, in the sum of seven hundred and fifty dollars. Yet, though the case appears to have been much contested in the County and Circuit courts, and in this court, no difficulty seems to have been made about the scire facias on this score, either by the counsel or by the cost. So, in the case of Randolph, governor, v. Brown & als., decided by the General court, and reported in 2 Va. Cas. 351, there were (as appears from the manuscript copy of the record) three recognizors

331 *bound severally in the same recognizance: the principal in the sum of thirty dollars, and the bail in the sum of fifteen dollars each; and one scire facias was issued against the three parties. The scire facias passed through a like ordeal, without challenge or question, as respects the particular under consideration. See also the case of Bias v. Floyd, already cited.

Upon the whole, I am satisfied that the common law practice regulating actions on several obligations, does not apply to writs of scire facias on several recognizances; but that, provided the scire facias recites the recognizance truly, and seeks to have execution according to the effect of the recognizance (as is the case here), it is no valid ground of objection that the principal and his bail, who have bound themselves, though severally, by one and the same instrument, are proceeded against in one and the same writ.

I think the judgment ought to be affirmed.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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332 *Phaup & als. v. Wooldridge & als.

April Term, 1858, Richmond.

Wills—Revocation by Marriage—Exception.*—Under the statute, Code, ch. 122, § 7, p. 517, marriage is a revocation of a will, "except a will made in pursuance of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her (the testator's) heir, personal representative or next of kin."†

This was an appeal from the sentence of the Circuit court of Chesterfield county, reversing the sentence of the County court, by which a paper was admitted to probate as the will of Benjamin Phaup deceased. The paper was propounded for probate by Ellis, Joseph and William Phaup, the nominated executors therein, and its probate was opposed by Edward Wooldridge and Mary his wife, and Martha Goode, the two female daughters of Benjamin Phaup deceased. It was duly executed and attested in July 1852. And afterwards, in July 1854, Phaup, then seventy-four years old, married Mrs. Judith Bass, who was forty-nine.

Prior to the marriage the parties entered into a marriage settlement, whereby it was agreed that all of her property should be settled upon her, with a general power of disposition on her part; and that she should have no claim upon his estate, if she survived him. And this agreement was executed prior to the marriage, by their

333 uniting in a deed by which *she conveyed her property to a trustee in trust for herself, and relinquished all interest in his estate; and he covenanted that she should have the power of disposition by deed or will; and that if she survived him she should have an annuity of one hundred and fifty dollars out of his estate; but not so as to hinder a division thereof.

The parol proofs were, that Phaup died in 1856, leaving his wife surviving him; there having been no issue of the marriage. That he expressed himself from the time of his marriage up to the time of his death, as much gratified that the marriage settlement would render it unnecessary to make his will again; and recognized the one offered for probate as his will and in full force. In his last illness he called for the paper and consulted one of the witnesses as to whether the property left to one of his daughters was effectually secured to her and her children, free from the control of her husband, telling the witness if that was not the case, he wished the witness to fix it.

The Circuit court held that though the paper had been duly executed and attested, and Phaup was competent to make a will, yet under the statute, it was revoked by the marriage; and therefore pronounced a sentence against the will; and reversed the sentence of the County court, by which the paper had been admitted to probate. From this sentence, the nominated executors and

*This section of Code 1849 is § 2517 of Code 1887.

†Code, ch. 122, § 7, p. 517. "Every will made by a man or woman, shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative or next of kin."

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the devisees of Phaup applied to this court for a supersedeas, which was allowed.

Green, Patton and Foster, for the appellants.

C. Robinson, for the appellees.

ALLEN, P. It was settled at an early period in England, that as to wills of personalty, marriage and the birth of a child for whom no provision was thereby made, operated as an implied revocation.
334 Lugg v. Lugg, *2 Salk. R. 592. As to realty, it was determined in Spraage v. Stone, Amb. R. 721, and Christopher v. Christopher, Dickens' R. 445, "that revocations by operation of law did not fall within the statute of frauds. The rule established by these decisions was adopted in this court in Wilcox v. Rootes, 1 Wash. 140. The principle on which these implied revocations rested has been controverted. On the one hand the revocation was grounded on the implied intention to revoke under the new circumstances occurring after the will was made. On the other hand, in the case of Doe v. Lancashire, 5 T. R. 49, Lord Kenyon held that such implied revocations were dependent on a condition annexed to the will by law, under which it would fail of effect in case of a subsequent marriage and birth of issue who would be left without provision were the will allowed to be effectual: and such was held to be the true view of such revocations in Marston v. Roe, 35 Eng. C. L. R. 303, where it was held that the revocation under such circumstances is in consequence of a rule of law, independent of any intention. The Court of appeals, in Wilcox v. Rootes, 1 Wash. 140, seemed to rest the principle of such implied revocation upon the implied intention to revoke under the new state of circumstances, and as a consequence that parol evidence was admissible to rebut such intention. It is remarked by the author, in 3 Lomax Dig. 131, that when we consider the provision made by our law for children pretermitted, or born after the will, or posthumous, and besides the provision of dower for the wife, in the real estate, legal or equitable, her rights as distributee, of which no testamentary act can deprive her, for she may renounce the provision made for her by the will, there would seem to be less ground in Virginia than in England for the rule that marriage and birth of a child should revoke a will made prior to the marriage.
335 *In England these questions have been set at rest by the statute of 1 Victoria, which provides that every will made by a man or woman shall be revoked by his or her marriage (except a will made in the exercise of a power of appointment, &c.). Under this statute, Jarman says, vol. 1, p. 114, that "marriage alone will produce absolute and complete revocation as to both real and personal estate, and that no declaration, however explicit and earnest of the testator's wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, and, least of all, evidence collected aliunde, will prevent the revocation." With this statute before the revisors, and with direct reference to it, they reported the 7th section of chap. 122 of the Code, page 517. The terms are too clear to admit of doubt, if they are to be construed literally. The statute of Victoria was understood by the commentator to be free from difficulty, and it is admitted that in England it must be taken literally to effectuate the intention of the legislature. Ours is a literal copy; and why should it not receive the same construction? It lays down a plain rule; it makes one exception; and from what source can the courts derive any authority to make another? Our statute has received the same construction by Lomax, 3d vol. of his Digest, p. 148, which has been put upon the English statute, and which it is conceded it must there receive. It is argued, however, that where the interests of the new parties brought by the marriage into close relation with the testator are in no wise affected by the will, the reason for such revocation ceases, and therefore the law should not apply. If this position could be maintained, it would result in a repeal of this 7th section of our statute; for in view of the provision of dower for the wife in the realty, her paramount right to her portion of the personalty, independent of any testamentary disposition, if she chooses to renounce
336 the *provision made for her in the will; and in view of the provisions made by the Code, ch. 122, § 17, 18, p. 518, in favor of the children of the testator pretermitted, or born after the will, or posthumous, the rights growing out of this new relation are sufficiently protected, and therefore there was no necessity for such implied revocation. This might have been an argument against incorporating the provision contained in the statute of Victoria into our Code; but when it has been so incorporated, it is not for the court to say that the legislature did not mean precisely what they have said. They may have thought that as marriage is the most important step a man can take, gives rise to new duties, brings into close connection new parties, and of necessity calls for a different arrangement of his property, it should, without reference to the provision made by law for these new parties, lead to new arrangements in regard to his property. Nor is the provision made by the law precisely the same which follows upon intestacy, or which it is presumable the testator would have made by his will. The 18th section of chap. 122 provides, that if the after-born child or descendant die under age, unmarried and without issue, his portion of the estate, or so much as may remain unexpended in his support and education, shall revert to the person to whom it was given by the will. By the 3d section of the same chapter, minors eighteen years or upwards may by will dispose of personal estate. The wife of a minor would be entitled to dower in his real estate,

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and her interest in his personal estate; and his estate, in case of his death under age intestate, would descend and pass according to the statute of descents and distributions. Whereas by the 17th section, the will is to be construed as if the devises and bequests therein had been limited to take effect in the event the after-born child should die under the age of twenty-one years, unmarried and without issue; and by the
337 18th section, if the pretermitted *child dies as aforesaid, his portion reverts to the person to whom it was given by will. The interests, therefore, of such issue are materially affected by the previous will. Again, we have seen that in Virginia in the case of Wilcox v. Rootes, ubi supra, and also in Yerby v. Yerby, 3 Call 28, the court considered that such revocation was grounded on the implied intention of the testator to revoke under the new state of circumstances, and upon such intention only. To rebut such presumed intention to revoke, any evidence is admissible in support of the will to show a contrary intention, 3 Lomax Dig. 129: thus letting in evidence of circumstances and of the parol declarations of the testator. The evils resulting from this practice have led the English courts to refer the revocation to a condition in law attached to the will so as to exclude such parol testimony of the declarations.

This conflict of decision and the evils arising from letting in parol testimony in such cases, so much against the policy of our legislation and the current of decisions in later times, upon the subject of wills, may have had some influence in inducing the legislature, by adopting the provision of the statute of Victoria, to put to rest all questions as to implied revocations by marriage and the birth of issue. They have done so by declaring that marriage alone, save in the excepted cases, shall be an absolute revocation.

I think the Circuit court properly held, that notwithstanding the deed of marriage settlement, by reason of the marriage the paper writing offered for probate was fully and completely revoked; and that the sentence should be affirmed.

The other judges concurred in the opinion of Allen, P.

Sentence affirmed.

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338 *Barksdale & als. v. Finney & als.

April Term, 1858, Richmond.

1. **Private Corporations—Purchase of Property Sold by Its Officer in Violation of Trust—Liability of Corporation.**—The president and acting manager of a private corporation is trustee in a deed of marriage settlement: and as trustee he sells the trust property, in violation of his duty as trustee, and purchases a part of it for the corporation. The corporation is a participator in the violation of the trust, and liable therefor.

2. **Same—Same—Same.**—The *cestuis que trust* having sued the trustee for an account of the trust subject and made the corporation a party; and having taken a decree against the trustee for the amount of the purchase money for which the trust property sold, which proves unavailing, may then pursue the property in the hands of the corporation, if it is still in the possession of the corporation, or have a decree against it for the price at which it was purchased.

3. **Fiduciaries—Breach of Trust—Liability of Participators.***—All who participate in a breach of trust are jointly and severally liable. And a purchaser concurring in a fraudulent breach of trust, and actively participating in it, and converting the property to his own use, incurs the like liability with the fraudulent trustee.

4. **Same—Same—Same—Case at Bar.**—In such case a part of the property sold having been slaves, which having been used in a dangerous occupation, one of them was injured, and this slave and another were returned to the *cestuis que trust*. On a decree against the purchaser for the price at which he purchased the slaves, he should be credited for those returned at their value when returned.

5. **Private Corporations — Succession — Liability for Debts of Former Corporation.**†—H owns or controls all the stock of the B corporation, and he contracts

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***Fiduciaries—Breach of Trust—Liability of Participators.**—It is well settled that all who participate in a breach of trust are jointly and severally liable; and thus a purchaser concurring in a fraudulent breach of trust, and actively participating in it, and converting the property to his own use incurs the like liability with the fraudulent trustee. The principal case was cited as authority on this subject in Rowe v. Bentley, 29 Gratt. 759; Sherman v. Shaver, 75 Va. 6; Jones v. Abraham, 75 Va. 469; Helsley v. Fultz, 76 Va. 674; Harvey v. Steptoe, 17 Gratt. 304.

See also, in accord, Pinckard v. Woods, 8 Gratt. 140; Hunter v. Lawrence, 11 Gratt. 111, 62 Am. Dec. 640; Broadus v. Rosson, 3 Leigh 12; Dodson v. Simpson, 2 Rand. 294; Fisher v. Bassett, 9 Leigh 119; Davis v. Christian, 15 Gratt. 49; Cocke v. Minor, 25 Gratt. 246, and *foot-note*; Jones v. Clark, 25 Gratt. 642, and *foot-note*; Tosh v. Robertson, 27 Gratt. 279; Utterback v. Cooper, 28 Gratt. 286; Patteson v. Bondurant, 30 Gratt. 96; Asberry v. Asberry, 33 Gratt. 463, and *foot-note*; Edmunds v. Venable, 1 P. & H. 140; Brockenbrough v. Turner, 78 Va. 448; Boisseau v. Boisseau, 79 Va. 77; Jackson v. Updegraffe, 1 Rob. 107; Mills v. Mills, 28 Gratt. 501; Graff v. Castleman, 5 Rand. 195.

In Patteson v. Bondurant, 30 Gratt. 96, it was said: "It is also the settled doctrine of this court that the debtor, or he who pays the money to the executor, in discharge of the obligation, knowing that it was not needed for the payment of debts or legacies, or that the safety of the debt did not require its collection, but that if received it would be for investment, and would involve the executor in a *devastarit* and breach of trust, will be held to be a participant in the *devastarit* and breach of trust. Pinckard v. Woods, 8 Gratt. 140; Cocke v. Minor, 25 Gratt. 246; Jones v. Clark, 25 Gratt, 642; Tosh v. Robertson, 27 Gratt. 279."

†**Private Corporations — Succession — Liability for Debts of Former Corporation.**—See monographic *note* on "Corporations (Private)" appended to Slaughter v. Com., 13 Gratt. 767.

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with third persons to obtain a charter for another corporation of which they shall be the corporators, and to transfer to the new corporation all the stock, and convey all the real estate and other property (except slaves) of B, as also some real estate of his own. The charter is obtained, and the stock is transferred, but there is no conveyance of the real estate; but the new corporation takes possession of it and holds it as its own. The new corporation is the successor of B, and takes the property subject to pay the debts of the corporation of B, to the value of the property received.

6. **Same—Conveyance of Real Estate—Case at Bar.**—The charter of B made its stock personal estate; but provided that its real estate should only be conveyed as other real estate. The legal title could only pass by deed from B.

339 *7. **Same—Rights of Stockholders—Title to Corporate Property.***—Where the stock of a corporation is declared to be a personal estate, and the certificates are made transferable on the books of the corporation, and it is authorized to acquire real estate, such estate is vested in it as a corporation, and not in the individual shareholders. The certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and on the expiration of the charter, to his proportion of the assets remaining after the payment of the debt; and every purchaser of the stock takes it subject to the same liabilities.

8. **Same—Succession—Suit by Creditor of Former Corporation—Parties.**—A creditor of a corporation, the whole stock and property of which has been transferred to its successor, which takes it subject to the debts of the first corporation, and which it is ample to pay, is not bound to convene all the creditors before the court, but may prosecute his own claim alone.

9. **Same—Same—Same—Same.**—A creditor of the corporation B prosecuting his claim against the successor to B, is not bound to make the judgment creditors of H, to whom the successor of B has contracted to pay an annual rent, a party in the suit.

As early as 1827 a marriage settlement was executed, by which certain land in Powhatan county and the slaves and other property thereon, were settled on William Finney and Elizabeth C. his wife, and the children of the marriage. In January 1837 Finney was dead, having left a widow and several children; and John Heth was the surviving trustee in the deed. On the 23d and 24th of January John Heth sold at public auction the whole of the trust property; at which sale his brother Beverly Heth purchased the land in Powhatan, and a number of the slaves; his whole purchase amounting to twenty-five thousand one hundred and three dollars and six cents. John Heth purchased slaves amounting to eleven thousand three hundred and forty-five dollars. These slaves the plaintiffs alleged were purchased for the Black Heath company of colliers, a corporation of which John Heth was the president and acting manager. This corporation had been created in 1833, and at its creation Beverly Randolph, John Heth and Beverly Heth were the owners of the property which
340 constituted its *capital stock. The number of shares were three thousand, nearly all of which in 1840 John Heth was the possessor or had the control.

In 1840 John Heth entered into a contract with persons living in England, by which he undertook to procure a charter for a new company, to be called "The Chesterfield coal and iron mining company," with certain provisions, which would enable them to conduct the business in England; and to transfer to the new company all the property of the Black Heath company (except their slaves and some lands specified), and all the shares of stock in that company; for which they were to pay him a certain sum of money, and a royalty of one shilling and three pence (reduced afterwards to one shilling) upon every ton of coal raised by the company. This agreement was carried out, with some modifications; and in 1841 the Chesterfield coal and iron mining company was organized, and the shares of the stock in the Black Heath company were transferred on their books to the Chesterfield coal and iron mining company: but there does not appear to have been any conveyance of the real estate from the one company to the other.

In 1840 Mrs. Finney, for herself and her infant children, filed her bill in the Circuit court of Powhatan county against John Heth and others, seeking an account of the trust property. In March 1841 there was a decree directing John Heth to account for the whole purchase money of the trust fund; which, upon a settlement of the account, it appeared amounted to forty thousand seven hundred and fifty-five dollars and eleven cents, after crediting him with his disbursements and the amount of the purchases made by Mrs. Finney. This decree was unproductive, Heth having become insolvent.

In 1842, after the death of John Heth, the plaintiffs filed a supplemental bill,
341 making Beverly Heth, the *two corporations herein before mentioned, and others, parties, seeking to recover from Beverly Heth and those claiming under him, the trust property he had purchased, and seeking to subject the Chesterfield coal and iron mining company for the price of the slaves alleged to have been purchased

*__Same—Rights of Stockholders—Title to Corporate Property.__—See generally, monographic *note* on "Stock and Stockholders" appended to Osborne v. Osborne, 24 Gratt. 392.

__Same—Shares of Stock—Nature of.__—In C. & O. R. Co. v. Paine, 29 Gratt. 506, it was said: "Whether shares of a stockholder in a joint stock company be chattels or choses in action, has been a vexed question. The better opinion seems to be that they partake of the nature of choses in action. Angel & Ames on Corporations, sec. 560 *et seq.*, and *notes*: *Barksdale v. Finney, 14 Gratt. 338, 357.* But whether they be the one or the other, they certainly constitute a part of the owner's estate, and as such are liable to the payment of his debts, and to a proceeding by attachment against him. The statute declares that they shall be deemed personal estate. Code, p. 550, sec. 21."

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by John Heth for the Black Heath company, on the ground that the Chesterfield company took the property of the Black Heath company, with the burden of paying the debts of the latter. The pleadings and proceedings in the case are stated by Judge Allen in his opinion.

There having been a decree for the plaintiffs against Beverly Heth or his trustees for the trust property in his possession, and against the Chesterfield coal and iron mining company, for the amount due upon the slaves purchased by Heth for the Black Heath company, William J. Barksdale and four others, who were judgment creditors of John Heth, on which judgments he had taken the oath of an insolvent debtor, filed their petition asking to be made parties in the cause, and claiming that they were entitled to have the royalty which the company had contracted to pay to John Heth subjected to satisfy their debt, in preference to the claim of the plaintiffs. But the court rejected their petition; and thereupon they and the Chesterfield coal and iron mining company applied to this court for an appeal; which was allowed.

Lyons and Macfarland, for Barksdale, &c.

C. Robinson, for the Chesterfield company.

P. Roberts and Morson, for the appellees.

ALLEN, P. The decree from which this appeal has been taken, subjected the Chesterfield coal and iron mining company to a heavy recovery on account of a debt alleged to be due to the appellees from the Black Heath company of colliers. The first
342 question, *therefore, which arises upon the record, and which is presented by the first assignment of errors, relates to the existence of this debt. Was the latter company at any time liable to the appellees for this debt; and if so liable, has that liability been discharged by the acts of the appellees?

On the 16th of December 1840 the widow of William Finney, in her own right, and as the next friend of her infant children, filed their bill against John Heth, Beverly Heth, and the Black Heath company of colliers, setting forth their claims as cestuis que trust under a deed of marriage settlement and other deeds touching the trust property, under which John Heth had become sole surviving trustee; and complaining of a sale made by John Heth in January 1837 of the whole trust property; which. they alleged in the bill, was made by John Heth without authority, and directly against the plain provisions of the deeds under which he was acting as trustee; and were a clear and distinct breach of trust committed by him, and by all who participated with him in the sale: and that at the sale of the trust property made by John Heth as trustee, he as the manager of the business of the Black Heath company of colliers, purchased for the company slaves, and perhaps other property, to the amount of eleven thousand three hundred and forty-five dollars. The bill further averred that at the said sale, Beverly Heth purchased land and slaves to the amount of twenty-five thousand one hundred and three dollars and six cents. It made John Heth, Beverly Heth and the Black Heath company of colliers defendants, and prayed for a decree that said purchasers should pay the principal and interest due from them respectively, and that John Heth should pay any balance appearing to be due from him, and for general relief.

To this bill John Heth filed his an-
343 swer, admitting *the sales of the trust property as stated in the bill; thereby admitting the purchase of the slaves by himself as manager of the Black Heath company at the sale made by him as trustee, at the price charged. And in regard to that purchase he states in his answer, that the sufficiency of the securities of the debt due from the Black Heath company for the purchase money of the slaves is undoubted, as until it is paid to this respondent the best property of that company is bound for it. What the securities for the debt were, he does not state: if any bond was given, it was not exhibited. The record shows that prior to this period he claimed to own or control almost all the stock of the company, and that he had actually made a transfer, by his deed of the 29th day of April 1840, to Stevenson and Brockenbrough, as trustees, of two thousand six hundred and eighteen shares of said company; the deed reciting that the remaining three hundred and eighty-two shares were vested in other persons, but were intended to be purchased or got in by him. The answer was sworn to on the 14th of January 1841, and filed on the 6th of March thereafter.

On the 30th of March 1841 an interlocutory decree was rendered, which recites, "that the cause came on to be heard upon the bill, the answer of the defendant John Heth, with the replication thereto, the bill taken for confessed against the other defendants, more than two months having elapsed since the filing of the plaintiffs' bill and the return of the subpœnas, with service acknowledged by the other defendants, and they still failing to appear and answer, and sundry exhibits." The decree then directs accounts to be taken in relation to the trust estate, and amongst them an account showing the exact amount due from the Black Heath company and from Beverly Heth to John Heth as trustee, or to the trust fund. The commissioner, in the
report made out in obedience to this
344 decree, states *that John Farrar attended and filed the accounts of John Heth as trustee, with the vouchers, from which the commissioner stated the accounts returned by him. John Farrar was afterwards made a defendant by an amended bill, as clerk and agent of said company; and in his answer admits he was such clerk and agent, and that as such the books and papers of the company were kept by him, and still remained in his possession. In the account returned by the commissioner

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the trustee was charged as of the 24th of January 1837, with eleven thousand three hundred and forty-five dollars, amount of articles purchased by the Black Heath company. No accounts were taken at this time with any parties except with the trustee; and in the account so taken the trustee was charged with the whole amount of the sales of the trust property; and there being no exception, the account was confirmed; and on the 27th of October 1841 an interlocutory decree was rendered against John Heth for the whole amount of the trust fund unaccounted for. The decree directed the commissioner, if required by the plaintiffs, to execute those parts of the decretal order directing the accounts, which had not been executed; and then proceeds to declare that liberty is hereby reserved to the plaintiffs to resort to this court for any further decree against the defendants, or any of them, and as to any of the subjects mentioned in the plaintiffs' bill in this suit, to which they may show themselves entitled in the event this decree shall prove unavailing in the whole or in any part. And liberty was given to them to amend their bill and make new parties.

On this decree an execution was issued against John Heth; the sum of four hundred and thirteen dollars and thirty-six cents made as of the 7th of February 1841; and a return of no effects found to make the balance.

Having thus made an unsuccessful
345 effort to collect *the amount of the trust fund from the trustee, and shown by the official return of the proper officer, that the decree against him had proved unavailing for nearly the whole amount decreed, the appellees, under the leave reserved to them in the said decree, to resort to the court for any further decree against the defendants, or any of them, and as to any of the subjects mentioned in the suit, filed their amended and supplemental bill on the 11th of February 1842, in which they make new parties, amongst them the Chesterfield coal and iron mining company, a new company incorporated by an act of assembly passed the 15th December 1840; Sess. Acts of 1840–41, p. 148; and allege in their bill, amongst other things, that John Heth, untruly pretending that he was the owner of the whole stock of the Black Heath company, had made some contract with the Chesterfield coal and iron mining company, by which the whole property of the Black Heath company, except slaves, had been taken possession of by the Chesterfield company, by their agents in this country; and that the stockholders of the latter company were all aliens, and with the exception of one of the agents, non-residents. They further state, that if John Heth had ever executed a deed conveying the property or stock of the Black Heath company to the members of the Chesterfield company, it had never been recorded in the County court of Chesterfield county, the county where the property was situated. And the bill contains the further and most material averment bearing on one of the questions arising in this controversy, that the property being corporate property, even if John Heth had been the owner of all the stock, he had no legal power or authority to convey as an individual the corporate property, exempt from the payment of the debts of the company. The bill furthermore, as to this branch of the case, alleges a sale
346 by John Heth of some of the *slaves purchased by the Black Heath company, and seeks to charge them in the hands of the purchasers or incumbrancers; and prays that the debt due from the Black Heath company be satisfied out of the proceeds of said slaves, or out of the other property of the Black Heath company in the possession of the Chesterfield company, and under the control of their agents, who are made defendants.

The bill also details the circumstances attending the sale of the land and other trust property to Beverly Heth; alleges a conveyance by Beverly Heth of the land and slaves pending the suit, to a trustee to secure certain creditors; and prays that the property be reconveyed to the appellees, or sold, and the proceeds applied to the payment of the debt due to them from John Heth.

On the 1st of November 1842 the cause again came on to be heard on that branch of the case affecting Beverly Heth's purchases; and the court decreed that John Heth committed a breach of trust in the sale of the trust property to Beverly Heth, in which the latter actively concurred; that the other defendants claiming under him were pendente lite purchasers, and they with their vendor should be regarded as trustees of the property for the appellees; and directed a reconveyance thereof to a trustee for their use. And an enquiry was directed to ascertain what portion of the property held by the trustees of Beverly Heth was the property sold to him by John Heth as trust property; and an account of hires of the personal property, and of rents, profits and permanent improvements was directed.

From this decree an appeal was taken to this court by two of the creditors of Beverly Heth. This appeal brought up the whole case for revision. The correctness of the decree of the 27th of October 1841 against John Heth for the
347 whole amount of the trust *fund, reserving liberty to pursue the purchasers if the decree against the trustee was unavailing, as well as the propriety of the decree of November 1st, 1842, setting aside the sale of the land, and directing a reconveyance of the land and such of the slaves as upon enquiry should be ascertained to have been part of the trust fund, were open for consideration.

It was assigned as one of the errors committed in the cause, that to repudiate the sales made by the trustee was incompatible with the course pursued, as the appellees had sought to enforce them by every means in their power; had taken a decree against

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the trustee for the balance due, and in part enforced it. On the 12th of May 1845, this court affirmed the decree.

After this affirmance, further proceedings took place in the court below in relation to the branch of the case now under consideration; and a report was made by the commissioner ascertaining the amount of the debt due from the Black Heath company on account of the slaves purchased at the sale of the trust property. In this account the company receives credit for several sums paid as interest by the company on this debt; and the deposition of John Farrar proves that those charges against the appellees were taken from the books of the company. He also furnishes a list of the slaves purchased for the company, and their prices: and in his answer to the amended bill, he states that a short time after the trust sale the president of the company directed him as clerk to charge against the company on its books a note given to John Heth for the amount of the company's purchase at the sale of the trust estate; which entry he made in the presence of the president.

From this reference to the pleadings and proofs in the cause, there can be no question as to the existence of the debt at one time. It is charged in the original
348 *bill, and that bill was taken as for confessed against the Black Heath company. This of itself concludes the company. But the report of the commissioner charged John Heth with the debt; and to that report there was no exception. And the clerk and agent of the company proves that the debt was entered on the books of the company as a charge against it, and credits entered for the interest paid.

The original existence of the debt does not appear to have been seriously controverted; and accordingly, in the special statement made out at the instance of the Chesterfield company, the Black Heath company is charged with the amount given for the property purchased at the trust sale.

But it is argued, that the appellees have elected to disaffirm the sale and pursue the property; that the purchase was merely void, and the slaves remained their property. It is true that John Heth having been the agent for the Black Heath company in making the purchase, as well as the trustee who sold, the company could not deny notice; nor have they done so. That it was a gross violation of duty and breach of trust in the trustee, to turn over the trust property to the company of which he was principal stockholder and the manager, without securing and investing the price, has not been controverted; and the cestuis que trust had a right to set aside the sale, and follow the property, if it could be traced, in the hands of the company, or any others, claiming it with notice of the breach of trust.

The question raised by this objection has already been adjudicated in this cause. Although the court gave a personal decree against the trustee for the whole amount for which he sold the trust property, it affirmed the right of the appellees to pursue the purchasers as to any of the subjects mentioned in the bill, if the decree against the trustee proved unavailing;
349 *and the construction put upon this reservation is shown by the decree on the amended bill, which set aside the sale of the land and such of the slaves as were purchased by Beverly Heth, so far as they could be traced in the hands of purchasers with notice: the court thus holding that a personal decree against the trustee for the price did not preclude a resort to the property itself in the hands of the wrong-doer participating in the breach of the trust, or in the hands of those who had notice of the fraud. And if the property can be so pursued, the reason applies with equal force to the party himself. All who participate in a breach of trust are jointly and severally liable. A purchaser concurring in a fraudulent breach of trust, and, as in this case, actively participating in it, and converting the property to his own use, incurs the like liability with the fraudulent trustee. Pinckard v. Woods, 8 Gratt. 140; Attorney General v. Corporation of Leicester, 7 Beav. R. 176, 29 Eng. Ch. R. 175; Hill on Trustees 520, n. The relief afforded in equity in such cases is two fold, retrospective in order to remedy the mischief done, and prospective to prevent further injury. Hill on Trustees 521. The court endeavors in the first place to replace the parties in the same situation they would have been in if no breach of trust had been committed. And, therefore, where the trust property improperly disposed of can be followed in specie, as where it consists of real estate, it will compel the trustee or party in possession, if the latter have taken with notice of the trust, to reconvey the estate to the purposes of the trust. Hill on Trustees 522.

And where trust moneys are followed into land, the cestui que trust may either take the land for the whole, or may have a decree for a sale; and if there be a deficiency, then prove on the estate of the trustee. Hill 522, n. 1. It is true that where property
350 has been *improperly sold by a trustee, the cestui que trust cannot claim both price and property; for that would be to get a double satisfaction; but he is entitled to one or the other; and it does not lie in the mouth of the fraudulent participator in the breach of trust to say that the sale was void and so no debt was due; for this would be setting up his own wrong to protect himself. Nor can the decree of the court replacing the parties in the same situation they would have been in if no breach of trust had been committed, by restoring the property where it can be restored, be held to release the party from all personal responsibility for the residue which the purchaser has converted to his own use.

In this case, as all were before the court, and jointly and severally liable, the decree against the trustee was for their benefit; for if the fund could have been collected and

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invested according to the stipulations of the deed of trust, they would have been relieved, as it was not alleged that the prices bid for the property were too low; and the trustee was empowered from time to time to vest any part of the property in real estate or other property. The breach of trust resulted from his failure to collect the price, and in permitting the purchasers to take and convert the trust property to their own purposes, without paying for it, or giving any adequate security for the money. It was therefore proper, in every aspect of the case, that an effort should be made to collect the amount from the trustee before resorting either to the property or the purchasers.

If these views as to the effect of the decree in this case, or of the law as applicable to the facts of the cause, are correct, the court did not err in holding that the existence of the debt due to the appellees by the Black Heath company was proved, and that they had not lost their right to proceed against the company for payment: and, therefore, the first exception taken by
351 *the Chesterfield coal and iron mining company to the report of Commissioner Shore, made under the decree of the 28th of October 1848, was properly overruled.

The second and third exceptions were sustained, and the credits allowed.

The prices of the two slaves surrendered to the appellees voluntarily by R. Gwathmey and Lewis Rogers, have been applied to the principal of the debt, the most favorable mode of applying the credit for the appellants. And having had the use of the slaves in a dangerous occupation, whereby one is proved to have been badly injured, a credit for their value, as at the time they were returned, is as much as they could claim.

Nor is there any just pretension for a claim to a credit for the whole amount of Beverly Heth's purchases. They amounted to twenty-five thousand one hundred and three dollars and six cents. The price of the land was fifteen thousand dollars, leaving upwards of ten thousand dollars for slaves and other property. Of the slaves, it would seem six were recovered. For the land which was decreed to be restored and the price of the slaves John Heth would be entitled to a credit; but it is manifest the six slaves restored did not sell for the ten thousand dollars; and that sum, with the interest, would far exceed the value of the slaves returned, leaving Beverly Heth largely indebted to the trust fund. The assumption that a credit should be given for the whole amount of Beverly Heth's purchases, because by pursuing the property the sale must be considered as disaffirmed, and the appellees be restricted to the property alone, has already been adverted to. So far as the trust property could be reached, they were entitled to pursue it, without thereby losing their remedy against the fraudulent alienee for the price of so much as was converted to his own use, and could not be restored in specie. Nor does
352 the failure *of the appellees to pursue the property in the hands of other purchasers or claimants, furnish any ground of complaint to their immediate debtor, the Black Heath company. Being directly responsible as participating in the breach of trust, the appellees have a right to look to the company for payment, as one of the original wrong-doers; and the company cannot insist on their creditor being sent on a doubtful and perhaps ineffectual pursuit of the property in the hands of those who, but for the intervention of the company, would not have acquired the possession of it.

If then the Black Heath company was alone sued, the appellees would have a right to a recovery against it for the amount of their claim, as ascertained by the decree, and to satisfaction out of the corporate property. And it remains to enquire whether, under the facts appearing in this record, they can charge this debt on the Chesterfield coal and iron mining company, either as holding the property of the Black Heath company, or as its successor liable for its debts at least to the extent of the property received from it.

The Black Heath company of colliers was incorporated by an act passed February 20th, 1833. The preamble, after reciting that B. Randolph, John Heth and Beverly Heth represented to the general assembly that they were owners of certain lands in Chesterfield county, on which there are valuable mines of coal, of a coal yard, and certain personal property, consisting of slaves, &c., and that they were desirous of carrying on their business under the management of a corporate body, proceeded to enact that the capital stock, consisting of the real and personal property aforesaid, should be divided into three thousand shares, and that as soon as one thousand five hundred shares shall have been sold on the joint account of the proprietors, and by them duly conveyed by deeds recorded in said county, then that the title that
353 the three *proprietors had in the capital stock should be vested in them and the purchasers in proportion to the shares respectively held by them, and that the stockholders, their heirs and assigns, should be a body politic and corporate by the name, &c., with the usual corporate powers. And it was further provided, that the stock should be real estate, and as such pass by descent, devise and sale. By an act passed January 10th, 1837, Sess. Acts 202, so much of the act before mentioned as declared the stock to be real estate, was repealed; and in lieu thereof it was enacted that it should be deemed personal estate, to be transferred, and certificates thereof issued in such manner as the president and directors or stockholders in general meeting should prescribe; with a proviso, that nothing in the act should be so construed as to prevent the company from selling and conveying any part of such real estate as they may hold, and which had been incor-

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porated into stock, and thereby declared personal estate; or to authorize the conveyance of such real estate, when sold or disposed of, in any manner than that prescribed by the laws of the commonwealth for the conveyance or disposal of real estate; and when so sold and conveyed, from being considered as real estate. These two acts constituted the character of the Black Heath company, when the transactions between John Heth and the parties afterwards incorporated in the name of the Chesterfield coal and iron mining company, took place.

On the 29th of April 1840 a deed was executed between John Heth of the first part, Stevenson and Brockenbrough of the second part, and various individuals residing in England, of the third part; which, after reciting the charter of the Black Heath company as aforesaid, describing its landed property, reciting that two thousand six hundred and eighteen shares of the stock
354 were then vested in John Heth, *and that he intended to get in the remaining outstanding shares vested in other persons; and describing various other portions of real estate belonging to Heth, or over which he had the control, proceeds to recite that said John Heth had proposed to the parties of the third part to form a company with them, to carry on the business of coal and iron mining, and to vest or to cause and procure to be vested in such company the fee simple and inheritance in possession, free from all incumbrance of the real or landed property of the Black Heath company, and the other lands described; and that the said parties of the third part had agreed with John Heth to join in forming such company, and that they should purchase said property which John Heth had so proposed to vest in them, in case the authority of the general assembly could be obtained in the manner described. The deed then, for the consideration therein mentioned, sets forth that John Heth had that day transferred the two thousand six hundred and eighteen shares of said Black Heath company to the parties of the second part, on the books kept for the transfer of such shares; and had also conveyed the other land owned by said Heth, to said parties of the second part, upon the various trusts set forth.

On the 15th of December 1840, Sess. Acts 148, an act was passed to incorporate the Chesterfield coal and iron mining company, as provided for in the deed before referred to, and an agreement of the same date with the deed between John Heth and the parties of the third part, named in said deed. By this act the company thereby incorporated was invested with full power and authority in their corporate capacity to take and receive valid conveyances and transfers of all the property and stock owned or occupied by the Black Heath company, setting forth that the said stock consisted of three thousand shares, and describing the
355 *lands of the company. The act also authorized and empowered the company to receive conveyances of and to hold the other property named in the deed of John Heth, before referred to.

After the passage of this act another deed, dated the 3d of August 1841, was entered into between John Heth and the persons constituting the company, by which certain differences between them were compromised, the terms of the agreement and the deed to Stevenson and Brockenbrough somewhat modified, and provision made for the indemnity of the Chesterfield coal and iron mining company against incumbrances and defects of title in the property agreed to be conveyed by John Heth. This deed, however, makes no specific conveyance of any of the property.

In the answer put in by A. F. D. Gifford, he states he is the sole general agent of the Chesterfield company; and he exhibits the deed, the articles of agreement, and the articles of agreement and compromise before mentioned, to show how the company acquired their property. He avers, that as such agent he holds certain conveyances of real estate, all recorded in Chesterfield county, intended in part to carry into effect the contracts made with said John Heth, and which it is not deemed material to the purposes of this suit to file or describe particularly. The answer further alleges, that all the stock of the Black Heath company was regularly transferred to John Heth, and by him conveyed to Stevenson and Brockenbrough, the trustees of the company, and afterwards transferred upon the books of the Black Heath company to the Chesterfield company.

There does not appear, in any part of the record, a conveyance of any real property by the Black Heath company of colliers to the Chesterfield coal and iron mining company. The amended bill averred that John Heth, as an individual, had no legal
356 power or authority *to convey the corporate property, exempt from the debts of the company.

The proviso of the act of January 10th, 1837, making the stock personal estate, whilst it authorized the sale and conveyance of real estate theretofore created into stock, declared the law should not be construed to authorize the conveyance of such real estate in any other manner than that prescribed by law for the conveyance or disposition of real estate. Such conveyance must be by deed duly executed in the name of the corporation by its duly authorized agent. In the absence of any such conveyance, the property still belongs to such company or its successor, the transferee of the stock.

Under this aspect of the case, it is unnecessary to consider many of the propositions so elaborately discussed at the bar: such as that,

The right of a corporation to dispose of and convey its real estate is commensurate with that of an individual.

That although creditors may subject the corporate property, this right does not give a lien so as to attach to the property in the hands of the bona fide purchaser.

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And although creditors may follow the assets in the hands of corporators who have sold out the whole corporate property and fraudulently appropriated the proceeds, yet such fraudulent appropriation would not affect the bona fide purchaser.

These propositions may all be sound; but they do not affect the present case.

If the appellees had procured a judgment or decree against the Black Heath company of colliers eo nomine, and issued their execution, what would have prevented a levy on the real estate of the company? Once vested in the company, it could be divested only by a conveyance executed by the company. A transfer of all the stock by the old or new stockholders, would
357 *not destroy the relation in which creditors stood to the company and its property.

A share in a joint stock company is not strictly speaking a chattel, but bears a greater resemblance to a chose in action. "If (says C. J. Shaw) a share in a bank is not a chose in action, it is in the nature of a chose in action, and what is more to the purpose, it is personal property." By bank-stock, say the Supreme court of Tennessee, is meant individual interest in the dividends as declared, and a right to a distribution pro rata of the effects at the expiration of the charter. Angel & Ames Corp. § 560, where the cases are cited.

A corporation may be seized of real property, as well as be possessed of personal property; but, as has been said by Lord Abinger, "the interest of each individual shareholder is a share of the net produce of both when brought into one fund." Bradley v. Holdsworth, 3 Mees. & Welsb. R. 422. And in Humble v. Mitchell, 11 Adol. & Ell. R. 205, 39 Eng. C. L. R. 46, it was held that shares in a joint stock company such as this, are mere choses in action, incapable of delivery, and not within the scope of the statute of frauds requiring certain contracts for the sale of goods, wares and merchandise, to be in writing. It would seem, therefore, to be clear law, that where, as in this case, the stock is declared to be personal estate, and the certificates are made transferable on the books of the corporation, and it is authorized to acquire real estate, such estate is vested in it as a corporation, and not in the individual shareholders; that the certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and on the expiration of the charter, to his proportion of the assets remaining after the payment of the debts; and every purchaser of the stock takes it subject to the same liabilities. The transferee occupies the place—sits in the seat of his predecessor.

358 *It has been argued that the agreement of the parties contemplated and provided for a purchase of the property which John Heth proposed to vest in them, and that the law incorporating the Chesterfield company invested it with the power and authority, in its corporate capacity, to take and receive valid conveyances and transfers of all the property and stock of the Black Heath company. It may be remarked that the deeds referred to make no provision, in express terms, for a conveyance by the Black Heath company. And the law, while it authorizes a conveyance, also provides for a transfer of the stock. If a mere vesting of the property was all the law contemplated, there would have been no use in a transfer of the stock. By providing for both, the authority was given to step into the place of the corporation so merged in the one newly created; and the new corporation, by accepting the transfer of the entire stock, have thereby, under the authority given by their charter, placed themselves in the position of successors to the former corporation, liable, to the extent of the property received, to the debts, and entitled to all the rights of the former corporation. They have so construed their authority under the charter, by taking possession of and holding the property of the Black Heath company as transferees of the stock, since the time limited for the expiration of the charter of the Black Heath company.

It was decided in Rider v. Union Factory, 7 Leigh 154, that as a corporation, without express provision of law, could never hold property, and can only hold it for so long a time as the charter permits, that after the expiration of its charter it can hold no property; and therefore a judgment against it would be fruitless. And 1 Lev. 237, is cited to show, that by the principles of the common law debts of a corporation, either to it or from it, are extinguished by its dissolution. This decision was in 1836. And afterwards, and no doubt
359 *in consequence of the suggestion contained in the opinion in that case, the act of February 13th, 1837, now incorporated in the Code, was passed. That act prescribed general regulations for the incorporation of manufacturing and mining companies which might thereafter be incorporated, and provided that when such corporation should be dissolved by lapse of time or other cause, the corporate name, with the right to sue and be sued, should continue for the purpose of collecting and paying debts and the distribution of its property.

As this law in terms was limited to joint stock companies thereafter incorporated, a grave question might arise as to the right of the Chesterfield company to hold any of the property of the Black Heath company, since the time limited for its existence has expired, if the argument of the appellants and their construction of the agreements of the parties and the charter of the Chesterfield company be correct. The property was vested in the Black Heath company. The law expressly provided for the mode of conveying such property; and no such conveyance is shown. The legal title must therefore have continued in the Black Heath company until its existence, as limited by the charter, expired. No such difficulty arises, by giving the act incorporating the Chesterfield company the construction

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contended for by the appellees, as authorizing the latter company, by accepting a transfer of the stock, to take the place of the former company, to incorporate the former company with itself, and as its successors to hold its property, with all its rights, and subject to all its liabilities under the new charter.

This, it seems to me, is the true construction to be given to the acts of these parties, and the charters referred to. It conforms with the understandig of the parties, as manifested by their acts. John Heth, in his answer to the original bill filed after
360 the deed to *Stevenson and Brockenbrough, the trustees of these parties, and after the passage of the law incorporating the Chesterfield coal and iron mining company, states that the sufficiency of the security for the debt due from the Black Heath company for the purchase of slaves, was undoubted, as until it was paid, the best property of that company was bound for it. And the Chesterfield company, by taking a transfer of stock as their evidence of right, and providing for their indemnity, by retaining a lien on the royalty to be paid to John Heth, and stipulating for a bond in the penalty of one hundred thousand dollars on the payment of the balance of the purchase money, with condition to indemnify them for any defects of title, &c. showed that they were not looking to any conveyance by the Black Heath company, in its corporate capacity, but that they were looking to John Heth, as the holder of the stock, to a substitution to his rights as such stockholder, and to an indemnity to be provided by him personally against defects of title. I think the appellees have, under the facts disclosed by the record, a right to charge their debt on the property of the Black Heath company in the hands of the Chesterfield company as the successors of the first company.

Nor do I think the appellees were under any obligation to convene all the creditors of the Black Heath company. They were asserting their individual claim against their personal debtor. It is not a creditor's bill calling for a distribution of the assets of an insolvent corporation amongst all entitled to participate. They occupy the position of any other creditor of a corporation seeking satisfaction by judgment and execution against their debtor. The corporate property can alone be charged, and there would be as much reason to require every creditor, the nature of whose claim compels a resort to equity, to convene all the creditors, as to exact it from these appellees. They
361 have *established their debt, and shown that the property held is much more than sufficient to pay it.

But an order was made to convene the creditors. If they failed to appear before the commissioner and prove their debts, the appellees were not in fault.

After the decree establishing the right of the appellees, a petition was offered by William J. Barksdale and others, asking, for the reasons set forth in the petition, that the appellees should be required to amend their bill, and make them defendants. The motion was overruled, and they have united in the petition for an appeal; and the refusal of the court to require them to be made parties, is assigned as error. The parties have not brought before this court the record of Barksdale v. Heth, referred to in the petition; but that perhaps would not vary the case. The motion of these petitioners seems to be of a somewhat anomalous character. The appellees have proceeded against the Black Heath company, and the Chesterfield company as its successor, to establish a personal debt; and after a decree in their favor, third persons, strangers to the proceeding, and who do not claim to be creditors even of either company, insist upon being made parties, upon the ground, in substance, that they are creditors of John Heth, who, as they allege, was a creditor of the Chesterfield company, for certain royalties, &c. That if the Chesterfield company is compelled to pay this debt to the appellees, they may insist on deducting the amount so applied from the sum they would otherwise be liable for to John Heth, and so the ability of John Heth to pay the petitioners would be diminished to that extent.

For the same reason, every creditor might insist on his right to intervene between any other creditor and the common debtor. For a recovery and satisfaction of the debt due to one creditor would diminish the means of the common debtor.

362 *This application seeks to carry the doctrine a step further. For this company is not the common debtor. These petitioners are creditors of John Heth, and seek to intervene between the appellees and their personal debtor, because the latter, in the event of being compelled to pay, may seek indemnity from John Heth, by applying his funds in the hands of the company to this purpose. With this question the appellees have no concern. Whether their debtor is or is not a debtor of Heth, and whether the latter is bound to indemnify the company on account of this recovery, does not affect them. The right of the company to such indemnity, and to apply the royalty, or any other funds of John Heth, under the control of the company, to that purpose, must be litigated between the company and John Heth, and those claiming under him. The appellees have shown that the company is their personal debtor, and has effects sufficient to pay the debt; and it would be most oppressive on them to be required to renew the contest with every stranger whose claims against others may be remotely and in some collateral way affected by such recovery.

I think the decree should be affirmed.

The other judges concurred in the opinion of Allen, P.

Decree affirmed.

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363 *Reid's Adm'r v. Blackstone & als.

April Term, 1858, Richmond.

Wills -- Precatory Words -- Case at Bar.—Testator gives his whole estate, including lands, slaves, bonds, &c., to his nephew R. of Pittsburg. And then in a postscript he says, "I wish you to take the negroes to Pennsylvania where they will be free." He appointed no executor, but B. qualified as administrator with the will annexed.

1. **Same—Same—Trust.***—QUÆRE: If the will creates a trust in favor of the negroes.
2. **Same—Emancipation of Slaves—Duty of Administrator.**—If the negroes are entitled to their freedom, they cannot maintain an action at law for its recovery against B. the administrator; his duty is to deliver them to R.
3. **Same—Same—Right of Slave to Action at Law against Executor.**†—Slaves emancipated by will cannot maintain an action at law against the executor to recover their freedom, without proving the assent of the executor to the bequest.

This was an action at law for freedom, in the Circuit court of Fairfax county, brought by the appellees against the appellant. The case is stated in the opinion of Judge Moncure.

The Attorney General, for the appellant.
Lawrence B. Taylor, for the appellees.

MONCURE, J., delivered the opinion of the court:

This is a supersedeas to a judgment of the Circuit court of Fairfax, in a suit for freedom, brought by Joseph Blackstone and two others against Henry W. Thomas, adm'r de bonis non with the will annexed of Patrick J. Reid. The jury found in a special verdict, that the said Reid died in the county of Fairfax, having first made his will, which, after his death, to wit, on the 16th of February 1852, was duly admitted to record in the County court of said county, and is in the words and figures following, viz:

364 *"In the name of God, amen. I will and bequeath to my nephew John Reid of Pittsburg all that I die possessed of, land, negroes, bonds, cash, horses and cows and household furniture. If Barney Reid is living or any other of my relations, I wish him to divide equally among them.

P. J. Reid,

***Trust—Precatory Words.**—There has been considerable fluctuation of judicial opinion of late years as to the doctrine of implying a trust on words of recommendation, entreaty, hope, etc. 2 Min. Inst. (4th Ed.) 250. The modern tendency seems to be to abandon the rule that, in the interpretation of wills, words of hope, recommendation, etc., *prima facie*, create a trust (4 Va. Law Reg. 545), and to give such recommendatory expressions their natural, ordinary, and familiar sense, and, having arrived at the intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case. 2 Min. Inst. (4th Ed.) 251; *note* to Harrisons v. Harrison, 2 Gratt. 1, 44 Am. Dec. 377; Crump v. Redd, 6 Gratt. 372.

In 4 Va. Law Reg. 545, it is said: "In Harrisons v. Harrison, 2 Gratt. 1, the language of the will was: 'In the utmost confidence in my wife, I leave to her all my worldly goods, to sell or to keep for distribution amongst our dear children, as she may think proper. My whole estate, real and personal, are left in fee simple to her; only requesting her to make an equal distribution amongst our heirs.' This was held to constitute a trust, carrying a life-estate only to the widow, with remainder in trust for the children of the marriage. BROOKE, J., dissented, holding that no trust was created.

"In Rhett v. Mason, 18 Gratt. 541, where the gift was to the wife for life, 'for her maintenance and support and for the maintenance and support of our children,' it was held that no trust was created for the children, but that the language, 'for the maintenance and support of our children,' was a mere expression of the motive of the gift. MONCURE, P., in delivering the opinion, quotes, with apparent approval, the dissenting opinion of BROOKE, J., in Harrisons v. Harrison. The decision in Rhett v. Mason (*supra*) has been followed by a long line of Virginia cases, among the last of which is Fackler v. Berry, 93 Va. 565, 25 S. E. Rep. 887 (2 Va. Law Reg. 531, and *note*)."

As to the effect of the words, "for the sole and separate use of herself and child or children," on a gift to the wife, see *foot-note* to Leake v. Benson, 29 Gratt. 153, and cases collected; *foot-note* to Rhett v. Mason, 18 Gratt. 541, and cases collected.

See also, on the subject of precatory trusts, an extensive *note* collecting the authorities appended to Harrisons v. Harrison, 44 Am. Dec. 365.

Same—Same—Case at Bar.—Hon. John Randolph Tucker, who was counsel for the administrator in the principal case, narrates its subsequent history in a letter published in 2 Va. Law Reg. 231. He says: "The slaves filed a bill in equity, making the administrator and the legatee parties thereto. The court (JUDGE JOHN W. TYLER) decided in their favor, and decreed against the legatee in favor of the trust for emancipation. The administrator and legatee appealed, and the question, free from all technical obstructions, was presented by me, on application for appeal, with full argument. The court refused to grant an appeal; so that the unanimous court held that the will clearly created a trust for emancipation. * * * This case is one where all the qualities required of precatory words in order to their validity are found to concur—certainty of object, of subject, and of purpose. The use of the word 'wish,' which usually expresses only desire, is coupled with the summons of the legatee, as it were, to the presence of the testator, with the admonitory prefix, 'N. B.'; and the statement presents the whole *rationale* of the testamentary disposal, in selecting as legatee a nonresident of Virginia, and a resident of a free state, to which, if slaves were taken, freedom would result.

"Despite the late tendency in England, stated in Lambe v. Eames, L. R., 6 Ch. App. 597, by LORD JUSTICE JAMES, and followed in other decisions, cited and commented on in Brett's L. C. Eq. 13, this decision in the Reid will case would be held valid. The refusal of the appeal excluded all doubt in the mind of the court on the case, and was acquiesced in by my client, JUDGE THOMAS and myself, as a sound decision, and valid as authority in Virginia."

†**Wills—Emancipation—Right of Slave to Action at Law against Executor.**—See Nicholas v. Burruss, 4 Leigh 289; Manns v. Givens, 7 Leigh 716, 717; Anderson v. Anderson, 11 Leigh 622.

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Nov. 15, 1851. From the county of Austin, Ireland.

N. B.--I wish you to take the negroes to Penn'a, where they will be free.

P. J. Ried."

That the plaintiffs were negro slaves of said P. J. Reid at the time of his death, and are now held in slavery by the defendant, and have been so held since the death of said Reid. And if upon the whole matter so found, it should seem to the court that the issue was for the plaintiffs, then the jury found for them, and assessed the damages of each of them at fifty dollars. But if it should seem to the court that the issue was for the defendant, then the jury found for him.

The court rendered judgment on the said verdict for the plaintiffs; and the defendant obtained a supersedeas.

In the petition for the supersedeas, the first and main error assigned in the judgment is, that upon a true construction of the will of P. J. Reid, the plaintiffs were not entitled to their freedom. The question raised by this assignment of error is discussed at great length, in the petition and in the printed arguments of the counsel on both sides; and many authorities, pro and con, are therein cited. But in the view which this court takes of the case, it will be unnecessary and would be improper now to decide that question. Two other grounds of error in the judgment are relied on, which are thus stated in the petition.

"1st. The administrator or defend-
365 ant never assented *to the bequest of emancipation, and an action at law could not be brought. Nor did it appear by the special verdict that there were no debts, for which the negroes, though emancipated, might not be liable.

2d. The will, if it emancipated, did not require the administrator to grant it. The devise is to John Reid in trust for emancipation. It was the administrator's duty to hand them over to the legatee; and a court of equity could alone execute the trust reposed in him. An action at law does not lie under the will against the administrator."

These two grounds of error, in proper order, first present themselves for our consideration; and if they or either of them be well assigned, there is an end of the case. We think they are both well assigned.

As to the 1st. While the statute declares, that "Any person may emancipate any of his slaves by last will in writing, or by deed, recorded in the court of his county or corporation" (Code, ch. 103, § 9), it also declares, that "all slaves emancipated as aforesaid shall be liable for any debt contracted by the person emancipating them, before such emancipation is made." (Id. § 11.) The slaves of a testator emancipated by his will, are a part of his assets, which his personal representative is entitled to receive, and bound to apply if necessary to the payment of his debts. They cannot recover their freedom of the personal representative in an action at law, without proving his assent to their emancipation. Tucker, P., in Nicholas v. Burruss, 4 Leigh 289, 295; Anderson's ex'ors v. Anderson, 11 Id. 616; 2 Lomax Ex'ors 236–238, new edition. He has a right to withhold his assent until he can ascertain that they will not be required for the payment of debts. If he improperly withhold his assent, or retain possession of them longer than is necessary, they are not without remedy, but may obtain relief by a suit in equity. That
366 a court of equity had *jurisdiction in such a case before the enactment of the Code, is well settled by authority. 2 Lomax Ex'ors 338; Patty, &c. v. Colin, &c., 1 Hen. & Munf. 519; Dempsey v. Lawrence, Gilm. 333; Dunn v. Amey, 1 Leigh 465; Paup's adm'r v. Mingo, 4 Leigh 163; Anderson's ex'ors v. Anderson, 11 Id. 616; Ellis v. Jenny, 2 Rob. R. 597; Peter v. Hargrave, 5 Gratt. 12; Jincey v. Winfield's adm'r, 9 Id. 708. There is no material difference between the old and the new law in regard to the remedy of persons unlawfully detained in slavery, as may be seen by comparing 1 Rev. Code, ch. 124, § 4, 5, 6, 7 and 8, with the Code, ch. 106. The same reason exists under the new law as existed under the old for the jurisdiction of a court of equity in such cases; and the authorities above cited are as applicable to the former as they were to the latter. No suit can be maintained, either at law or in equity, for the recovery of freedom, unless it has been conferred in the mode prescribed by law. And the suit must always be brought at law, when there is no impediment to the legal remedy. But the legal remedy may sometimes be obstructed; as where an executor improperly withholds his assent to the emancipation; and then the aid of a court of equity may be invoked to prevent a failure of justice. There can be no right without a remedy; and wherever the law gives a right, it gives by implication, if not expressly, such remedies as may be necessary to recover that right. On this principle the cases before cited depend. And on the same principle it has been held, and is well settled, that emancipated slaves may propound for probate the deed or will conferring their right to freedom. 2 Lom. Ex'ors 337; Redford's adm'r v. Peggy, 6 Rand. 316; Manns v. Givens, 7 Leigh 689; Phœbe v. Baggess, 1 Gratt. 129; Ben Mercer v. Kelso's adm'r, 4 Id. 106.

The assent of the defendant to the emancipation of the plaintiffs being neces-
367 sary to maintain this action, *and no such assent having been found in the special verdict, the judgment must for that cause be reversed. In Nicholas v. Burruss, 4 Leigh 289, there was a demurrer to evidence, and the court inferred the assent of the executor from the evidence set out in the demurrer. In this case, even if there had been a demurrer to evidence instead of a special verdict, nothing appears from which such assent could have been inferred. But upon a special verdict, the court cannot infer other facts from those

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found by the jury. 1 Rob. Pr. 372-3, and the cases cited. In the case of Lemon v. Reynolds, 5 Munf. 552, there was a special verdict, in which it does not appear that the assent of the defendant was found, though the substance only of the verdict is set out in the report. The only question litigated in that case was as to the validity of an emancipation conferred by a will accidentally destroyed in the testator's lifetime, but of which a copy was admitted to probate after his death. No question appears to have been raised, either in the court below or in this court, in regard to the assent of the defendant, who indeed had no counsel in this court. The case occurred in 1817, long before the necessity for proof of an executor's assent to an emancipation conferred by the will of his testator, in an action at law for freedom, had been settled, or even considered, by this court. It cannot be regarded as an authority to show that such proof in such an action is unnecessary, or that the fact may be inferred from a special verdict which finds nothing on the subject. In Hunter v. Humphreys, ante, p. 287, the action was not against the personal representative of the testator under whose will freedom was claimed by the plaintiff, but against the personal representative of a person claiming as legatee under the will. Proof of the former's assent was therefore unnecessary.

As to the second of the two grounds
368 of error last *assigned. The devise of the testator's whole estate, including negroes, is to his nephew John Reid: and whether it be to him in his own right, or as trustee in whole or in part, he alone can maintain an action at law for the estate, or any part of it. He is entitled to receive the whole estate, or so much of it as may remain after the payment of debts and expenses of administration. If the will creates a valid trust in regard to any part of the subject, and there should be a breach of trust, or any reasonable ground for apprehending one, the parties injured or likely to be injured thereby, can obtain relief in a court of equity. The negroes, if emancipated at all, are emancipated by means of such a trust. But whether they are so emancipated or not, is a question which it would be premature now to decide, and which can only be decided in a suit between proper parties. Whether an action at law could be maintained by them against John Reid, after he shall have received possession of them, is also a question which it is unnecessary, and would be improper, now to decide.

We think the judgment must be reversed.

Judgment reversed.

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369 *Harcum's Adm'r & als. v. Hudnall.

April Term, 1858, Richmond.

Wills—Case at Bar.—H died in February 1820; and by his will, among other things, gave a tract of land and grist mill thereon, to his wife during her widowhood: and at her death or marriage the same was directed to be sold; but not until his youngest child came of age; and the proceeds of the sale he directed to be equally divided among all his children, to them and their heirs. The widow renounced the provision made for her by the will. There were four children; E who married L in 1836, who died in 1842, and E afterwards married S, and died in 1852, leaving S surviving her; T who died an infant, intestate and unmarried, before the youngest child came of age; M who died in 1840, and bequeathed her share of the property to E; and J the youngest child, who came of age in 1839. L after his marriage with E, and S as the guardian and agent of J, rented out the land; and L took one-third of the rents, and paid one-third to M till her death, when he took two-thirds, and S, as guardian or agent of J, took the other third. After the death of L, E and S rented out the land, and took the rents in the same way; and after the marriage of E with S, he rented it out, and took the rents in the same way until 1850, when W was appointed the agent of J, and took his share of the rents. E left one child by L and two by S. J seems to have lived in New Orleans. S was the administrator of E, and S S was administrator of T, and administrator *de bonis non* of M. HELD:

1. **Same—Equitable Conversion.***—The land and mill is to be considered as money, and to pass as such to and from the legatees of H.

2. **Same—Same—Election—Essentials.**†—Though the legatees might have elected to take the same as land, yet such an intention must have been clearly manifested; and all the parties interested in the property must have united in the election.

***Equitable Conversion.**—In Zane v. Sawtell, 11 W. Va. 48, it was said: "A court of equity regards lands deeded or devised to be sold and converted into money, or money either articled or bequeathed to be invested in land as having the character of property into which it is to be converted, though the actual conversion by sale or purchase as the case may be, has not been actually effected. *Harcum's Adm'r &c. v. Hudnall, 14 Gratt. 369*; Washington's Ex'or v. Abraham &c., 6 Gratt. 66; Tazewell *et al.* v. Smith's Adm'r, 1 Rand. 315; Pratt v. Taliaferro, 3 Leigh 419; Morrow v. Brenizer, 2 Rawle 185; Allison v. Wilson's Ex'or, 13 S. & R. 330; Edwards and Wife v. Countess of Warwick, 2 P. Wms. 171-175 n.; Cruise v. Barley, 3 P. Wms. 22, n. 1; Craig v. Leslie, 3 Wheat. R. 563."

The principal case is also cited as authority on this subject in Ropp v. Minor, 33 Gratt. 109; Carr v. Branch, 85 Va. 602, 8 S. E. Rep. 476; Watson v. Conrad, 38 W. Va. 543, 18 S. E. Rep. 746; Findley v. Findley, 42 W. Va. 375, 26 S. E. Rep. 434; Board of Trustees v. Blair, 45 W. Va. 825, 32 S. E. Rep. 208.

See also, in accord, Effinger v. Hall, 81 Va. 107; Siter M'Clanachan, 2 Gratt. 280, 294; Phillips v. Ferguson, 85 Va. 509, 8 S. E. Rep. 241.

See monographic *note* on "Conversion and Reconversion" appended to Vaughan v. Jones, 23 Gratt. 444.

†**Same—Election.**—In Buxton v. Shaffer, 43 W. Va. 298, 27 S. E. Rep. 319, it was said: "Where the whole beneficiary interests of the land directed to be converted into money by sale is in the children, a court of equity will not compel the executor to execute the trust against the wishes of the *cestuis que trustent*, but will permit them to take the land, if they elect

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3. **Same—Same—Same—Evidence—Case at Bar.**‡—The renting out the land and taking the rents by L, during his life, is not sufficient evidence of an election on his part to take the land as land.

4. **Same—Same—Same—Same—Same.**—M having in her will spoken of a bill about to be filed for the sale of the land, and having given either the land or the proceeds of sale to E, it is evident she had not elected to take the land as land; and therefore no election by L could change the character of the bequest.

370 *5. **Same—Same—Sale after Specified Period—Case at Bar.**—The property having been directed to be sold when J came of age, it will be considered as money from that period: And the interest which E took under her father's will being an interest in money, the proceeds of the sale of the property whenever it should be made, at her death nothing passed to her children as her heirs at law.

6. **Same—Same—Same—Nature of Property after That Time.**—M having lived until J came of age, her bequest to E was a bequest of money, the proceeds of the sale of the land.

7. **Same—Same—Same—Nature of Property before That Time—Quære.**—T having died before J came of age, and therefore before the time fixed for the sale of the property, *quære*, if his interest passed as real estate to his heirs, or as money to his administrator.

8. **Same—Same—Same—Same.**—If T's interest descended to his heirs, they took it subject to be converted into money by a sale, just as he held it.

9. **Same—No Debt Due from Estate—Rights of Beneficiaries.**—There being no suggestion by the administrator of T and M, that there are any debts due from them, the interest of T in the property may be distributed among his brother and sisters; and E may take directly her sister's third of the whole under her will, without regard to the claim of S as administrator of T and M.

10. **Same—Equitable Conversion—Nature of Beneficiary's Interest—Case at Bar.**§—The interest of E was not an estate in the premises, but a mere chose in action, a right to have a sale of the property, and to receive her two-thirds of the proceeds. The act of her first husband L in renting out the land and receiving the rents, was not a reduction of the chose in action into possession; and therefore on his death it survived to E; and on her second marriage and death, her surviving husband is entitled to it as her administrator.

11. **Same—Same—Sale at Future Time—Right to the Rent before Sale.**—The rents of the property before the sale belonged to the persons who were entitled to the principal subject, and would go to them in common with the moneys arising from the sale, as personal property. And those received by L in his lifetime were thus reduced into his possession, and became his absolute property.

This was a suit in equity instituted in September 1853, in the Circuit court of Northumberland county, by John J. Hudnall the younger, for the division of the estate left by his father; and the only subject of controversy was the land.

John Hudnall the elder died prior to February 14th, 1820, having left a will,
371 which was admitted to probate *on that day. By his will he gave to his wife certain slaves by name, certain other personal property, and the plantation on which he lived and his water grist mill, to be held by her during her widowhood, for the support of herself and of the testator's children. At the death or marriage of his wife, he gave all the slaves and personal property to be equally divided among all his children. And at the death or marriage of his wife, he directed that his mill and land should be sold; but it should not be sold until his youngest child came to the age of twenty-one years. And the proceeds of the sale of said mill and land he directed to be equally divided among all his children, to them and their heirs. William Hudnall, who was appointed executor, refused to qualify, and administration with the will annexed was committed to William Harding. The widow also renounced the provision made for her by the will. There were four children. Elizabeth, who married Leroy Harcum, in 1836, who died in 1842. She afterwards married Samuel Harcum, and died in 1852, leaving him surviving; and he qualified as administrator on her estate. Thomas Hudnall died an infant, intestate and unmarried, before the youngest child came of age. Margaret Ann died in 1840, having made her will, in which reciting, that steps had been taken to obtain a decree for the sale of the land, for the purpose of distribution, she gave her share of the proceeds of sale, if it was sold, after paying her debts, to her sister Eliza-

to do so before the sale has been made; and this election they may make as well by acts or declarations clearly indicating it as by application to a court of equity. Craig v. Leslie, 3 Wheat. 563; *Harcum's Adm'r v. Hudnall, 14 Gratt. 369.*" See also, in accord, the principal case cited in Zane v. Sawtell, 11 W. Va. 49.

As authority for the proposition that no one beneficiary can exercise the right of election without the affirmative consent of all the others, see the principal case cited in Brown v. Miller, 45 W. Va. 212, 31 S. E. Rep. 957; Effinger v. Hall, 81 Va. 107. See monographic *note* on "Conversion and Reconversion" appended to Vaughan v. Jones, 23 Gratt. 444.

‡**Same—Same—Evidence.**—In Shanks v. Edmondson, 28 Gratt. 812, it was said: "The election to hold such real estate, either by a person *sui juris*, or by a married woman, made by her husband in her behalf, or conjointly with himself, must be plainly and distinctly proven, and cannot be left to mere inference, unless such inference is so strong from all the circumstances as to be equivalent to positive proof of a clear intention so to elect. See Siter, Price & Co. v. McClanachan, 2 Gratt. 280; Pratt v. Taliaferro, 3 Leigh 419; Commonwealth v. Martin's Ex'ors, 5 Munf. 117, 128; *Harcum's Adm'r & als. v. Hudnall, 14 Gratt. 369, 378, 379;* Thornton v. Thornton, 3 Rand. 179; Craig v. Leslie, 3 Wheat. R. 563, 578, 585, 586; 2 Story's Eq., §§ 1210, 1211; 1 Lead. Cas. in Eq. pt. 1st, vol. 1st, 335 to 342; Ib. § 793."

§**Same—Nature of Beneficiary's Interest.**—See principal case approved in Effinger v. Hall, 81 Va. 107; Carr v. Branch, 85 Va. 602, 8 S. E. Rep. 476.

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beth. And if the land should not be sold, that it should go to Elizabeth and at her death to the heir or heirs of her body. Leroy Harcum qualified as administrator with the will annexed on her estate. John J. the youngest child was born in 1818, and came of age therefore in 1839. He seems to have lived for years in New Orleans. It does not appear in the record when the widow of John Hudnall died.

372 *During the lifetime of Leroy Harcum, and after his marriage with Elizabeth, he and Samuel Harcum, who acted as guardian or agent of John J. Hudnall, rented out the land devised by John Hudnall, the elder, jointly, as a whole tract, and Leroy Harcum took two-thirds of the rents, including the share of Margaret Ann, and Samuel Harcum as guardian or agent of John J. Hudnall, the plaintiff, took the other third. After the death of Leroy Harcum, Elizabeth his widow, and Samuel Harcum as agent of John J. Hudnall, rented out the land jointly, and took the rents in the same proportions, until her marriage with said Samuel Harcum, when he rented the land out himself, and took two-thirds to himself and one-third as the agent of John Hudnall, until 1850, when he settled with said John J. Hudnall. And since 1850 Harcum rented out the land and received two-thirds of the rents himself; but he then ceased to act as the agent of John J. Hudnall, who at that time appointed William B. Hudnall as his agent to receive his part of the rents. Elizabeth left one son by her first and two children by her last husband. And at the time of the decree Samuel L. Straughan was the personal representative of Margaret Ann and Thomas Hudnall.

The cause came on first to be heard on the 28th of October 1853, when the court held that the remainder in the land and mill mentioned in the will of John Hudnall deceased, was by his will converted into personal estate, in equity, and that the right thereto devolved upon the four children the legatees of the testator as legatees of personalty, and upon the personal representative of such as were dead. And a commissioner was appointed to sell the land and mill.

After this decree was made William B. Hudnall, the administrator of Leroy Harcum deceased, filed his petition asking to be made a party in the cause, and claiming that the will of John Hudnall having

373 converted *the land and mill into personal estate, Leroy Harcum had reduced it into possession during his marriage with his wife Elizabeth; and this included his wife's share of the interest of her brother Thomas, and the whole of the share of Margaret Ann, both of whom were dead whilst he was alive. The petitioner relied on the possession of the land by Leroy Harcum, and his renting it out and receiving two-thirds of the rents, as the means by which his wife's interest in the property had been reduced into his possession.

The cause came on again to be heard in April 1854, upon the report of the commissioner and the petition of Leroy Harcum's administrator, when the court confirmed the report, and held that the interest of Elizabeth Hudnall, as legatee under her father's will, as distributee of her brother Thomas, and as devisee of Margaret Ann, survived to her upon the death of her first husband Leroy Harcum, without having reduced the same into possession; and that the proceeds of the sale of the land, when due and collected, belonged to Samuel Harcum as her administrator, to the extent of her interest, which was two-thirds thereof: and the petition was therefore overruled. From this decree Leroy Harcum's administrator and Leroy Harcum his son applied to this court for an appeal, which was allowed.

Patton, for the appellants.
C. Robinson, for the appellees.

LEE, J. That the effect of the disposition made by John Hudnall of his real estate by his will was, in the view of the court of equity, to change its character and as between the representatives of the realty and the personalty of those who were to take under the will, to render it transmissible as money, is agreed by the counsel for the appellants and for the appellee

374 *Samuel Harcum. Nor could this be successfully questioned on behalf of the children of Mrs. Harcum. It is a familiar doctrine of that court that land articled or devised to be sold and converted into money, or money articled or bequeathed to be invested in land shall assume the very character of the property into which it is to be converted; and if the new form thus impressed upon it remain unchanged, it will pass to such of the representatives of those who take under the will as would be entitled to it as property of the character into which it is to be converted. 2 Story's Eq. Jur. § 79, 1212; Fletcher v. Ashburner, 1 Bro. Ch. Cas. 497, and editor's note; Craig v. Leslie, 3 Wheat. R. 563, and cases cited by Judge Washington. And land thus directed to be converted into money, will pass as money although the actual conversion by a sale may not yet have been effected; and if the will directing the conversion also dispose of the proceeds, the gift of the proceeds is to be considered as a gift of personal estate. Tazewell v. Smith's adm'r, 1 Rand. 313; Pratt v. Taliaferro, 3 Leigh 419; Craig v. Leslie, ubi supra; Ashby v. Palmer, 1 Meriv. R. 296.

But though the subject thus directed to be converted is thus stamped with the character of the property into which it is to be converted, the party entitled to the beneficial interest may elect to prevent the actual conversion, and to hold it in the form in which he found it; and this election he may make by application to the court of equity or by unequivocal acts or declarations plainly manifesting his determination. Cruse v. Barley, 3 P. Wms. 22, n. 1; Edwards et ux. v. Countess of Warwick, 2 P. Wms. 171, 175, n.; Craig v. Leslie, ubi

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sup.; 2 Story's Equ. Jur. § 793. If however he die without having made an election, the property will pass to his heirs or personal representatives just as it
375 would have passed if the purpose *of the will or other instrument under which he claimed had been fully carried into effect and the conversion actually made before his death. Kirkman v. Miles, 13 Ves. R. 338; Edwards et ux. v. Countess of Warwick, 2 P. Wms., ubi supra; Craig v. Leslie, 3 Wheat. 563, 577 et seq.; 2 Story's Equ. Jur. § 793, and authorities cited in n. 1.

Thus in a controversy between the heir and personal representative of a party who was beneficially entitled to a subject thus directed to be converted, as to the succession to the property, it becomes material to ascertain whether such party had made an election to retain the subject as it was and dispense with the actual conversion, as it is not the mere right to make the election, but the actual exercise of the right, which changes the character of the subject and makes it either real or personal at the will of the party entitled to the whole beneficial interest. Craig v. Leslie, ubi supra; 2 Story's Equ. Jur. ubi supra, and n. 1, and authorities there cited.

In this case I think nothing appears sufficiently manifesting an intent to elect by any of the parties interested. The only thing that looks at all like such election was the failure of the parties to cause the sale to be made at an earlier period and the retention of the property so long in the form of realty. But by the will of the testator the property could not be sold until John J. Hudnall attained the age of twenty-one years which was not until the fall of 1839, and from the retention of the property afterwards in the same form unaided by other circumstances or any express declaration, the intent to elect is not necessarily to be inferred. The acts or declarations which shall constitute an election must clearly manifest the determination to make it. Willing v. Peters, 7 Barr (Pa. R.) 287; 2 Story's Equ. Jur. § 793. And the mere continuing to hold and rent the prop-
376 erty is not inconsistent *with the intent to carry out the direction of the testator and to have a sale of the property at some convenient period. It may have been deemed expedient to defer the sale in the hope of receiving a larger dividend by an improvement in the value of real estate. Moreover, in order to make a valid election all who were jointly interested must have concurred. Willing v. Peters, ubi sup.; Fletcher v. Ashburner, 1 Bro. Ch. C. 497, opinion of Sir Thomas Sewell (master of the rolls); Allison's ex'or v. Wilson's ex'ors, 13 Serg. & Rawle 330, opinion of the court delivered by Gibson, J. In these opinions it is distinctly stated that where an estate is directed to be sold and the proceeds divided amongst several persons, none has a right to say that any part shall not be sold, and that one having an undivided interest in the subject cannot compel those who are associated in interest with him to take in land what was bequeathed to them in money. And accordingly it was held in Willing v. Peters, above cited, that all who are jointly interested must unite in the act of election, otherwise it is nugatory.

Now it would seem that Margaret Hudnall did not consider that she had made any election to take land instead of money, for in her will dated in 1840, she speaks of steps having been taken to obtain a sale of the land by a decree, and gives her portion of the proceeds or her share of the land if it should not be sold, to her sister Mrs. Harcum. And in 1853 John J. Hudnall who had for many years previously resided in New Orleans, filed his bill claiming the right to have a sale of property and a division of the proceeds, alleging that since he arrived at the age of twenty-one years, the period at which the land was directed to be sold, there had been no representative of his father's estate, and no one authorized to sell the land. Not a single act or declaration evincing the purpose to make an election can be imputed to either
377 beyond the bare acquiescence *in the retention of the subject in the form of real estate after John J. Hudnall became of age, and this may be sufficiently explained by the circumstances.

No discrimination appears to be made in this doctrine of "equitable conversion," between the case of a conversion which is not required to be made at any particular period and which therefore in the case of a will, should be made presently after the death of the testator, and one in which the conversion is to be made at some future period prescribed. In the latter case "we must consider the property as converted from the time when it ought to have been converted." Per Cranworth, Lord Chancellor, Ferrie v. Atherton, 28 Eng. Law and Eq. R. 1. Here the will directed in effect that the conversion should be made when John J. Hudnall arrived at the age of twenty-one years, and equity will regard that which ought to have been done as having been actually done and consider the property devised as stamped with the character of money from and after that period, and as so continuing afterwards in the absence of an election by all those jointly interested to take the testator's bounty in the form of real estate.

We must conclude therefore that the interest which Mrs. Harcum took under the will of her father was an interest in money, the proceeds of the sale of the property whenever the same should be made, and that at her death nothing in this subject could pass to her children as her heirs at law. And this is equally true of the interest which she took under the will of her sister Margaret, and as one of the heirs at law and distributees of her brother Thomas. Margaret by her will made after her brother John became of age, gave her whole interest to her sister Mrs. Harcum; and as the period for the conversion of the property had arrived, it was clearly a bequest

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378 of money, her share of *the proceeds of the sale. Thomas Hudnall died before his brother John attained his majority, and before the actual conversion of the property by a sale could be made; and if his interest for that reason is to be regarded as in the realty and descendible to his heirs, they would nevertheless take it subject to be converted into money by a sale, just as he held it, and as they held their respective interests in the same subject, under the will of their father. If it be regarded as personalty, it might now be successfully claimed by his administrator Straughan if it were needed for payment of any debts due from his estate; and Straughan as administrator of Margaret Hudnall might also lay claim to have her interest paid to him if any such exigency of her estate required it. But Thomas Hudnall died an infant, unmarried, intestate and without issue, and in the absence of any suggestion to the contrary, it will be presumed that he owed no debts. Myers v. Wade, 6 Rand. 444, 448, opinion of Green, J. Leroy Harcum administered upon the estate of Margaret Hudnall and as it appears, settled the affairs of the same in his lifetime; and as Straughan in his answer or elsewhere, makes no suggestion that there were any debts due from the estate of Margaret, it should be taken that there were none. The interest of Thomas would then be properly distributed among his surviving sisters and brother, and Mrs. Harcum might take directly her sister's third of the whole under her will in addition to her own, without regard to the claim of Straughan as administrator of Thomas and Margaret.

Thus the case is resolved into a controversy between the administrator of Leroy Harcum, the first husband, and Samuel Harcum the second husband and personal representative of Mrs. Harcum whom he survived. The interest of Mrs. Harcum was not an estate in the premises, but a mere chose in action, a right to have
379 a *sale of the property and to receive her two-thirds of the proceeds. Willing v. Peters, ubi sup. If Leroy Harcum during his life did any thing that can be accepted as a reduction of this chose into possession or as the equivalent, it thereupon became his property and his administrator would be now entitled to recover it. If otherwise, then upon his death it survived to Mrs. Harcum, and upon her death Samuel Harcum her second husband who qualified as her administrator became entitled to receive it. Coke Litt. 351; 1 Bright on Husband & Wife, ch. 4, § 1, p. 34; Id. § 4, p. 41; Siter, &c., v. McClanachan, 2 Gratt. 294.

It appears that after Leroy Harcum's intermarriage with Elizabeth Hudnall, which took place in 1835 or 1836, he and Samuel Harcum (as guardian, it is to be inferred, for John J. Hudnall during his minority and as his agent afterwards), rented out the land, conjointly, and received the rents. Margaret Hudnall during her life received her third of the rents, and after her death her portion was appropriated by Leroy Harcum along with his wife's third. And it is urged for the appellants that this was such a reduction into possession on the part of Leroy Harcum as vested the property in him because the subject being in the form of real estate until a sale took place it was not susceptible of any other possession.

No case has been cited, nor in my examination have I seen any, presenting the question as to a subject situated precisely like the present. There are however some cases to be found bearing a strong analogy to this and which will serve to aid in its elucidation.

The acts to effect a reduction into possession of the wife's chose in action must be such as to change the property in it or something to divest the wife's right and to make that of the husband absolute; such as a judgment in an action commenced by him in his own name, or a receipt of the money or a decree that it be
380 *paid to him or applied to his use. Prec. in Ch. 412, 418; Schuyler v. Hoyle, 5 John. Ch. R. 196; 1 Bright, ch. 5, sect. 1, p. 48. In Yerby et ux. v. Lynch, 3 Gratt. 460, the question was whether settling with a guardian and administratrix and taking a bond to the husband for the amount due his wife was a reduction of the chose into possession of the husband; the court however was equally divided. In the course of his opinion, Judge Baldwin said that by suing out execution upon a judgment recovered in the name of himself and wife, the husband divested the interest of the wife. He referred to Clancy on Rights, 113 to 116. This proposition is controverted by a learned writer who maintains that it is entirely unsupported by authority. 3 Rob. N. P. 206. However this may be, Leroy Harcum, in his lifetime effected no change of the condition of this property, he obtained no decree that his wife's interest should be paid over to him or applied to his use. He received the rents and thus reduced them to possession: but he did not and could not appropriate the principal subject. He took no step to obtain such a decree as would have vested the property in himself. He made no demand on Harding the administrator, who if living might have made sale of the property, to make it; nor if he were dead or refused, did he file a bill to execute the trust. He contented himself with receiving the annual rents. Now if he could have done nothing more during John J. Hudnall's minority towards a reduction of the subject into possession, the same cannot be said of the period that lapsed after John J. Hudnall attained his majority. Leroy Harcum lived some three years after that event, and might readily have obtained a decree which would have vested the property in himself. But to any proceeding instituted to obtain such a decree, he would have had to make his wife a party. For although as to all rights of personalty and causes of action ac-
381 crued *to the wife or to husband and

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wife jointly, during the coverture, he may, if he will, sue in his own name alone, yet as to such rights and causes of action as accrued before the coverture including negotiable instruments (though as to them the rule was formerly different), it is now well settled that he cannot maintain an action at law to recover them without joining his wife as a party. Hardy v. Robinson, 1 Keb. R. 440; Milner v. Milner, 3 T. R. 627; Rumsey v. George, 1 Mau. & Sel. 176; Richards v. Richards, 2 Barn. & Ald. 447, 22 Eng. C. L. R. 119; Sherrington v. Yates, 12 Mees. & Welsb. 855; 1 Bright, ch. 5, sect. 4, p. 63, 64. Here as the interest of the wife was in the nature of a legacy, to obtain which the aid of a court of equity must be invoked, it would a fortiori, have been necessary that the wife should be joined in any proceeding in the court to obtain it. Blount v. Bestland, 5 Ves. R. 515. And the criterion by which to determine whether the wife may join in the action is whether the right of action would survive to her upon the death of her husband in her lifetime. Ayling v. Whichner, 6 Adol. & Ell. 264; 1 Bright, ch. 5, § 4, p. 63.

The rents issuing out of the property before the sale belonged to the same persons who were entitled to the principal subject and would go to them in common with the moneys arising from the sale, as personal property. Yates v. Compton, 2 P. Wms. 308; Doughty v. Bull, Id. 320. And as already stated, those received by Leroy Harcum in his lifetime were thus reduced into his possession and became his absolute property; but it does not follow that therefore the principal subject was thus reduced into possession. After the death of Leroy Harcum, Mrs. Harcum continued to receive the rents in the same way, and after her marriage with Samuel Harcum he received them by virtue of his marital rights. Thus the acts of Samuel Harcum after his marriage with Mrs. Harcum, constituted as much *a reduction of the subject into possession as did those of Leroy Harcum, for the reason that the property remained just as it was throughout the whole period, including the widowhood of Mrs. Harcum, without any change having been effected in its condition. None of these parties had any estate in the land under the will or any interest which could be the subject of a lien by a judgment or could be reached by a creditor with an execution against his lands. Allison's ex'or, v. Wilson's ex'ors, 13 Serg. & Rawle 330; Morrow, use, &c., v. Brenizer, 2 Rawle's R. 185; Willing v. Peters, 7 Barr's R. 289, et seq. and cases cited in the opinion of Bell, J. Nor did the receipt of the rents by either change the character of the subject or confer upon him any other or different interest than he already had. If it had constituted a reduction into possession by Leroy Harcum, it would be unnecessary for his representative to come into court now and ask it to give him possession.

The receipt of interest by a husband upon a chose in action belonging to his wife, has not been held to be such a reduction into possession as would vest the chose in him and defeat the wife's right by survivorship. Thus where a sum of money was charged in favor of a feme sole upon her brother's estate, and he upon occasion of her marriage covenanted in a settlement to pay it to her husband, and the husband received the interest for some time after the marriage but died without having collected the principal, it was held that although the husband during the coverture might have released or discharged it, yet not having done either, upon his death it vested in the wife by survivorship. Howman v. Corie, 2 Vern. R. 190, and n. 1. So where a promissory note bearing interest was given to a woman before coverture, and after her marriage her husband received the interest upon it during her life, it was held that the note was not *thereby reduced into his possession, but passed to her administrator. Hart's adm'r v. Stephens, 6 Ad. & El. N. S. 937, 51 Eng. C. L. R. 537. In Nash v. Nash, 2 Madd. R. 133, a promissory note for ten thousand pounds payable on demand was given to a woman after her marriage, and she delivered it to her husband who received one thousand pounds of the principal and also received the interest on the remaining nine thousand pounds up to his death. His wife survived him, and it was held by the vice chancellor (Sir T. Plumer) that this was no reduction of the chose into possession, but that the right to the nine thousand pounds belonged to the wife by survivorship.

In Hart's adm'r v. Stephens, 6 Ad. & El. 937 (51 Eng. C. L. R. 537), Patterson, J., speaking for the court, says that for the proposition that the receipt of interest by the husband on a note belonging to his wife will serve to reduce it into possession, "we think there is no foundation." The observations of Lord Ellenborough in giving judgment in McNeilage v. Holloway, 1 Barn. & Ald. 218, which were supposed to favor that doctrine, have been considered too strong and disapproved of in subsequent cases. See Richards v. Richards, 2 Barn. & Ald. 447; and Gaters v. Madely, 6 Mees. & Welsb. 423.

The cases which I have thus cited and briefly stated, seem to me to be not stronger against the husband's claim, in principle, than the case in judgment, and to my mind their tendency is very direct to deny to the receipt of the rents by the husband in such a case as the present, the effect of a reduction of the subject into his possession so as to defeat the wife's right of survivorship. Nor will the case be helped by a reference to the doctrine touching the husband's interest in his wife's chattels real. To these the law gives the husband a qualified title with a right to the possession and enjoyment of the subject and a power of *alienation during the coverture. If he dispose of his wife's terms for years by a complete act in his lifetime, her

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right by survivorship will be gone, and this whether his disposition was with or without consideration, and whether the legal estate in the terms was in the wife or was held in trust for her benefit. Grute v. Locroft, Cro. Eliz. 287; Tudor v. Samyne, stated in note to Scarborough v. Borman, 4 Mylne & Craig 389; Sir Edward Turner's Case, 1 Vern. R. 7; S. C. 1 Ch. Ca. 307; Carteret v. Paschal, 1 P. Wms. 197; Mitford v. Mitford, 9 Ves. R. 87, 98, opinion of Sir William Grant. But if the husband do not alien the terms and survives his wife, he takes them by virtue of his marital rights. Co. Litt. 46, b, 351, a; 1 Bright, ch. 8, s. 1, p. 94. But notwithstanding the husband's possession and enjoyment of the terms during the coverture, if the wife be the survivor and the terms remain in statu quo and unchanged, she and not the husband's next of kin will be entitled to them; and even his disposal of them by will will not prevail against her right by survivorship; for as this takes effect immediately upon his death, it takes precedence of the bequest in the will which cannot take effect until after his death. Co. Litt. 351; 1 Bright, ubi sup. and p. 95.

In every view that I have been enabled to take of this question, I think that upon the death of Leroy Harcum, the right to Mrs. Harcum's share of the proceeds of the property survived to her; that upon her death it passed to her second husband Samuel Harcum, who also qualified as administrator to her estate, and that the Circuit court did not err in directing the same, being two-thirds of the whole, to be paid to him. And I am therefore of opinion to affirm the decree.

The other judges concurred in the opinion of Lee, J.

Decree affirmed.

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385 *City of Richmond v. Daniel.

April Term, 1858, Richmond.

Taxation—Shares of Railroad Stock—Case at Bar.*—The shares of a railroad company are not liable to be taxed by the council of the city of Richmond, either under the charter of the city or § 19 of ch. 54 of the Code.†

This was an action of assumpsit brought by Peter V. Daniel, jr. against the city of Richmond, to recover back the sum of two hundred and twenty-two dollars and seventy-six cents, which he had paid as city taxes on stock owned by him in the Seaboard and Roanoke and the Richmond and Petersburg rail roads. The parties agreed the facts; and it was agreed that if the plaintiff was not bound by law to pay the sums assessed against him, and collected of him for said taxes, judgment should be entered up in his favor for the amount he had paid. The acts of assembly in relation to the city of Richmond, and the ordinances of the city having reference to the subject, were made a part of the case agreed. The only questions were whether the stock of the rail roads was exempted from taxation by their charter: and if not, whether the city council were authorized to tax the stock owned by a person living in Richmond. The Circuit court rendered a judgment for the plaintiff: and the city of Richmond obtained a supersedeas from this court.

R. T. Daniel, for the appellant.
J. Alfred Jones and Robinson, for the appellee.

386 *SAMUELS, J. This case is brought here by writ of supersedeas to a judgment of the Circuit court of the city of Richmond, rendered in an action of assumpsit for money had and received. The object of the suit is to recover money alleged to have been improperly assessed as a city tax on certain rail road stocks held by the defendant in error and paid by him. This court has jurisdiction under article 6, § 11, of the constitution. The facts are

*Power of Taxation—Conferred on Corporations or Counties—Rule of Construction.—Laws conferring the power of taxation upon a municipal corporation, or upon a county, are to be strictly construed, for the power of taxation as confided in them is a delegated trust; they act, not by virtue of any inherent power, but as mere agencies of the state. Va. & Tenn. R. Co. v. Washington County, 30 Gratt. 474; Lynchburg v. N. & W. R. R. Co., 80 Va. 247; Whiting v. West Point, 88 Va. 906, 14 S. E. Rep. 698; O. & A. R. Co. v. Alexandria, 17 Gratt. 176, and *foot-note* collecting cases.

Legislature—Taxing Power.—"There is certainly one proposition which will not be questioned, and that is that the legislature possesses the full, absolute, sovereign power of taxation, excepting so far as it may have been surrendered to the general government or may be interdicted by the constitution of the United States, or as it may be controlled by the restrictions and mandates of the constitution of the state. See City of Richmond v. Daniel, not yet reported, opinion of SAMUELS, J."; Eyre v. Jacob, 14 Gratt. 426. See the principal case also cited in Schoolfield v. Lynchburg, 78 Va. 370. See, in accord, Com. v. Moore, 25 Gratt. 955; Helfrick v. Com., 29 Gratt. 848; Mackin v. County Ct., 38 W. Va. 340, 18 S. E. Rep. 632.

Taxation—Power of Exemption.—The principal case is cited in C. & O. Ry. Co. v. Miller, 19 W. Va. 418, along with Home of the Friendless v Rouss, 8 Wall. 438, and City of Richmond v. R. & D. R. Co., 21 Gratt. 604, as authorizing the proposition that the power of exemption as well as the power of taxation unrestricted by constitutional limitation is one of the essential attributes of sovereignty. See, in addition, *foot-note* to the last-named case, where there is a collection of cases on this point.

See generally, monographic *note* on "Municipal Corporations" appended to Danville v. Pace, 25 Gratt. 1.

†The act, after authorizing a town levy, says, it "may be upon the free male persons in said town above the age of sixteen years, and upon any property in the said town, and on such other subjects as may at the time be assessed with state taxes against persons residing in the town."

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agreed between the parties, and made part of the record; and it was further agreed by them, that if the defendant in error had not been bound by law to pay the tax assessed, or any part of it, judgment should be rendered in his favor for so much of the money as he had not been bound by law to pay. Thus the parties by consent submitted to the court a question of law, and by like consent the judgment was to be in favor of the party with whom the law was on that question.

The consent of parties withdraws the case from the rule declared in Mayor, &c. of Richmond v. Judah, 5 Leigh 305, if the protest under which the money was paid would not have had the effect of so withdrawing it.

The only question is, Whether the city council, acting under the charter of the city of Richmond, had authority to assess the taxes on rail road stock held by the defendant? The chartered powers of the city, so far as involved in this case, are created and defined by the statutes, ch. 335, p. 259, Sess. Acts 1852; and chapters 54 and 56 of the Code of Virginia.

In order to ascertain the extent of the powers granted, it is necessary to know the general principles ruling the construction of such grants. The power in question is of the class merely derivative, and to be distinguished from the class of original and sovereign powers. Each class has its own rules of construction. The first named
387 having power only in *derogation of common right, being merely carved out of the power theretofore vested only in the general assembly, its powers are to be strictly construed. See 2 Kent's Com. p. 298; Grant on Corporations 7 and 8; Richmond, &c. R. R. Co. v. Louisa R. R. Co., 13 How. U. S. R. 71. Especially is the power of taxation, when granted to a subordinate body, to be strictly construed. The powers of the second class are illustrated in the general assembly. That body is invested with the sovereign power of taxation pertaining to the whole commonwealth, with only the limits prescribed by the mandates or the prohibitions of the constitution. The council of the city of Richmond can exercise no power of taxation unless granted by charter; the general assembly may exercise all power of taxation not prohibited by the constitution; and it may omit to exercise the power, unless compelled to act by mandate of the same instrument.

That the general rule of strict construction is to be applied to charters, seems free from doubt; and I find nothing to warrant a different rule in regard to the charter of the city of Richmond. In section 55 of the charter it is enacted, that "In all courts this act shall be construed as favorable for the city as the nature of the case will admit of." In regard to this section, it must be said, that "every case," "in all courts," in its "nature," is made up of the very facts thereof, and of the mere law upon the facts; there is no case, and can be no case, which, in its nature, allows any judgment other than that required by the law upon the facts. When, therefore, the section refers to the nature of the case as the measure of favor, it refers only to that which would have controlled the decision, if no favor had been required. If there be any difficulty in prescribing definite legal limits to the operation of the section in question, still it is enough for the purposes of this case to decide
388 that it does not confer any *power which would not have existed if the section had been omitted from the charter.

The validity of the assessment is denied by the defendant in error, because the council had no authority to make it; and because if this would have been otherwise or the general grants of power, still his stocks in the rail roads (Seaboard and Roanoke and Richmond and Petersburg) are exempt under the respective charters of these rail roads. In this position of the controversy it is incumbent on the plaintiff in error to show an authority in the city council, under its granted powers, to make the assessment. If this be done successfully, it will then be incumbent on the defendant in error to make good his claim to exemption.

We are referred to several portions of the charter, and of the statute, ch. 54 of the Code, as giving the power claimed. I shall consider each of these alleged sources of power in its turn.

It is said that section 36 of the charter, giving power to tax personal property within the city other than slaves under the age of twelve years, gives the power to tax the rail road stocks above mentioned held by the defendant in error, who resides within the city. In answer to this claim, it may be said that it is a material question whether these stocks be personal property within the meaning of the general assembly when exercising the tax laying power; for the word when used in the charter is to bear the same signification as when used in the state tax laws. A careful reading of all the tax laws passed since the adoption of the existing constitution, has left no doubt on my mind as to the meaning of the general assembly when imposing a tax on personal property; it is not understood as embracing every thing of a personal nature which one may own, to the exclusion of all others. In Sess. Acts 1852, § 2, p. 14, we find the first tax law under the existing constitution. Personal property is
389 mentioned *as a subject of taxation. Moneys and credits are also mentioned separately, as subjects of taxation. Again, money itself is subjected to different rates of taxation, to be ascertained by reference to the source from which it was received. If the general assembly had regarded all these subjects as property, then the discrimination in rates of taxation would be a palpable infraction of article 4, § 22, of the constitution. If, however, we suppose that the legislature properly used the word "property" in its popular sense, meaning visible subjects, then no violation of the

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constitution was produced by the tax law. The subsequent tax laws are substantially the same in the particulars above mentioned. It is not material in this case to consider whether the state tax laws are in conformity with the constitution; our only enquiry is, What meaning did the general assembly attach to the word "property," when itself exercising the power of taxation? Whatever the meaning was, we must hold it to be the same when used in granting power of taxation to a subordinate authority. It would therefore seem that rail road stocks are not taxable under the denomination of property.

If, however, I am wrong in this, still the question recurs, Are these rail road stocks property within the city? To sustain the affirmative of this question, the counsel for the plaintiff in error relied only upon the argument that personal property and especially choses in action are of the place at which the owner resides. In regard to goods and chattels, the tax laws regard them as of the place at which they may be, and accordingly direct that taxes be assessed and paid at that place. If it be conceded that credits due to a party are, for some purposes, even for the purpose of taxation, of the place of the owner's residence, it would still remain to be shown that rail road stocks in themselves are credits.

390 These stocks are only evidence *that if in future dividends shall be declared, the holder will be entitled to a ratable share; and moreover, that in case the corporation be dissolved, the holder will be entitled to a ratable share in the surplus, if any remain after discharging superior claims. These claims possess no ingredient in common with credit. This last never exists without a debtor, nor without a sum to be paid, nor without a time of payment, not one of which has any sort of connection with rail road stocks, the specific subject of taxation in our case. After dividends shall have been declared, they (unless exempt) would be classed with such liquidated demands as are taxed under the name of credits, or otherwise, as provided by the law at the time. The dividends not yet declared being of uncertain existence as well as uncertain in amount, cannot be taxed as credits, which by the terms of the tax laws must have actual existence, and be taxed on the amount. Nor can the remote and contingent claim to a share of the corporate effects after dissolution, be relied on as assimilating rail road stock to a credit. The charters are without limit of duration, and thus the claim is postponed indefinitely; it is uncertain, and cannot be classed with such liquidated claims as are taxed under the name of credits.

In further support of the power of taxation, the counsel for the plaintiff in error relied on § 19 of chapter 54 of the Code, insisting that rail road stocks may be classed with those "other subjects" not specifically enumerated, on which tax may be assessed. This argument cannot prevail, unless it be shown that the rail road stocks in question had been, in the language of the law, "at the time assessed with state tax against the owner residing in the town." This has not been shown, and cannot be shown, as no state tax has been so assessed on rail road stocks. It has been said that although no state tax on

391 such stocks *has been required by law, still if the state might impose the tax, so may the city council. It would be an idle labor in the general assembly to prescribe limits to powers of taxation, by referring to its own state laws for a designation of subjects, if the power is not to be measured by the law referred to, but to be coextensive with the sovereign power of taxation vested in the general assembly. To carry this pretension to its results, we must hold that the property included in the exempting clauses of the state tax laws, may still be taxed under city ordinances; for these exemption clauses may be repealed by the general assembly. In fine, we must hold that the sovereign power of taxation within the city is vested in the council; and, according to the argument of the counsel on another branch of the case, never to be resumed by the general assembly. This would be giving a construction far more liberal than has ever been applied to a grant of any kind by a superior to an inferior authority.

It has been said that, although the city council can impose a tax on such subjects only as may be assessed at the time with state tax, still the city tax need not necessarily be in the same form as the state tax; and in illustration of the position, it is said, as the state taxes rail road corporations (when not exempt) on property, or dividends, or on all passengers carried, at the rate of a mill per mile, therefore the city council may tax, not the rail roads (they not being in the city), but individual stockholders in the city. There is a wide difference, a total absence of identity between the individual property of the stockholder and that of the corporation. To infer the power to tax the one because the state taxes the other, would extend the power beyond all proper rules of construction.

I have thus adverted to all the rea-

392 sons relied on to *justify the assessment of the tax in question; finding them wholly insufficient, it is not necessary to consider what may be the effect (if any) of the clauses in the rail road charters exempting them from taxes or public charges, if it should be necessary to rely on those clauses.

I am of opinion to affirm the judgment.

LEE, J., was of opinion that the city council of Richmond had the power under the charter to tax stock held by her citizens in a rail road company wherever its works were constructed unless the same were specially exempted by its charter or some other valid legal provision. And he was of opinion that the stock of the Richmond and Petersburg rail road company was exempted by its charter from such tax-

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ation, as it was from taxation for state charges. But he was of opinion that the stock of the Seaboard and Roanoke rail road company was subject to taxation both for state and city charges, because he considered the exemption found in the charter of the Portsmouth and Roanoke rail road company as having been in effect repealed by the operation of the several acts subsequently passed in relation to that company, and the acceptance by the Seaboard and Roanoke rail road company of their provisions. And he was of opinion that the city council of Richmond might impose a tax upon stock held by her citizens in this company whether the general assembly had exercised the power of taxation which it possessed over the subject or otherwise.

He was therefore of opinion that the judgment should be reversed, and that in lieu thereof, judgment should be rendered in favor of the defendant in error for the sum of eighty-six dollars, that being the amount of the tax paid by him on his stock in the Richmond and Petersburg rail road, and the costs of the Circuit court.

393 *MONCURE, J. I concur in the opinion of Judge Samuels, except that I am not prepared to say that the word "property," as used in the charter of the city of Richmond, does not embrace rail road stock. The word in its proper sense, and I think in its ordinary acceptation, embraces that subject; but whether it does, in the sense in which it is used in the said charter, is a question which I have not fully considered, and upon which I express no opinion. It is unnecessary to do so, as the other grounds relied on by him fully sustain his conclusion.

DANIEL, J., whilst he concurred with Judge Samuels in most of the views on which he rested the conclusions of a majority of the court, thought with Judge Moncure that it was unnecessary to express any opinion as to whether the word "property" was employed in the charter of the city of Richmond, in a sense that would include rail road stocks.

ALLEN, P., concurred with Lee, J., in opinion as to the power of the city council to tax stock held by residents of the city in a rail road company, wherever its works were constructed, unless the same were exempted by its charter or by law. That under the law the power of the city council did not depend upon the exercise by the general assembly of the power of taxation over the same subject; but where the general assembly had authority to impose such tax, but had not exercised it, the city council could impose a tax. And he was further of opinion, that under the various laws in relation to both of said companies, the stock of each company was subject to taxation by the city council: and he was therefore of opinion that the judgment should be reversed with costs, and a judgment entered in favor of the plaintiff in error.

Judgment affirmed.

394 *Williamson & als. v. Coalter's Ex'ors & als.

April Term, 1858 Richmond.

Wills—Emancipation—Dependent on Slave's Election—Effect.*—Testatrix makes her will in August 1857, by which she emancipates one slave by name. By another clause she says, "I direct in regard to the balance of my negroes, that they shall be manumitted on the 1st day of January 1858." She then directs her executors to raise a fund out of her estate sufficient for the purpose, and use it in settling her said slaves in Liberia or any other free state or country in which they may elect to live: and then says, "And I further direct, that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners." HELD: The freedom of the slaves is made dependent on their election: and they having no legal capacity to elect, the will is ineffectual to emancipate them.

This was a bill filed in September 1857 in the Circuit court of Stafford county, by the executors of Hannah H. Coalter deceased, asking for the instruction of the court in the administration of their trust. The daughter, and other legatees of the testatrix, and her slaves were made parties. The only question considered by this court is, whether the slaves were emancipated. The will of Mrs. Coalter bore date the 4th of August 1857, and after making provision for her only daughter, and for the payment of her debts, provides for her slaves in the fourth and fifth clauses as follows:

"Fourth. I hereby manumit my faithful servant Charles, and direct my executors to provide him with a fund sufficient to take him to such state or country as he may elect to live in, and pay to him an annuity of one hundred dollars during his life."

"Fifth. I direct in regard to the balance of my negroes, that they shall be manumitted on the 1st day of *January 1858. And I authorize and request my said executors to ascertain what fund will be sufficient to provide the usual outfit for, and to remove, said negroes to Liberia. And I hereby direct my executors to raise said fund, or such an amount as in their judgment may be sufficient for that purpose from my said estate, and to use the said fund in removing and settling my said servants in Liberia, or any other free state or country in which they may elect to live, the adults selecting for themselves, and the parents for the infant children; and I further direct that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners; said election to be

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*Wills—Emancipation—Dependent on Slave's Election—Effect.—See Bailey v. Poindexter, 14 Gratt. 136, and *foot-note*.

Same—Construction of.—See principal case cited in *foot-note* to Hooe v. Hooe, 13 Gratt. 245.

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made by the adults and parents as aforesaid."

The slaves embraced in the fifth clause of the will were ninety-three in number. Some of these negroes were old; and many of them, consisting of families composed of a mother and six, seven or eight infant children, and one an orphan, were chargeable.

Mrs. Coalter's estate, exclusive of her slaves, was estimated to be worth from fifteen to twenty thousand dollars; and was ample to carry out the provisions of her will in regard to the removal and settlement of her negroes in Liberia or a free state.

The cause seems to have been heard at the same term at which the bill was filed: and the court directed enquiries to be made by a commissioner, as to the election of the negroes to be free, and if so, to what free state or country they would elect to go; and the cost of their outfit and removal to Liberia or such other free state as they might elect to go to. And the court held further that said negroes were emancipated by the will, unless they declined to accept its provisions, and chose to remain slaves: And

396 that this condition of freedom was independent altogether *of the removal of said negroes from Virginia, said removal being a condition subsequent to said emancipation. From this decree Mrs. Coalter's daughter and the other legatees applied to this court for an appeal; which was allowed.

The case was elaborately argued by John Howard and Patton, for the appellants, and by Little and Morson, for the appellees. The counsel for the appellants contended that the case could not be distinguished from Bailey v. Poindexter, lately decided by the court and reported supra 132. That the principle of that case was, that wherever a testator intended that the slaves should have the right to elect to be free or to remain in slavery, there the bequest was void. The counsel for the appellees contended that the case fell plainly within the principle of the case of Osborne v. Taylor's adm'r, 12 Gratt. 117; and was in fact a stronger case in favor of the emancipation of the slaves than that case. That here was a distinct clause positively emancipating the slaves, which distinguished it from Bailey v. Poindexter; and it was monstrous that a subsequent clause, which the court held was a mere nullity, should have the effect to render the previous clause, which if by itself no one denied or doubted would emancipate the slaves, also a nullity.

ALLEN, P. It was decided in the case of Bailey v. Poindexter, that slaves have no legal capacity to elect between freedom and slavery; and that where it appears to have been the intention of the testator that the manumission was to depend on the election of the slaves, the bequest was void. That case was twice argued and fully considered by the court. I entertained but little doubt from the first argument of the case, as to the correctness of the principle upon which it was determined. The supposed

397 effect of previous *decisions and the alleged general impression as to the law, created the principal difficulty with me in coming to the conclusion at which the court ultimately arrived. But notwithstanding the weight of all these considerations, it seemed to me that the determination of the majority of the court was the just result to be deduced from the law and our adjudications upon the relation of master and slave in Virginia. That to confer civil capacity on slaves to make such election, was in conflict with the principles affirmed in respect to the condition of slaves in Sawney v. Carter, 6 Rand. 173; Stevenson v. Singleton, 1 Leigh 72; Rucker's adm'r v. Gilbert, 3 Leigh 8; Winn v. Carrell, 2 Gratt. 227; Smith's adm'r v. Betty, 11 Gratt. 752; and in the cases decided in other states and the Supreme court, cited in the opinion of Judge Daniel: and that to carry out the exception attempted to be created in favor of such bequests, the courts were called upon by a species of judicial legislation, to enact a distinct code of laws to regulate and determine the rights growing out of it, and to prescribe the mode of procedure. What for instance was to be the condition of those under the age of discretion? Who was to elect for them? What was to be the effect of such election upon their rights when arriving at full age? If the right was given to the mother, and she while electing freedom for herself, chose to elect slavery for the child, so as to cast the burden of support on the estate, would such election bind the child on attaining full age? and what is the legal age of a slave? These and other difficulties in the practical application of the doctrine, satisfied me of the propriety of conforming in this respect to the general rule which treats the slave as a nonentity so far as respects civil capacities; that as there can be no intermediate condition between slavery and freedom in the status of

398 the negro, so *neither can there be an intermediate condition as to civil rights and capacities.

Adhering to the principle of Bailey v. Poindexter, and giving to it in all cases its legitimate effect, it becomes merely a question of construction, upon every will presenting this subject, to ascertain what in a given case was the intention of the testator. Though difficulties may arise in determining in a particular case whether it be an absolute bequest of freedom, or of an election between freedom and slavery, and different minds may come to different results, the principle is not affected thereby; that is fixed and no difficulty attends its application when the intention of the testator is ascertained. If he intended to manumit absolutely, and that intention can be fairly gathered from the terms he has used, construed with reference to the whole will, and with aid derived from the light of surrounding circumstances, so far as they can be lawfully regarded, the slaves are entitled

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to their freedom, unaffected by any repugnant conditions thereafter or by the same will attempted to be affixed to this absolute renunciation of property. If he did not so intend, but designed to refer the question of slavery or freedom to the choice of the slave, then he has, ignorantly perhaps, attempted to confer a capacity on the slave with which he cannot be endowed, and the bequest is void. It is not for the court to say that such a construction will defeat the benevolent intention of the testator. No one has the right to say, or can say, what would have been the disposition of the testator if he had known he could not submit the alternative to the choice of the slave.

Manumission, in the language of Stanard, Judge, in Crawford v. Moses, 10 Leigh 277, is an act by which property is renounced and extinguished. It is the exercise of a power conferred on the owner by the
399 law, *with which the slave has nothing to do. The moment the deed or will, the instruments alone by which slaves can be manumitted, takes effect, he is, in legal contemplation, transformed into a new being; no property in him can exist, and he occupies the same relation to the former owner that he does to every other person in the community. The intention of the owner to sever all connection between the slave and himself or his estate, must be apparent on the face of the will. If it appears that the will contemplates a continuance of that relation in a certain contingency; that the slave, notwithstanding the provision as to his manumission, is in a certain event to remain in the condition in which he was born, to continue without change a slave of his estate, subject to the control of the representative of the estate, such an intention is inconsistent with the idea of an intention to confer absolute manumission, and tends to throw light on that portion of the will which treats of manumission. Upon the subject of intention, the rule is very clearly stated by the judge giving the opinion of the court in Wootton v. Redd's ex'or, 12 Gratt. 196: "The traces of the testator's intention will be diligently sought out in every part of the instrument, and the whole carefully weighed together." And in the same connection, it may be well to bear in mind the familiar remark of Pendleton, Judge, in Shermer v. Shermer, 1 Wash. 266: "In disputes concerning wills, cases seldom elucidate the subject, which, depending on the intention of the testator, to be collected from the will, and from the relative situation of the parties, ought to be decided upon the state and circumstances of each case." In this case, all that we know of the relative situation of the parties, is to be gathered from the face of the will and the averments contained in the bill. It is alleged, that exclusive of the negroes, the estate of the testator is estimated to be worth from
400 fifteen thousand to *twenty thousand dollars; and that some of the negroes are old, and many of them, consisting of families composed of a mother and from six to eight infant children, and one an orphan, are actually chargeable.

By the first clause, the testatrix bequeathed to her daughter for life all her estate, exclusive of her negroes, after the payment of her debts, and the legacies and charges to which said estate was thereafter subjected.

No other clause of the will has any bearing upon the provisions contained in the fourth and fifth clauses, which respect the manumission of her slaves; and the first is only so far material, as it shows that the bequest to her daughter for life of all her estate, real and personal, was exclusive of her negroes.

By the fourth clause she manumits her faithful servant Charles, and directs her executors to provide him with a fund sufficient to take him to such state or country as he may elect to live in, and pay to him an annuity of one hundred dollars during his life.

Upon this clause no question has been raised; the slave is directly emancipated. As soon as the executors assented to the bequest, he was free.

The fifth clause, upon which this controversy arises, is in the following words:

Fifth. I direct in regard to the balance of my negroes that they shall be manumitted on the 1st day of January 1858. And I authorize and request my said executors, to ascertain what fund will be sufficient to provide the usual outfit for, and to remove said negroes to Liberia; and I hereby direct my executors to raise said fund, or such an amount as in their judgment may be sufficient for that purpose from my said estate, and to use the said fund in removing and settling my said servants in Liberia, or any other free state, or country, in which they may elect to live, the adults selecting for themselves, and the
401 parents for their infant *children; and I further direct, that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners; said election to be made by the adults and parents as aforesaid.

Are the slaves absolutely emancipated by this clause? or does it do more than tender to them an election to accept the provisions made for their manumission, or if they should prefer to remain in Virginia instead of accepting the foregoing provisions, to do so by remaining the slaves of her estate?

In the previous clause the testatrix had manumitted her faithful servant Charles, and provided for his support in the country he should elect to live in. From the terms in which he is mentioned, he was no doubt a confidential servant, and from being in immediate attendance upon her, she knew his wishes, that he desired to be free; and therefore no alternative of preferring to remain in Virginia, instead of accepting the provision in his favor, is presented to

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him. She knew that he could only remain in Virginia as a slave: and as she was apprised of his wishes, her will conforms to them. The only reference to an election is as to the country where as a freeman he might choose to reside. The others were not to be emancipated immediately, but at a future day, specified. In such a number, some were old, and as it appears from the bill, chargeable; others no doubt were approaching that period of life when they could not support themselves by their labor; others may have formed connections with persons of their own condition in the neighborhood. There was therefore strong reason why, with the most benevolent feelings towards her slaves, she should not, without consulting their wishes, renounce all property in them, sever the connection
402 between them and her *estate, and by the mere exercise of her legal power, banish them from the place of their birth, dissolve the ties connecting them with others in their own condition, and cast the old and helpless, who had labored all their past lives in her service, into a distant country, without any provision for their support. She had no doubt as to their legal capacity to choose between freedom and slavery; and from the considerations before adverted to, it is manifest to my mind she did not intend to coerce them; but to give them, after a fitting time for enquiry and consideration, the right to elect for themselves what should be their future condition. This difference of intention accounts for the difference in the terms between the clause emancipating Charles and the clause in regard to the rest of her negroes. The whole clause must be taken together to ascertain her intention. Two alternatives were presented; one necessarily preceded the other, and the order of their position in the clause cannot vary the effect of the whole. Neither conferred absolute freedom or continued in slavery independent of the election of the slaves: and until that choice, the clause was inoperative. If before the 1st of January 1858 or on that day, the slaves or any of them, had, in the language of the decree appealed from, declined to accept the provisions of the will, would the executor have been justified in discharging them? The court below considered they were manumitted, unless they declined to accept its provisions and remain slaves. But if manumitted, they could not, by merely declining to accept, remain slaves, for the manumission, if effectual, is not dependent on their act, and the condition of slavery instantly ceased, so that they could no longer remain slaves. It is argued that her intention to give absolute freedom is apparent, because there is no bequest over. In Winn v. Carrell, there was no bequest over; and the testator was
403 held *to die intestate as to the slave. In the present case, however, even if there be no bequest over, a question not presented for adjudication, and therefore one upon which no opinion is expressed, the testatrix did contemplate and provide for such refusal to accept the provisions of the will, by treating them as remaining the slaves of her estate under the control of her executors; for she desires that in that event they be permitted by her executors to select among her relations their respective owners.

The cases of Forward's adm'r v. Thamer, 9 Gratt. 537, and Osborne v. Taylor's adm'r, 12 Gratt. 117, are mainly relied on by the appellees, the last case especially, as being analogous to this case, and ruling it. The principle established by those cases is, that where the will actually emancipates, so that the status of the negro is changed from that of a slave to a freedman of color, all provisions imposing conditions and granting privileges, to take effect after that change of condition, are void.

In the first case the judge, in giving the opinion in which a majority concurred, remarks, "that the slave was entitled to her freedom for six months at least, the time allowed within which the slave was to leave the state. So if when the period of emancipation arrived the law did not require him to leave the state, he was to be free; or if the law did require it and he left the state, there was no forfeiture of freedom." And therefore it was held, that as the testator had emancipated the slave, he could annex no condition subsequent to the grant of freedom.

And in Osborne v. Taylor, the judge observes, "that it was a misapprehension of the will to construe it as directing that the slaves should remain such until they elect to become free; whereas the will in a substantive clause distinctly manumitted them, and afterwards in another clause gives
404 them the election to remain *in Virginia in a condition intermediate between slavery and freedom; an alternative against the policy of the law, and of no effect. Whether the interpretation was correct or not, does not change the principle of the decision. But I do not entertain any doubt as to the correctness of the construction placed upon the clause of the will then under consideration. It conferred absolute freedom, with a bequest of property to them: and then a provision was inserted, amounting in fact to no more than a suggestion of a mode by which the negroes, if they preferred remaining in the state, could do so, by choosing not owners, but masters to serve during life, and at the death of the master, they were to have the option of freedom or slavery, by making a second choice. The absolute property was vested in no one; it was not contemplated that the slaves preferring to remain should remain the property of the testator's estate. The masters to be successively chosen were to have but a limited interest. They could neither sell or bequeath them, but in consideration of service, were to support and protect them. This was a condition of qualified slavery, which the testator could not create, nor could the slaves do so by any election on their part. The testator intended to emancipate, to extinguish all

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property in them as slaves; but suggested an option, which was merely nugatory after freedom had attached.

In the present case there was no intention to emancipate without consulting the slave. The alternative of freedom or slavery was presented to the slave. Until acceptance, he remained a slave. If he declined he continued a slave, his status never having been changed.

The cases of Pleasants v. Pleasants, Elder v. Elder, and Dawson v. Dawson, have been cited on behalf of the appellees as bearing on the construction of this will.

The first two have been reviewed in
405 the case of *Bailey v. Poindexter, and it is unnecessary to add any thing to what was there said, except that as to the first case the suit was brought on behalf of the negroes; and one having arrived at thirty years of age, brought suit himself in forma pauperis. In Dawson v. Dawson's ex'or, 10 Leigh 602, the provisions of the will were almost identical with the clause of the will in the case under consideration; and if in the interpretation of that will it had been construed as conferring immediate freedom, irrespective of any election by the slave, it would have been difficult to have distinguished between the two cases. Upon the question of the capacity of slaves to elect between freedom and slavery, the case is of no authority. No such point was raised or considered. The question presented arose upon the codicil to the will, and whether the devise of the land thereby made for the support of the slaves thereon gave both land and slaves absolutely to the devisee, or created a trust for the slaves until they should be emancipated or sold. The capacity of the slaves to elect was not controverted in the pleadings or argument; but the case proceeded on the concession of such capacity and their right to freedom if they elected to take it. The court below held that the codicil did not amount to a devise of the land or bequest of the slaves thereon to the devisee as his absolute property, but created a trust for the benefit of the slaves during the period which might elapse between the testator's death and the election of the slaves, but that the slaves were not yet freedmen, and would not be until they so elected. This court affirmed the decree deciding that the codicil created a trust for the support and maintenance of the slaves for the year within which they were to be emancipated or sold. The case can scarcely be regarded as an authority upon any of the questions raised in this case. But it serves to show that in the construction of a will almost identical
406 *in its terms, the counsel, the court below and this court incidentally construed the will not as conferring direct emancipation, but the capacity to elect; the court below deciding expressly, that they were not and would not be freedmen until they so elected; and Judge Tucker referring to emancipation not as a thing accomplished, but to be accomplished within the year when they were to be emancipated or sold, as they might elect.

It has been argued, that as the will in this case was subsequent to the act providing for the voluntary enslavement of the free negroes of the commonwealth, passed February 18th, 1856, Sess. Acts 1855-6, p. 37, the will should be construed with reference to that act; and that the testatrix may have contemplated a voluntary enslavement under that act. I think that would be a forced construction. The right conferred by that act is restricted to females who have attained the age of eighteen, and to males who have attained twenty-one years of age. If she had intended to make her slaves freedmen absolutely, she would have known if the act in question was present to her mind; that any direction was idle; as free persons, if of the proper age, they could act for themselves. And she gives to the adults and parents of infants the same right to select among her relations their respective owners as she had just before given them the right to accept or reject the provisions for their emancipation and outfit. If she had made a bequest with reference to the act of February 18th, 1856, she must be presumed to have known something of its provisions, and could not have supposed that parents would be authorized to re-enslave their infant children, or that the permission of the executor was necessary to enable a freedman to choose his master under that law.

The testatrix, it is manifest, was actuated by the most benevolent feelings
407 towards her slaves, and the *intention apparent in the various provisions of the will was to make such disposition as the slaves desired. She therefore gives immediate freedom to the favored servant, because his wishes were no doubt well known to her. As to the others, not questioning their legal capacity to elect, she did not emancipate them directly. She no doubt supposed, perhaps hoped, that such as could by their labor maintain themselves, would choose freedom; and her intention was that such should be emancipated as desired to be free, and those should be slaves who preferred to remain in the state; and still looking to the welfare of her slaves, and anxious to render their condition as comfortable as she could, she desires her executors to permit such as preferred to continue in a state of slavery, to select their owners among her relations—Thus throughout consulting their wishes and intending to conform her bequest to their desires.

I think that the operation of this will as an instrument of emancipation, as in the case of Bailey v. Poindexter, is made to depend on the choice of the slaves, and therefore that the provisions of the will giving such option are void: and this is the only question necessary to be decided in the present case.

The bill was filed to get the aid and direction of the court in regard to the emancipation of the negroes. The only question decided by the court was that the slaves were emancipated by the will, unless they decline to accept its provisions and remain

slaves; and as a consequence of such decision, a commissioner was directed to ascertain the election of said negroes under the provisions of the will. No question was raised by the pleadings or decided by the court as to the rights of those interested in the estate, should the fifth clause in regard to emancipation prove ineffectual. I think that the decree should be reversed, leaving open all questions respecting the
408 rights of the parties interested *in the estate, to be adjudicated when a proper case shall be made for that purpose. The slaves not being manumitted by the will, they cannot be entertained as suitors in court, and as to them the bill must be dismissed.

MONCURE, J. The slaves of the testatrix were among the chief, if not the chief, objects of her bounty. They constituted by far the most valuable portion of her estate. She emancipated them by her will, by words as plain as the English language affords: not precatory, but mandatory words. It was lawful for her to emancipate them. The statute declares, that "any person may emancipate any of his slaves by last will in writing" &c. She emancipated hers by her last will, executed according to law. Why then is the emancipation invalid? The counsel for the appellants contend that it is invalid, not because she has not emancipated her slaves in plain and mandatory terms, but because, in her anxiety to provide for their comfort and happiness, she has superadded other terms which in effect give to them an election between freedom and slavery, instead of freedom absolutely; that they are incapable of making such an election; and that therefore they must remain in slavery; according to the recent decision of this court in Bailey v. Poindexter, supra. In other words, the counsel for the appellants contend that this case is ruled by that; and so ruled, as that the slaves are neither entitled to their freedom absolutely nor to elect between freedom and slavery; while the counsel for the appellees contend that this case is like that of Osborne v. Taylor's adm'r, 12 Gratt. 117, according to which the slaves are entitled to their freedom absolutely.

I think the position of the counsel of the appellees is correct, and that this case is like that of Osborne v. Taylor. If there be any difference between the two
409 *cases, I think this is stronger than that in favor of the absolute emancipation of the slaves. Let us compare the two cases. By the second, third and fourth clauses of the will in that case the testator directs certain of his slaves to be liberated, or, at their option, to remain in the state and choose masters. By the eighth clause he gave the residue of his negroes to trustees for the use of Mrs. C. M. R. Johnson during her life; and then disposed of the subject as follows: "At the death of Mrs. C. M. R. Johnson it is my further will and direction that the slaves embraced in this item be emancipated, and one-fourth of the property which Mrs. J. may not dispose of at her death as required in item the sixth, be distributed amongst them as may be deemed most equitable by my executors. But should a part or the whole of the negroes prefer remaining in the state, they can do so by choosing masters to serve during the life of the person or persons chosen, at the death of whom they shall have the option of freedom or slavery by making a second choice." The slaves mentioned in the second, third and fourth clauses appear to have received their freedom soon after the testator's death. At the death of Mrs. J. a question arose as to the rights of the negroes who had been given to her for life by the eighth clause before recited. And the personal representative of the testator filed a bill to have that and other questions arising in the execution of his office determined by the court. The Circuit court held that the negroes bequeathed to Mrs. Johnson for life became entitled to their freedom at her death; and that the provision authorizing them to choose masters was void; and decreed accordingly. This court, composed of all the judges, unamimously affirmed that portion of the decree. Judge Samuels, in whose opinion on this branch of the case the other judges concurred (certainly all except Judge Daniel, who concurred in the decree of affirmance),
410 speaking *of the objection taken by the appellants, that the slaves in question were not emancipated by the will, says, "this objection is insisted on, because, as is alleged, the slaves were left by the will in the condition of slavery at the death of Mrs. Johnson, with the capacity to become free upon their election to become so; and until the election shall be made, they remain in the condition of slavery: and we are referred to the case of Elder v. Elder's ex'or, above cited. This part of the objection is founded on a misapprehension of the will. The counsel construe the will as directing that the slaves shall remain such until they elect to become free; whereas the will, in a substantive clause, distinctly manumits them; and afterwards, in another clause, gives them the election to remain in the state of Virginia, in a condition intermediate between slavery and freedom. The latter alternative is against the settled policy of the law, and has no effect. Forward's adm'r v. Thamer, 9 Gratt. 537. The bequest of freedom is in no wise impaired by the impracticable and repugnant alternative offered to the choice of the slaves." That is the case of Osborne v. Taylor. And now let us look at this case.

By the first clause or item of Mrs. Coalter's will she gave to her daughter for life all her estate, exclusive of her negroes, after the payment of her debts and the legacies and charges to which it was therein after subjected. By the second she gave the estate so given to her daughter for life, in remainder at her daughter's death to the children of her sister Mrs. Lacy. By the third she authorized her executors to sell any portion of her estate for the pay-

ment of said debts, legacies and charges, and also for the purpose of reinvestment. By the fourth she manumitted her servant Charles, and directed her executors to provide him with a sufficient fund to take him to such state or country as he might elect to live in, and pay to him an annuity
411 of *one hundred dollars during his life. The fifth is in those words:

"Fifth. I direct, in regard to the balance of my negroes, that they shall be manumitted on the 1st day of January 1858. And I authorize and request my said executors to ascertain what fund will be sufficient to provide the usual outfit for and to remove said negroes to Liberia; and I hereby direct my executors to raise said fund, or such an amount as in their judgment may be sufficient for that purpose, from my said estate, and to use the said fund in removing and settling my said servants in Liberia, or any other free state or country, in which they may elect to live, the adults selecting for themselves, and the parents for their infant children. And I further direct that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners; said election to be made by the adults and parents as aforesaid."

The remaining clauses are not material to be stated.

Now what is the essential difference between these two cases? The words of manumission are at least as strong and mandatory in this case as in that. The words in that case are, "At the death of Mrs. C. M. R. J. it is my further will and direction that the slaves embraced in this item be emancipated." The words in this case are, "I direct in regard to the balance of my negroes, that they shall be manumitted on the 1st day of January 1858." This express and absolute manumission is immediately followed in each case by a provision, in property or money, for the emancipated slaves. And then follows a similar provision in each case in regard to their preference to remain in the state, the said provision being contained in the same item with the manumitting clause in
412 each case; *to wit, the eighth item in that, and the fifth in this case. The words of the provision in that case are, "But should a part or the whole of the negroes prefer remaining in the state they can do so by choosing masters to serve during the life of the person or persons chosen, at the death of whom they shall have the option of freedom or slavery by making a second choice." The words in this case are, "And I further direct, that if any of my said servants shall prefer to remain in Virginia instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners; said election to be made by the adults and parents as aforesaid." Can the will in this case, any more than in that, be construed "as directing that the slaves shall remain such until they elect to become free." And may it not as well be said in this case as it was in that, "that the will, in a substantive clause, distinctly manumits them; and afterwards, in another clause, gives them the election to remain in the state, in a condition intermediate between slavery and freedom?" and that "the bequest of freedom is in no wise impaired by the impracticable and repugnant alternative offered to the choice of the slaves?" Is there any substantial difference between the nature of the alternatives offered to their choice in the two cases? If in the one case it was, "to remain in the state in a condition intermediate between slavery and freedom," was it not equally so in the other? The testator in that case obviously did not expect or intend that if they elected to remain in the state they would remain otherwise than as slaves—slaves of the person they might choose as their master during his life, and then to be free or slaves absolutely, at their election. The testator could lawfully have given his slaves to any person for life, and then to be free. And when that case was decided, it was
413 *generally supposed that the testator might lawfully have given them, at the death of the life tenant, their "option of freedom or slavery:" in other words, might have made them then free, on condition that they wished to be free. The "condition intermediate between slavery and freedom," to which the court referred, was a state of slavery, with a right to choose masters from time to time: a right incompatible with that state to which no civil rights are incident. So in this case, the testatrix probably did not expect or intend that, if the negroes preferred to remain in the state, they would remain otherwise than as slaves—slaves of those whom they might select from among her relations, as their respective owners; "said election to be made by the adults and parents as aforesaid." But that right of election is incompatible with the state of slavery, and would have placed the slaves in this case as much "in a condition intermediate between slavery and freedom," as the similar right attempted to be given to the slaves in that case would have placed them in a like condition. Certainly there is at least as much in the will in this case to indicate an intention that the emancipated slaves might remain in the state otherwise than as slaves, as there is in the will in that case. The word "masters" in that case is just as strong to indicate a state of slavery as the word "owners" in this. The express "option of freedom or slavery," given in that case, leaves no doubt of the testator's intention; and if confirmation were required, it would be found in similar expressions occurring elsewhere in the will. No such expressions occur in the will in this case. The testatrix obviously designed that if her negroes preferred to remain in the state, they

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should be permitted to enjoy as much freedom as might be consistent with their so remaining. She had their comfort and welfare alone in her view, in making the provision which she did on that subject. *She desired that they might be permitted to select their respective owners from among her relations: supposing no doubt that they would take better care of the slaves than any other owners. She probably did not intend that the selected relations should pay any thing for the slaves selecting them. To have required that, might have defeated her purpose to give to the slaves a choice of owners. The selected relations might be unwilling or unable to pay full value for the slaves selecting them. No disposition is made of the proceeds of any sale of the slaves in the event of their preferring to remain in the state, while the slaves themselves are expressly excluded in the residuary bequest.

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If it were necessary, therefore, in order to bring this case within the principle of that of Osborne v. Taylor, to show that "the alternative offered to the choice of the slaves," is "a condition intermediate between slavery and freedom," I think that has been fully shown: at least as much as it was shown in the case of Osborne v. Taylor itself.

But it is not necessary to do so. The principle of that case, as I understand it, at least goes to this extent, that if the will, in a substantive clause, distinctly manumits the slaves, the bequest of freedom is in no wise impaired by any impracticable and repugnant alternative, afterwards, in another clause, offered to the choice of the slaves; and if that principle goes no farther, it goes full far enough to sustain the claim of the negroes in this case to their freedom. The will of Mrs. Coalter comes up, literally, to the requisitions of the principle thus laid down in its most restricted form. But I do not understand that case as restricting the principle to a set form of words, in which alone it can be conveyed. The form of words which occurred in that case was referred to in illustration of the substantive principle on which the case was decided; *which principle is, that if the will distinctly manumits the slaves, the intention to manumit thus plainly expressed, is not to be frustrated by the occurrence of other words in the will of equivocal import, or which, if they have any intelligible meaning at all, merely offer to the choice of the manumitted slaves some impracticable and repugnant alternative; whether it be "a condition intermediate between slavery and freedom," or a condition of unqualified slavery: either of which conditions is an "impracticable and repugnant alternative," and the latter more repugnant than the former. The intention to emancipate is considered, in such case, as the paramount intent, and will prevail though the subordinate intent be unlawful. The order in which the words of the will occur is immaterial, except so far as it may serve to throw light on the question of intention. The order used in Mrs. Coalter's will more plainly indicates a paramount intention to emancipate than any other which could be used, where the manumission is accompanied by an offer of such an alternative as is before mentioned; and being the precise order used in the will which was construed in Osborne v. Taylor, that case, it seems to me, must govern this. Otherwise, that case can have no effect at all in any other case, and has been virtually overruled by Bailey v. Poindexter. But the majority of the court in the latter case, who concurred in the decision of Osborne v. Taylor, expressly recognize it, not only in Bailey v. Poindexter, but in this case, as a still binding authority. I have therefore so regarded it in this opinion. An expression occurs in the will in this case which does not occur in the will in that, and upon which much stress was laid in the argument of the appellants' counsel. I mean the words, "instead of accepting the foregoing provisions." It was argued that the manumission of the slaves is one of the "provisions" referred to; and that these words indicate *an intention to give a mere election between freedom and slavery. Conceding, for the present, that the manumission of the slaves is one of the provisions referred to, the words in question are only an expression of what is implied in the will in Osborne v. Taylor. The testator did not any more expect in that case than did the testatrix in this, that the negroes could have the benefit of both alternatives. And when he said, "But should a part or the whole of the negroes prefer remaining in the state," the words, "instead of accepting the foregoing provisions," or others of like import, are plainly implied.

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We have seen how much this case resembles that of Osborne v. Taylor. Now compare it with Bailey v. Poindexter. The words under which emancipation was claimed in that case were, "The negroes loaned my wife, at her death I wish to have their choice of being emancipated or sold publicly." There are other words in the will bearing upon the question, but they all confirm the plain meaning of those I have quoted; which do not distinctly manumit the slaves, but merely give them a "choice of being emancipated or sold publicly." There are expressions in the will in Osborne v. Taylor which bear some resemblance to these. The testator there speaks of his slaves having "the option of freedom or slavery." But no such expressions occur in Mrs. Coalter's will, nor any bearing the remotest resemblance to them. The principle of the case of Bailey v. Poindexter is, that where a mere election between freedom and slavery is given, as in that case, the slaves are incapable of making an election, and therefore must remain slaves. The principle of the case of Osborne v. Taylor is, that where the will in a substantive clause distinctly manumits the slaves, nothing re-

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mains to be done by them to complete their right to freedom, which will be in no wise impaired by any impracticable and
417 repugnant alternative offered *elsewhere in the will to the choice of the slaves. Under which of these two principles does this case fall? Plainly to my mind, under that of the case of Osborne v. Taylor.

A great deal has been said in the argument about the proper rules for the construction of wills: As that the intention of the testator if lawful must prevail; and that to ascertain the intention, we must look to the whole will, and may transpose sentences and strike out and supply words. And the argument was practically illustrated by transposing the sentences of Mrs. Coalter's will, striking out and supplying words, and thus showing what was supposed to be the intention of the testatrix. By far the best rule for construing a will is to place ourselves, as nearly as we can, in the situation of the testator when he wrote it, and then to read it precisely as it is written. Its meaning, if it have any, can almost always be thus ascertained. The application of that rule to Mrs. Coalter's will leaves no doubt as to its meaning. It is a plain will, expressed in language and in a form perhaps as well calculated to convey the meaning of the testatrix as any that could have been used. It was written in her last sickness and a few months only before her death. She had but one child to provide for, and that only for life; and had an ample estate, independently of her slaves, to enable her to make that provision. Her slaves, except her house servant Charles, were generally hired out for the year, and could not be emancipated before the end of the year. Under these circumstances the will was written. By the fourth clause she manumitted Charles presently; and by the fifth the balance of her negroes on the first day of the ensuing year. On that day they were to be absolutely free. The testatrix then, as she had a right to do, renounced all dominion over them. They then became free without the necessity of any act or acceptance on their
418 part. *Indeed, they could not refuse their freedom, supposing it to have been given to them absolutely. The testatrix, by plain and positive words, placed them in a state of freedom on that day; and then proceeded to direct her executors to provide the necessary funds and remove the negroes to Liberia or any other country in which they might elect to live. She further directed, it is true, that if any of them should prefer to remain in Virginia instead of accepting the foregoing provisions, it was her desire that they should be permitted by her executors to select among her relations their respective owners. But she surely did not intend, by this expression of what she desired in a certain event—this precatory bequest, if it may be so called—to convert an absolute, into a conditional emancipation—a positive bequest of freedom into a bequest of a mere choice between freedom and slavery. She certainly did not intend that the right of her negroes to freedom should depend on the expression of their acceptance of it, on or before the first of January 1858. They were to be absolutely free on that day, so far as she was concerned. She supposed, that though free on that day, they might thereafter lawfully remain in Virginia; and should they prefer doing so instead of accepting the provisions she had made for their removal to Liberia or some other country, she desired that they might be permitted to select owners from among her relations. She no doubt supposed that they might express their preference to remain in Virginia at any time before it became necessary for them as free negroes to remove therefrom.

It was argued that the words "instead of accepting the foregoing provisions," embrace manumission as one of the provisions referred to; and that thus, the previous positive bequest of freedom is converted into a bequest of a mere election between freedom and slavery. These words seem only to refer to the provisions
419 *which had, immediately before and in the same sentence, been made for removing and settling the negroes in Liberia or any other country in which they might elect to live. "If any of my said servants shall prefer to remain in Virginia instead of accepting the foregoing provisions" (that is, for their removal and settlement in some other country), "it is my desire that they shall be permitted by my executors to select," &c.; the selection, in either case, to be made by the adults and parents as aforesaid. She desires that they shall be permitted by her executors, not to elect between freedom and slavery, but to select among her relations their respective owners in case they should prefer to remain in Virginia. But if the manumission itself be one of the provisions referred to, the effect would not be as contended for. It would only show that the testatrix supposed that her servants could lawfully refuse the freedom she had previously given them; or, at most, supposed that she could give them a right, instead of accepting it, to remain in Virginia in the manner provided, if they preferred to do so.

It was admitted in the argument, that if the testatrix intended that her slaves should be absolutely free on the 1st of January 1858, they are entitled to their freedom, notwithstanding what is said in the will about their preferring to remain in Virginia. But it was said, that it would be absurd to suppose she intended any such thing; and that it is more reasonable to suppose she intended to give them a direct election to be free, and go out of the state, or slaves, and remain in it. The same supposed absurdity existed in the will in Osborne v. Taylor, and also in Forward's adm'r v. Thamer, 9 Gratt. 537. But that did not prevent this court from con-

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struing the wills in those cases to confer freedom, with conditions subsequent annexed, which were repugnant and void. Is it reasonable to suppose that the testatrix intended to give a mere right of elec-
420 tion *to her slaves, which, according to Bailey v. Poindexter, would simply be a void bequest? Is it not at least as reasonable to suppose that she intended to give them freedom, with a condition subsequent annexed? Which would she have been more likely to have done, had she been informed, when she made her will, of the law as it has been since adjudged in Bailey v. Poindexter, and of the act of February 18, 1856 (Sess. Acts, p. 37), providing for the voluntary enslavement of free negroes? To construe her will as giving a mere right of election, would, according to that case, render the bequest totally void. While to construe it as giving freedom to the slaves, with a condition subsequent annexed, would effectuate, in greater part at least, if not fully, the intention of the testatrix, not only in giving freedom to all, but in enabling such of them as prefer to remain in the state and are of the required age, to do so, by complying with the requisitions of the act aforesaid.

We ought to read the will as it is written, and give effect, as far as we can, to the intention thus ascertained. We ought not to be astute to find out some other intention, for the purpose, not of effectuating, but of disappointing it. We ought to apply to bequests of freedom the same rules of construction which we apply to bequests of property. "This power of emancipation (said Judge Carr in Mann v. Given & al., 7 Leigh 689, 701), we ought not to suppose that the legislature has dealt out grudgingly; nor ought we, when a man has resorted to the legislative means, to look with a jealous eye upon the proceeding, and hedge him round by rules and restrictions which we do not apply to other cases. The slave is his own property; the law gives him the right of emancipation; and when he has intended honestly to exercise it, without trenching upon the rights of others, we ought to extend to the instrument by which he attempted to effect
421 *his intention, as much liberality at least as is shown to others disposing of property."

I am therefore of opinion that the negroes in this case are entitled to their freedom, even conceding that the case of Bailey v. Poindexter was rightly decided. I must say, however, that for reasons assigned in my dissenting opinion in that case, I still think it was not rightly decided; and I would now be willing to overrule it, if it were like this case. Stare decisis, I know, is a rule of the first importance. But that case itself, in my judgment, does so much violence to the rule, that it would be more vindicated by overruling than by adhering to the case. I do not mean to say, however, that, confirmed as that case is by the opinion of the majority in this case, I may not feel myself bound by it hereafter.

DANIEL and LEE, Js., concurred in the opinion of Allen, P.

SAMUELS, J., concurred with Moncure, J.

Decree reversed.

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422 *Eyre v. Jacob, Sheriff.

April Term, 1858, Richmond.

[73 Am. Dec. 367.]

Collateral Inheritance Tax—Constitutional.*—The act of March 2d, 1854, § 15, which imposes a tax upon collateral inheritances, is within the constitutional powers of the general assembly, and is still in force.

John Eyre, late of the county of Northampton departed this life the 19th of June 1857, leaving neither father, mother, wife, brother, sister, or lineal descendant. He left a will, which was duly admitted to probate in the county court of Northampton. By this will the testator made large devises and bequests to his niece, Mrs. Margaret A. Taylor, and to others, and he constituted his grand nephew Severn Eyre his residuary devisee and legatee, and appointed him one of his executors. The whole personal estate of the deceased was assessed by the sheriff of the county at one hundred and five thousand three hundred and fifty-four dollars, and the value of his real estate in Northampton county was

*Collateral Inheritance Tax—Constitutional.—In Schoolfield v. City of Lynchburg, 78 Va. 371, it was said: "In the cases of Miller v. The Commonwealth and Barrett v. The Commonwealth, reported in 27th Gratt. (110), all the successive statutes upon the subject of this (collateral inheritance) tax are collated and reviewed by JUDGE CHRISTIAN, who cites and approves *Eyre v. Jacob*, JUDGE MONCURE concurring, who had dissented in *Eyre v. Jacob*, and while the court in this case was not unanimous, yet the question as to the state tax upon collateral inheritances may be said to be settled. And in a later case—Peters v. The City of Lynchburg (76 Va. 927),—JUDGE STAPLES concedes the complete power of the legislature of the state to tax collateral inheritances."

In Magoun v. Illinois, etc., Bank, 18 Sup. Ct. Rep. 596, 170 U. S. 283, MR. JUSTICE MCKENNA cited many cases as declaring the constitutionality of legacy and inheritance taxes, and as explaining the principle upon which they are based. Among others he cites the principal case; Schoolfield v. City of Lynchburg, 78 Va. 366; U. S. v. Perkins, 163 U. S. 625, 628, 16 Sup. Ct. Rep. 1073; Clapp v. Mason, 94 U. S. 587; Scholey v. Rew, 23 Wall. 331.

The legality of an inheritance tax seems to be based on the grounds that it is not in the proper sense a tax on property, but is a tax on a privilege, granted by the state, of acquiring property by inheritance. See Miller v. Com., 27 Gratt. 117, and *foot-note*; U. S. v. Perkins, 16 Sup. Ct. Rep. 1075, 163 U. S. 625; Knowlton v. Moore, 20 Sup. Ct. Rep. 753, 178 U. S. 41; Plummer v. Coler, 20 Sup. Ct. Rep. 831, 835, 178 U. S. 115; Wallace v. Myers, 38 Fed. Rep. 186, all citing the principal case as authority on the subject.

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eighteen thousand and eighty-nine dollars; and he owned a tract of land in Accomack county, which he devised by his will, and which did not come into the hands of the executors.

The sheriff of the county of Northampton claiming that the estate of John Eyre was liable to pay the tax assessed by the act of March 2d, 1854, on collateral inheritances, and assessing the property at the above valuation, levied on property of the testator which he had bequeathed to Severn Eyre, and which was then in his possession. And thereupon Eyre applied to the judge of the Circuit court of Northampton for an injunction to restrain the sheriff from
423 selling the property *of the plaintiff so levied on by him, on the ground that the act was unconstitutional; which was granted.

The only party to the bill was Jacob the sheriff; but an amended bill was afterwards filed, making the auditor of public accounts a party; and then the cause was transferred to the Circuit court for the city of Richmond.

In March 1858 the defendant moved the court to dissolve the injunction, which had been awarded the plaintiff; which motion the court sustained; and thereupon Severn Eyre applied to this court for an appeal; which was allowed.

The case was argued by Morson, for the appellant, and the Attorney General, for the appellee, upon, 1st. The constitutionality of the law; and, 2d. Whether the law was in force when this tax was assessable?

The questions were, Whether the provisions in the constitution, which provide that taxes shall be equal and uniform, apply to this tax? Mr. Morson insisted that the provision for uniformity and equality of taxation applied to every species of tax. And he insisted further, that this tax on collateral inheritances was a tax on property, and therefore indisputably came within the constitutional provision. The attorney general contended that the constitutional provision relied on by the appellant only applied to taxes on property; and that this was not a tax on property, but on the transitus of property; a distinction which defined the boundaries between federal and state taxation.

LEE, J. The regularity of the proceeding by injunction in this case although discussed by the counsel for the appellant in his opening argument, was not controverted by the attorney general. He
424 was understood *to concede that it is a proper mode by which to test the legality of a levy made by an officer under the supposed authority of a law the constitutionality of which is denied. Upon this point therefore I shall content myself with referring to the cases of Goddin v. Crump, 8 Leigh 120; and Bull, &c. v. Read, 13 Gratt. 78, and authorities there cited. It might perhaps admit of more question whether a court of equity would as a matter of course in such a case as this inter-

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In 6 Va. Law Reg. 186, the editor, while admitting that the principle above laid down is established by authority, ventures the remark that the distinction between a tax on specific property, and a tax on the privilege of acquiring, holding, and enjoying the same property, is scarcely broader than that between tweedledum and tweedledee.

Constitutional Law—Taxation—"Equal and Uniform."—In American Harrow Co. v. Shaffer, 68 Fed. Rep. 753, it was said: "It is settled by unquestioned authorities that the terms 'equal and uniform' apply only to a direct tax on property, and that the clause by which equality and uniformity are prescribed does not limit the power of the legislature as to the subjects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. Com. v. Moore, 25 Gratt. 951; *Eyre v. Jacob, 14 Gratt. 422;* Cooley, Const. Lim. (5th Ed.) 616, 617; Sedg. St. & Const. Law (2d Ed.) 504." Justice and equality are of the essence of constitutional taxation, but exact justice and equality are not attainable, and consequently not required. Danville v. Shelton, 76 Va. 329; Ould v. Richmond, 23 Gratt. 473; Helfrick v. Com., 29 Gratt. 850, all citing the principal case. See also, Slaughter's Case, 13 Gratt. 769; Gilkeson v. Frederick Justices, 13 Gratt. 577. The most that can be done is to approximate them as near as possible. Helfrick v. Com., 29 Gratt. 850; Com. v. Moore, 25 Gratt. 958. In Helfrick v. Com., 29 Gratt. 850, the court said: "It has been repeatedly held by this court that the provisions in the constitution requiring equality and uniformity of taxation, apply only to a direct tax on property, and not to license tax, which do not admit of a tax strictly equal and uniform in the sense contended for. But, if it be conceded that the rule must apply to all subjects, yet it can only be applied as far as practicable. If a given subject be only susceptible of a modified application of the principle, it must receive this, and not be rejected, because the rule cannot be applied with perfect precision to its whole extent and in all its results. See *Eyre v. Jacob, Sheriff, 14 Gratt. 422*, and the laws there cited. See also, Ould & Carrington v. The City of Richmond, 23 Gratt. 464; which last case is a strong illustration of this doctrine." See also, Slaughter's Case, 13 Gratt. 769, 775, and *foot-note*; Gilkeson v. Frederick Justices, 13 Gratt. 577, and *foot-note*.

Legislative Enactment—When Declared Void.—In Helfrick v. Com., 29 Gratt. 847, it is said: "It is universally conceded that to declare a legislative enactment void is the exercise of a judicial function of a most delicate character, never to be done except upon the clearest conviction of the unconstitutionality of the law. Nowhere has this doctrine received a more unqualified sanction than has been given to it by this court. See the cases of *Eyre v. Jacob, Sheriff, 14 Gratt. 422*, and cases there cited; Homestead Cases, 22 Gratt. 266; Roberts' Adm'r v. Cocke, etc., 28 Gratt. 207; Reed v. Union Bank of Winchester, *supra* (29 Gratt. 719)."

See, in accord, the principal case cited in Bridges v. Shallcross, 6 W. Va. 570; Slack v. Jacob, 8 W. Va. 627; State v. Cottrill, 31 W. Va. 206, 6 S. E. Rep. 451; American Harrow Co. v. Shaffer, 68 Fed. Rep. 753. See also, in accord, Sharpe v. Robertson, 5 Gratt. 518, 642.

The Legislature—Taxing Power of.—See *foot-note* to City of Richmond v. Daniel, 14 Gratt. 385.

Chancery Practice—Remedy against Illegal Taxation.

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fere by way of injunction to restrain the act of an officer, not because the constitutionality of the law under which he is proceeding is called in question, but because the existence of any such law is absolutely denied. Upon this question however I think it may be unnecessary to express any opinion.

The commonwealth being the party substantially interested in the subject matter of controversy, it might have been more regular under the provisions of the act entitled an act regulating the jurisdiction of the Circuit courts, passed May 22, 1852 (Sess. Acts 1852, p. 58, § 3), that this suit should have been originally instituted in the Circuit court of the city of Richmond in order that the commonwealth might be duly represented by the proper officer, and such officer should of course have been made a party defendant. As however the suit was subsequently removed to that court in conformity to the provisions of § 8 of ch. 46 of the Code, p. 239, and the auditor of public accounts who had been made a party by an amended bill, duly appeared and filed an answer, all difficulties as to parties and the regularity of the hearing before the Circuit court of Richmond city, may be considered as overcome, and we may proceed to consider the case upon its merits.

The object of the bill was to test the legality of the levy made by the sheriff of Northampton upon the property of the appellant to enforce payment of the
425 *tax claimed to be due to the commonwealth under the several provisions of law imposing a tax upon the transmission of estates by devise or descent to any other person or use than those specified, and prescribing also the rate of the same. The provisions under which the tax was claimed to be due are those of ch. 35 of the Code, § 10 and § 42, p. 179, 184, and of ch. 39, from § 6 to § 12, inclusive, p. 214, 215, and the act entitled an act imposing taxes for the support of government, passed March 2, 1854, § 15; and the legality of the sheriff's proceeding was denied because as it was alleged, the several provisions of law above cited including the fifteenth section of the last named act, were unconstitutional, inoperative and void. And in the argument here, the further ground was taken by the counsel for the appellant, that in point of fact when this levy was made, there was no law upon the statute book authorizing or requiring such a levy to be made, the act of March 2, 1854, having expired or been replaced by the act of March 18, 1856, which contained no provision for a tax upon a subject of this character.

It has always been considered to be a most delicate office for a judge to undertake to pronounce an act of the legislature to be unconstitutional and void. It is substantially to repeal the obnoxious law and thus in effect to exercise a power properly belonging to another department of the government. "The question (says Judge Marshall) whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom if ever, to be decided in the affirmative, in a doubtful case." "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the constitution and the law must be such that the judge feels a
426 clear and *strong conviction of their incompatibility with each other." Fletcher v. Peck, 6 Cranch's R. 87. "The question whether a law is in accordance with the constitution (says Judge Brooke) is at all times a very delicate and important question." "It should not be in a doubtful case that the acts of that body (the legislature) should be decided by the courts to be unconstitutional." Sharpe v. Robertson, 5 Gratt. 518, 642. "The duty of enquiring into and deciding upon the legal validity of an act of the legislature has always been regarded by this court, and justly, as one of the most delicate it can be called upon to discharge." Per Daniel, J., in S. C. p. 574. Where a plain and palpable infraction of constitutional provision is shown in a law upon the validity of which it is called upon to decide, it is of course one of the highest and most solemn duties of the court to declare such law to be inoperative and void. If however it be only upon slight implication or inconclusive reasoning that the supposed infraction can be made out, the court should never undertake to rescind and annul the solemn and deliberate act of the legislative department of the government. To doubt in such a case should be to affirm.

There is certainly one proposition which will not be questioned, and that is that the legislature possesses the full, absolute, sovereign power of taxation, excepting so far as it may have been surrendered to the general government or may be interdicted by the constitution of the United States, or as it may be controlled by the restrictions and mandates of the constitution of the state. See City of Richmond v. Daniel, not

—It is proper to proceed by injunction in order to test the validity of a levy made by an officer under the supposed authority of a law the constitutionality of which is denied.

This proposition in the principal case was approved in the City of Richmond v. Crenshaw, 76 Va. 940; Blanton v. Southern Fertilizer Co., 77 Va. 335; S. V. R. R. Co. v. Supervisors, 78 Va. 276; Lynchburg, etc., Ry. Co. v. Dameron, 95 Va. 546, 28 S. E. Rep. 951. The rule seems to be established by a long line of decisions. See Goddin v. Crump, 8 Leigh 121; Bull v. Read, 13 Gratt. 78, and *foot-note*; Miller v. Lynchburg, 20 Gratt. 330; Johnson v. Drummond, 20 Gratt. 419; Lewellen v. Lockharts, 21 Gratt. 570; Richmond v. Richmond & Danville R. R. Co., 21 Gratt. 604; Pelton v. The National Bank, 101 U. S. 143; Cummings v. The National Bank, 101 U. S. 153; Redd v. Supervisors, 31 Gratt. 697-98, and *foot-note*; Roper v. McWhorter, 77 Va. 214.

See also, monographic *note* on "Injunction."

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yet reported, opinion of Samuels, J. And this power it is most important should be sustained and upheld as essential to the very existence of the government of the state, and as providing the means for vindicating her sovereign authority.

427 See Providence Bank v. Billings, *&c., 4 Peters' R. 514; Weston v. City Council of Charleston, 2 Peters 449. We do not go to our constitution to see what powers of taxation are given to the legislature but to ascertain what restrictions and limitations upon its general sovereign power are imposed by its provisions. If therefore the power to tax any subject whatever is not excluded by the terms of the constitution or by necessary and inevitable implication, it must exist in the general assembly to be exercised at the discretion of that body as wisdom and a proper sense of justice shall direct.

The counsel for the appellant does not controvert this position, but he insists that the particular tax in question though not expressly and in terms prohibited by the constitution, is yet as effectually prohibited by the most necessary implication from its provisions as if the power to impose it had been expressly denied. He insists that it is in effect purely a tax on property, or if it is not to be regarded as a tax on property but on a benefit or privilege to the citizen, that the power to impose it is excluded because it is not enumerated amongst those authorized to be imposed by the twenty-fifth section; and whether a tax on property or privilege it is equally violative of the twenty-second section of the fourth article of the constitution which declares that taxation shall be equal and uniform throughout the commonwealth. He also maintains that if it is to be considered a tax on property, it conflicts with the provision of the twenty-second section which declares that all property other than slaves shall be taxed in proportion to its value and with the twenty-third section of the same article regulating the taxation of slaves.

If this tax were properly to be considered as a tax on property, there would be great force in the argument of the counsel. As the ordinary annual tax had been assessed upon the decedent, this would then

428 appear *to be a second taxation of the same subject, with the additional assessment upon all the slaves of whatever age and at their real value. But such, I think is not its true character. It cannot be regarded in a proper legal sense as a tax upon property. The property tax which the framers of the constitution were contemplating in the twenty-second section was the ordinary annually recurring tax for the support of government laid upon all property whatsoever. They had no reference to casual subjects of taxation occurring irregularly and occasionally which though connected with property were yet readily to be distinguished in their essential character and features. If the tax imposed had been a fixed and arbitrary sum, it would scarcely have been said to be a tax on property although every tax for which the property of the tax payer is liable might be called a tax on property in a certain sense. But the argument is that as the tax is a certain per centum of the value of the estate and the property pays it, it is therefore a tax on the property itself. But this is by no means a necessary logical conclusion. The intention of the legislature was plainly to tax the transmission of property by devise or descent to collateral kindred; to require that a party thus taking the benefit of a civil right secured to him under the law should pay a certain premium for its enjoyment; and as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the value of the subject enjoyed, it is fixed at a certain per centum upon the value of the whole estate transmitted. And of this surely there can be no just complaint; on the contrary it would have been unequal and unjust to require that a party receiving an inconsiderable property should pay as high a premium as one who takes a large and valuable estate. It is perfectly in accordance with the principles of natural justice and the spirit of the consti-

429 tution that *the tax upon such a subject should be regulated in strict proportion to the value of the benefit which it secures.

The case of Brown, &c. v. The State of Maryland, 12 Wheat. R. 419, was cited by the counsel. In that case it was held that the prohibition in the constitution of the United States to the states to lay duties or imposts on imports or exports, prevented them from requiring the importer to take out a license and pay a tax before he could be permitted to sell the articles by the bale or package; and that the requirement of such a license and tax before the importer could sell also conflicted with that provision of the constitution which declared that congress should have power to regulate commerce with foreign nations and among the several states and with the Indian tribes. The court considered that as the importer had paid the duty imposed by the act of congress, he thereby acquired the right not only to bring the articles into the country but also to dispose of them afterwards, that being the essential object of the importation and the motive for paying the duty. But I do not perceive how this touches the question in our case. It was not decided that a tax on the transitus of property and on the property itself, were one and the same; but it was held that both the right to import and the right to sell the merchandise after it was imported were secured to the importer by the payment of the duty imposed by the act of congress, the power of conferring both these rights having been appropriated to the general government by the constitution and necessarily therefore denied to the states.

The objection that the tax is not levied upon the heir or legatee but is to be paid out of the estate of the decedent, and that

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therefore it cannot be considered a tax upon the privilege of succeeding to the property, is I think more specious than real.

430 Whether *the tax is paid by the personal representative before he turns over the estate to the party entitled or by the latter after he receives it, the effect is the same. It is in either case a premium paid for the right enjoyed and the value of the estate is exactly diminished by the amount of the premium. Nor does the manner in which the tax is spoken of in the Code and subsequent acts at all change its real character. It is spoken of as a tax on "decedents' estates," but in immediate connection with their transmission under the statute of wills or the laws regulating descents and distributions; and the character of the tax is not to be fixed by any isolated words that may be employed, but they must be taken in the connection in which they are used and the true character is to be deduced from the nature and essence of the subject.

That the general assembly of Virginia in the absence of a constitutional prohibition does possess the power to tax a civil right or privilege like this is beyond all question. This is fully embraced within its general and comprehensive power upon the subject to which allusion has already been made. But it may be deduced from the very nature of the subject itself. The right to take property by devise or descent is the creature of the law and secured and protected by its authority. The legislature might if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may tomorrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses. Possessing this sweeping power over the whole subject, it is difficult to see upon what

431 *ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition upon which those who take the estate shall be permitted to enjoy it, can be successfully questioned. That the tax is confined to collateral inheritances and devises to others than those specified, presents no difficulty. It is the will of the legislature to make this discrimination and its discretion upon the subject must be regarded as having been duly and properly exercised.

Assuming then that this is a tax upon a civil right or privilege, which the legislature may impose if there be no prohibition in the constitution, we are to enquire whether there be any such prohibition. None certainly in terms is to be found in that instrument, but it has been argued that as it is not one of the subjects named in the twenty-fifth section, the power to impose it is excluded by necessary implication, upon the principle expressio unius exclusio est alterius. But this argument would prove too much, for it would sweep away the taxes on deeds, suits, notarial seals and that class of subjects, the constitutionality of which has never been questioned by any one. It would restrict the whole power of taxation to the particular subjects named in the twenty-second and three following sections. But this surely could not have been designed by the framers of the constitution. If those four sections had been entirely omitted no one can doubt that the legislature would have had full power to tax all the subjects to which they relate. The three first of these were plainly not intended to confer a power of taxation; they prescribe rules by which the power already supposed to be possessed by the legislature shall be exercised. The language of the twenty-fifth section is somewhat different and might seem to be permissive in its character; but the section seems

432 *rather to be introduced for the purpose of imposing a restriction than of conferring a power. All property was to be taxed ad valorem, and taxation was to be equal and uniform; but if it should be deemed expedient to tax incomes and licenses, the property from which the income was derived and the capital invested in the business for which the license was required, were to be exempted. Or it may have been thought that as all property was to be taxed a doubt might arise whether a tax on incomes and licenses could be substituted for one on the property or capital, and therefore the particular language was used to remove such doubt and show that the legislature had an election as to which of the subjects should be made to bear the tax. Why "salaries" was also named may not be so apparent. It may be that it was intended by just implication to exclude the power to tax the office or employment from which the salary proceeded and the salary itself. Or it may be that as "incomes" had been mentioned, it was thought the kindred subject of "salaries" should also be made to exclude any conclusion from its omission that the power to tax them was not intended to be exercised by the legislature. And thus that the section was intended to make a qualification and to remove doubts, but not to tie up the hands of the legislature so as to restrict the power of taxation to the property tax, capitation tax, and tax on incomes, salaries and licenses. But however this may be it seems to me that where a general sovereign power exists to be exercised at the pleasure of the legislature over numerous different subjects, it would be very unwise and unsafe to hold that because a few of those subjects may have chanced to be named for some particular purpose or in some particular connection in the instrument which is intended not to confer but to restrict its powers, therefore all others were im-

433 pliedly *excluded. To my mind there is not that necesaary and inevitable

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implication which alone can supply the place of an express and positive prohibition.

If the power of taxation then was intended to be exercised over other subjects than those named in these sections, it is not surprising that in their number this tax should have a place. It is a tax of great antiquity having been imposed upon the Romans as early as the days of the Emperor Augustus. It was adopted by various nations of Europe, and together with the tax on transfers of property among the living, constituted in ancient times according to a learned writer, one of the principal branches of the revenue of the federal crown. See Smith's Wealth of Nations, p. 387, et seq. In modern times, it is in some shape or other a tax of frequent imposition, and that it was not introduced into our system at an earlier day was perhaps only owing to the fact that the exigencies of the treasury had not sooner required a resort to other subjects of taxation than those previously adopted. It was first imposed, I believe, by the act of 1843-4, and at the late revisal of 1849 was re-enacted as a regular and permanent tax. And at the first session of the general assembly after the new constitution was adopted and when the cotemporaneous history of that instrument must be supposed to have been fresh in the memory of the law makers, it was recognized as a valid existing subject of taxation and the rate fixed at which it was to be levied.

If this tax is not to be regarded as a property tax, the counsel concedes that the ad valorem principle cannot be applied to it, and therefore that it is not within that provision of the twenty-second section nor those of the twenty-third section; but he argues that every tax of what nature soever is within the principle of equality and
434 uniformity prescribed in the *twenty-second section, and that this tax is violative of that provision.

I think it may well be questioned whether all the provisions of the twenty-second section are not to be confined to taxes on property. The argument to show that the principle of equality and uniformity was intended to apply to them alone is at least strong and persuasive. The cotemporaneous history of the constitution proves that this section grew out of the supposed antagonism between the eastern and western portions of the state in respect of the slave property so predominant in the former. Had the interests of all portions of the state been uniform and homogeneous, the principle of representation would have afforded adequate protection to the tax payer against injustice and oppression, and no such provision would have been introduced. As they were deemed otherwise, a guarantee was demanded, and the controversy was adjusted by the concession of the provisions of the twenty-second and twenty-third sections. See Gilkeson v. Frederick Justices, 13 Gratt. 577, opinion of Samuels, J.; Slaughter's Case, Id. 767, 775, opinion of same judge. Now the reason of these sections cannot extend to subjects as to which no discrepancy of interests exists. This discrepancy is in the matter of property alone, and there can be no sectional difference in respect of devises or descents to collaterals any more than there can be in respect of incomes, salaries, notarial seals, and the like.

A similar provision is to be found in the constitutions of several others of the states, and the same terms "equal and uniform" are employed in most of them. In the constitutions of Tennessee, Louisiana, Arkansas, Massachusetts, Illinois, Texas, Wisconsin, Michigan and California, the rule of equality and uniformity is enjoined
435 either in terms or by equivalent *expressions, and in giving them construction, it has been held in several of the states, that the terms "equal and uniform" apply only to a direct tax on property, and that the clause by which such equality and uniformity is prescribed does not limit the power of the legislature as to the objects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality without regard to value. Hence specific taxes have been sustained as a valid exercise of the legislative power. Portland Bank v. Apthorp, 12 Mass. R. 252; Sawyer v. City of Alton, 3 Scamm. R. 127; People v. Dorr, Same v. Hussey, cited in Sedgwick on Stat. & Constit. Law, 558, n; Aulanier v. The Governor, 1 Texas R. 653; Sedgwick 554, et seq.

In view then of the construction of these terms which has prevailed elsewhere, and bearing in mind the particular reason which led to the adoption of the twenty-second and twenty-third sections, the inference is strong that property only was in the mind of the framers of the constitution; and it is further strengthened by the fact that although incomes and salaries as well as property of assessable value may be brought under the rule, yet there is a large class of subjects, such for example as licenses, which do not admit of a tax strictly equal and uniform in the sense contended for; and thus the constitution is to be made to conflict with itself, and a large and important branch of the revenue is to be cut off, because it cannot be brought within the rule of exact equality and uniformity. It is true the language used is broad enough to cover every thing, and if it be conceded that the rule must apply to all subjects, yet as remarked by Judge Samuels in Slaughter's Case, 13 Gratt. 767, it can only be so applied so far as practicable. If a given subject be only susceptible of a modified application of the principle, it must receive this, and not be rejected because the
436 rule cannot be *applied with perfect precision to its whole extent and in all its results. See Aulanier v. The Governor, above cited, p. 660.

In this view I do not perceive wherein the inequality and want of uniformity complained of can be said to consist. To say that the decedent's estate is charged with the regular annual tax and then with

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the additional tax on the transmission to his collateral heirs or devisees, and thus charged with taxes greater than those imposed on other citizens, is but to repeat the argument that it is a property tax which I have already considered. The tax is equal and uniform, throughout the state as far as it is susceptible of the application of the rule. It is the same every where upon the succession to estates of equal value of whatever subjects they may consist. Every person, every where, who takes by this succession, pays a tax for the privilege, and this tax is proportioned to the value of the interest which he acquires. But in this, it is said, there is a want of uniformity; that unlike the tax on deeds, seals and the like, it is not fixed at a sum certain, the same to all, but varies according to the value of the estate taken. In other words that the legislature in seeking to carry out the principle of equality as far as practicable have destroyed that of uniformity. I think there is no force in the objection. To such subjects as deeds, seals, &c. it may be that the principle of equality cannot be applied. The legislature have thought so; certainly they have not attempted to apply it. But to the succession to property, as between those who constitute the class of such beneficiaries, the application is easy and simple, and the legislature have sought to make it by fixing the tax at a certain per centum upon the property acquired; and have in this mode as far as practicable carried out the rule of equality and uniformity. Nor does the exemption where
437 the estate is of less value than two hundred *and fifty dollars constitute a necessary departure from it. The legislature may define the class to which this tax shall be restricted as they in their discretion may think just and proper, taking care to render it uniform with all those who constitute the class; or as they are authorized to exempt any particular subject from taxation, it may be regarded as an exemption in favor of those entitled to inconsiderable estates of less value than the sum named: and we must take it that the adoption of the tax as it stood in the Code, after the new constitution, amounted to an exemption by the constitutional majority of all those falling under the minimum prescribed.

But it is said that the principle of taxation in cases like this is of dangerous tendency and inadmissible, because, if allowed, the legislature may under the form of taxing transfers and sales of slaves between the living, impose taxes to any amount whatever upon that species of property, and thus break down the guaranty which it was the intention by the compromises of the constitution to afford to the eastern people against injustice and oppression. It is the argument oft repeated of the possible abuse of power, and may be urged with equal truth of any power whatever possessed by the legislature, however indisputable or how indispensable soever its exercise may be for the public welfare. Any power wielded by mere human will may be abused. For myself, I do not question the power of the legislature, by requiring a license or otherwise, to impose a tax upon the sale of slaves, any more than I do that of imposing a tax upon the sale of cattle or any other property or a tax on stamps, if the exigencies of the public finances should be such as in their opinion to render a resort to such a source of revenue necessary, whatever might be my opinion as to the wisdom and policy of imposing burdens of this character. But
the power to impose such a tax
438 *is one thing; the expediency and propriety of its exercise is another and a very different thing. The legislature has seen proper to lay a tax upon the alienation of real estate, for such in effect is the tax upon deeds, and I have never heard its constitutionality called in question. The possibility that the general assembly may be influenced by sinister, improper or unworthy motives in the passage of any law, is, I think, utterly inadmissible as a correct basis of judicial action. When we speak of their power we are to do so, as said by Ch. J. Parker, "presuming that it will never be exercised but for wise or necessary purposes." Portland Bank v. Apthorp, 12 Mass. R. 252. We do not sit here to review the manner in which the legislature has exercised its discretion, but to declare when it has plainly transcended its constitutional powers. The guarantee for just, wise and wholesome legislation is to be sought in the intelligence and integrity of the members composing the legislative body and in their immediate responsibility to their constituents.

It remains to consider the ground taken for the first time in the argument here, that in point of fact there was no law in existence at the time of the levy of this tax which authorized or required it to be made. There is no suggestion of this kind in the bill, and if it were true, the sheriff in thus acting without any authority would be a trespasser and liable to the action of the aggrieved party for damages. As however the case has been bona fide instituted and brought up to this court upon the constitutional question, it may not be improper to decide this question also and thus put an end to the litigation between these parties.

This tax was declared by the Code (ch. 35) and made a part of the permanent system of taxation. By chap. 40, the rates of assessment on the different subjects of taxation are fixed and prescribed. The
Code took effect on the 1st of July 1850
439 and at the following session of *the legislature no tax bill was passed and that of the Code remained in full operation. At the session in 1852 a temporary bill was passed fixing the rates of taxation for one year and this tax was rated at two per centum of the estate transmitted. By this act ch. 40 and § 1 of ch. 39 of the Code were repealed. At the session of 1852-3 a general tax bill was passed which unlike

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that of the session of 1852 was not limited in its operation to any year or years. By this act the tax upon this subject was fixed at the same rate of two per centum of the value of the estate, and the 40th chapter of the Code was again repealed, as was also the 1st section of the 39th chapter. At the session of 1853-4, the same tax was repeated and the same chapter and section of the Code were again repealed. In the act passed at the session of 1855-6, no rate is fixed for this tax. Why it was omitted whether by inadvertence or design we are not informed. But although by the act entitled an act concerning the assessment and collection of the public revenue, passed April 7, 1853, and by the several acts above recited, various chapters and sections of the Code on the subject of taxation are expressly repealed, yet no where is there found any clause repealing the 10th and 42d sections of chapter 35, or either of the sections from the 6th to the 12th, inclusive of chapter 39, which are the sections imposing the tax in question. And the act of the 7th of April 1853 distinctly recognizes those sections as permanent provisions of the revenue laws of the commonwealth.

Now the testator died in June 1855 and the tax immediately thereon accrued to the commonwealth although the collection could not be enforced until the following year, and it was the duty of the sheriff to proceed to collect it in 1856 according to the rate prescribed by the act of March 2, 1854, notwithstanding the legislature had
440 omitted to fix any rate in the tax *law of March 18, 1856. The failure of the legislature to fix a rate in 1856 without any repeal of the previous laws prescribing the tax and fixing its rate could not operate as a release of the tax accrued in 1855. The provisions of the Code and of the act of March 2, 1854, are permanent provisions and must remain in force until they are expressly repealed or replaced by other provisions plainly intended to be substituted in their stead. The mere omission to fix a rate upon a particular subject will not operate as a repeal of previous laws prescribing the tax, but it will be left still in force at the rate prescribed by the previous laws, if there are no expressions showing clearly that the legislature intended the tax to be discontinued. And if the testator had died in 1856 instead of 1855, I incline to think that the tax would have accrued and should be collected according to the rate prescribed by the act of 1854; though upon this point it is perhaps unnecessary to express an opinion.

I think the Circuit court did not err in dissolving the injunction and am of opinion that the order be affirmed.

ALLEN, P., and SAMUELS, J., concurred in the opinion of Lee, J.

DANIEL and MONCURE, Js., dissented.

Decree affirmed.

441 *Livesay v. Helms & als.

July Term, 1858, Lewisburg.

(Absent ALLEN, P.)

1. **Husband and Wife—Legacy to Wife—Presumption of Executor's Assent—Case at Bar.***—A slave having been lent to a husband and wife on their marriage, by the wife's father, he by his will gives the slave and her increase to his daughter for life, with remainder to her children. The husband having died a few months after the father, leaving his wife surviving him; in the absence of all proof, the court will not presume the assent of the father's executors to the legacy, so as to vest the life estate of the wife in the husband; but it will be held to survive to the wife.

2. **Administrators—Statute of Limitations—Case at Bar.**†—A widow qualifies as administratrix of her husband, and takes possession of and holds certain slaves, in which she claims a life estate, as having been given to her by her father's will. She is afterwards removed from her office of administratrix; but she continues to hold the slaves, claiming them as her own for life; and she holds them for more than five years after she ceased to be administratrix. HELD: The statute of limitations will protect her against any claim by the administrator *de bonis non* and next of kin of her husband. And the fact that one of the next of kin had been a married woman during the whole period, will not prevent the running of the statute against her.

This was a bill filed in the Circuit court of Floyd county, by John Helms and Sarah his wife who was Sarah Livesay, against Susannah Livesay and others, the object of which was to recover certain slaves held and claimed by Susannah Livesay; but which the plaintiffs insisted were a part of the estate of her deceased husband Peter

*__Legacies—Assent of Executor—Presumption.__—In 3 Min. Inst. (2d Ed.) 617, it is said: "Assent (of an executor) may be sometimes *presumed* from the time which has elapsed since the debts were paid, or from acquiescence in the possession of the *subject of the bequest by the legatee.* (2 Lom. Ex. 235; Lowry v. Mountjoy, 6 Call 59.) And, on the other hand, presumption of assent may also be repelled by circumstances which render it improbable. (*Livesay v. Helms, 14 Gratt. 448-'44.*)"

__Husband and Wife—Chattels of Wife—Transfer to Husband.__—Mr. Minor (1 Min. Inst. [4th Ed.] 325) says that the absolute transfer of the wife's chattels to the husband by the marriage is not always viewed with a favorable eye, when, after his death, a conflict arises between the surviving wife on one side and the husband's personal representatives on the other, citing, in support of the proposition, the principal case; Wallace v. Taliaferro, 2 Call 447; Gregory v. Marks, 1 Rand. 355; Taylor v. Yarbrough, 13 Gratt. 193.

See generally, monographic *note* on "Husband and Wife."

†__Equity—Limitation of Actions.__—In Etting v. Marx, 4 Fed. Rep. 679, it was said: "There are three classes of cases with reference to the bar of time—*first*, those in which equity is bound to apply the statutes of limitations; *second*, those in which it merely acts in analogy to those statutes; and, *third*, those in which it is neither bound by nor acts upon the

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Livesay. The court below held that the slaves did belong to the estate of Peter Livesay, and directed them to be delivered to his administrator de bonis non; and ordered an account of their hires and profits whilst in the possession of Susannah
442 *Livesay. And from this decree she obtained an appeal to this court. The facts are stated in the opinion of Judge Samuels.

Baldwin, for the appellant.
Staples and B. Johnston, for the appellees.

SAMUELS, J. This cause is brought here by appeal from a decree of the Circuit court of Floyd county, in a suit wherein John Helms and wife (in right of the wife) were complainants, and Susannah Livesay and others were defendants, brought for an account and distribution of Peter Livesay's estate; he being dead intestate, and the parties being his next of kin and his administrator de bonis non. The principal subject of controversy was the issue of a slave named Julia. On behalf of the administrator de bonis non, and the next of kin other than Susannah Livesay the widow, it was insisted that the slave Julia had been given to Peter Livesay by John McGehee about the year 1800, on Livesay's marriage with the defendant Susannah, the daughter of McGehee. That on Livesay's death in 1828, his widow and son George W. Livesay were appointed administratrix and administrator of his estate, and as such took into their possession the slaves in controversy. That they had failed to make distribution or to account for hires; and that the appellant had appropriated to herself exclusively the services of the slaves.

The defendant Susannah Livesay denied the alleged gift by her father John McGehee. She averred that the slave was only loaned to her husband and herself by her father, on their promise to return her if required to do so. That her father (who died a few months before the death of Livesay), by his last will and testament, a copy of which is filed as an exhibit, bequeathed Julia and her increase to her
443 for life, with *remainder to her children. That immediately after the death of her husband she took the slaves into her own exclusive possession, claiming them as her own for life, under the will of her father. That her co-administrator George W. Livesay, who attended exclusively to the administration of the estate, acquiesced in her claim of title and possession. That her possession and claim of title continued from Livesay's death in 1828 until the month of August 1834, when the grant of administration to herself and George W. Livesay was duly revoked, and John Helms (one of the complainants) was on the same day appointed administrator de bonis non of Peter Livesay's estate. That her possession was not interrupted by the revocation of her powers; but continued as before until the bringing of this suit in 1848. She relies upon the statute of limitations as a bar to the relief sought.

On behalf of the complainants it is alleged in an amended bill, that the female complainant was a married woman at the time her rights accrued, and has so continued ever since; and that thus her rights were within the saving of the statute of limitations.

The case turns upon the questions whether Peter Livesay had any property in the slaves either absolute or for the life of his wife. If he had such property, then whether the claims of his administrator de bonis non and of his next of kin are barred by the statute of limitations.

The evidence is not very clear to show whether Livesay had the absolute right of property in the subject of controversy. It seems, however, that the weight of direct testimony is against such right. In regard to the estate for life of his wife, it must be said, that he could have no such right without the assent of McGehee's executors to the bequest to Mrs. Livesay; and it is not shown, by direct proof, that such assent was given; nor can it be pre-
444 sumed from *the short interval of time between McGehee's death and the death of Livesay. The long continued and exclusive possession of Mrs. Livesay, apart from any effect under the statute of limitations, affords a strong presumption of right to the subject in her. Some of the parties now claiming against her were sui juris, and their acquiescence and that of his co-administrator, should be construed into an acknowledgment of her right.

It remains to consider whether the appellant is protected by the statute of limitations, if the slaves belonged to the estate of her intestate. After her removal from the office as administratrix, and after the appointment of John Helms to the office of administrator de bonis non, her relations to the estate itself and to the next of kin, were greatly changed. She was no longer a trustee having title to and holding the unadministered assets in trust for the next of kin: the title, by operation of law, was vested in the administrator de bonis non. See Wernick v. McMurdo, 5 Rand. 51. He might, by action of detinue, have recovered of her the slaves, and damages for detention. The next of kin could bring no available suit in equity against her without having the administrator de bonis non before the court. Samuel v. Marshall, 3

principle of analogy to them, but proceeds on doctrines peculiar to and inherent in itself." The principal case is cited as an instance of the first class.

The principal case was distinguished in Rowe v. Bentley, 29 Gratt. 762, the court saying that, in the principal case, no fraud, collusion, or other thing (as in the case at bar) was shown to deprive the plea of the act of limitations of any part of its efficacy; but that if such proof had been made, the decision must have been different.

See generally, monographic *note* on "Executors and Administrators."

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Leigh 567; 2 Lomax Ex'ors 514. In him was vested the legal title which a court of equity, on showing a proper case, would cause to be conveyed to those having the right. The next of kin could bring no suit at law against a party holding assets of the estate; their right and remedy is through the personal representative. See authorities above cited. The possession of Mrs. Livesay from 1834 to 1848, was adverse to the administrator de bonis non, and was of sufficient length of time to bar his action against her. No fraud, collusion or other thing is shown to deprive her plea of the statute of limitations of any part
445 of its efficacy. *The coverture of the female complainant, if proved, would not avail to prevent the operation of the plea in this case, seeing that her rights are represented by the administrator de bonis non, and by her husband, who are sui juris and barred by the statute.

It is not necessary for any purpose in this case to consider whether the possession of Mrs. Livesay, during her continuance in office, adverse in fact, was also adverse in law so as to bar the next of kin.

On the whole case, I am of opinion, that Peter Livesay had no title at all to the slaves in controversy. And if this fact were otherwise, I am further of opinion, that any right derived from Livesay is barred by the statute of limitations; and thus there was no cause of action existing against Susannah Livesay at the time this suit was brought. I am of opinion to reverse the decree of the Circuit court, so far as it directs the surrender of the slaves, and an account of their hires, and to dismiss so much of the bill as prays for the slaves and their hires, but without prejudice to the right of any party to his or her rights in remainder to the slaves after the death of Mrs. Livesay, and to remand the cause for further proceedings as to other subjects passed on by the decrees.

DANIEL and LEE, Js., concurred in the opinion of Samuels, J.

MONCURE, J., concurred in the results, on the first ground stated in the opinion.

The decree is as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that said decrees are erroneous in so far as they adjudge the question of title to the slaves in controversy against the appellant, and direct a surrender of said slaves, and
446 an account of *their hires. It is therefore adjudged, ordered and decreed, that said decrees, so far as they are herein declared to be erroneous, be reversed and annulled; and that the appellee John Helms, administrator de bonis non of Peter Livesay deceased, out of the assets in his hands to be administered, and the other appellees, out of their own proper estates, do pay to the appellant her costs in this court expended. And the court, proceeding to render such decree as the Circuit court should have rendered, instead of so much of said decrees as is herein declared to be erroneous, it is further decreed and ordered, that so much of the original and amended bills as seeks to recover the slaves, Julia and her increase, and hires of the slaves, be dismissed; but without prejudice to the rights in remainder after the death of the life tenant. And the court being of opinion there is no other error in said decrees, it is further adjudged, ordered and decreed, that the residue thereof be affirmed, and the cause remanded for further proceedings to be had therein in conformity with this decree.

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447 *Baltimore & Ohio R. R. Co. v. Polly, Woods & Co.

July Term, 1858, Lewisburg.

1. **Pleading and Practice — Special Pleas — General Issue.***—In *assumpsit*, upon the common count for work and labor, &c., defendant offers a special plea setting out a special contract, and averring that the work, &c., sued for was done under it, and the acts to be done by defendant were done. The special plea, if it contains a defence to the action, only amounts to the general issue; and should be rejected.

***Pleading and Practice—Special Pleas Amounting to General Issue.**—It seems well settled that special pleas amounting to the general issue if objected to, should be rejected. B. & O. R. R. Co. v. Laffertys, 14 Gratt. 478; Travis v. Ins. Co., 28 W. Va. 583, 595; Van Winkle v. Blackford, 28 W. Va. 671, 681; M. & M. Bank v. Evans, 9 W. Va. 382.

In an editorial to 4 Va. Law Reg. 769, Campbell Co. v. Angus Co., 91 Va. 438, 444-5, 22 S. E. Rep. 167; B. & O. R. Co. v. Whittington, 30 Gratt. 805, 811, were cited in support of this proposition; and it was said that, while these cases held that the special pleas were properly rejected because "the same matters could be shown under the general issue," in reality, the pleas were objectionable because they "*amounted* to the general issue." This article draws a clear cut distinction between pleas "provable under the general issue" and "pleas amounting to the general issue," and lays down the true rule governing the latter case to be "whatever amounts to the general issue, must be shown in evidence under it and cannot be special pleaded." The principal case is cited as correctly stating the rule by which to decide whether a plea amounts to the general issue or not: the rule being, that "all matter of defence which give color to the action of the plaintiff, may be pleaded specially; and all matters of defense which do not give such color of action, amount to the general issue, and must be given in evidence under it."

Same—Special Pleas Provable under the General Issue.—The converse of the rule that what amounts to the general issue cannot be special pleaded—that is, that defences which do *not* amount to the general issue may be special pleaded—is not of universal application, or rather is subject to be controlled by the trial court. 4 Va. Law Reg. 772. For, it is well established that where the general issue is pleaded, it is not error to reject special pleas setting up matters of defence provable thereunder. The principal case was cited as authorizing this proposition in Fire Assoc. v. Hogwood, 82 Va. 344, 4 S. E. Rep. 617; Hale v. W. Va., etc., Co., 11 W. Va. 236; Moore v. Wetzel Co., 18 W. Va. 641; Dillon Beebe's Son v. Eakle,

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2. **Same—Assumpsit—Evidence—Case at Bar.**—In *indebitatus assumpsit* for work and labor, on the trial the plaintiffs having offered evidence tending to prove that they had done certain work for the defendant, and the price and value thereof, thereupon in the same connection offered evidence to prove independently of any special contract, the quantity, quality and kind of said work. Thereupon the defendants moved to exclude it, and with a view to its exclusion moved the court to suspend the reception of the plaintiffs' evidence, and offered to prove that the work was done under a special contract, and that the same was not complied with in certain particulars. HELD:

1. **Same—Same—Same—Special Contract.**†—Defendant has no right to arrest the plaintiffs in the course of making out their case, by an offer to show that the work was done under a special contract, it not having appeared from the plaintiffs' evidence that there was any such contract.

2. **Same—Same—Evidence by Plaintiff of Special Contract—Effect.**—If it appears in the course of the plaintiffs' evidence, that the work was done under a special contract which remains in full force and ascertains the price; they have no right to prove the value of the work, and can only recover the contract price, upon proving the contract fully executed on their part.

3. **Same—Same—Evidence by Plaintiff of Special Written Contract—Contents Must Be Proved.**—If it appears from the plaintiffs' evidence, that the work was done under a written contract, they must, before they go any further, produce it, or duly account for its non-production, and prove its contents.

4. **Same—Same—Evidence by Defendant of Special Contract—Effect.**—If it appear, for the first time, on the cross-examination of the plaintiffs' witnesses, or from the defendants' evidence, that the work was done under a special contract, or that the contract was in writing, the plaintiffs will then be *required to proceed in the same way as if the fact had appeared in the course of their own evidence in chief.

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3. **Instructions—When to Be Given.**—It is for the judge who tries a cause to determine whether he will give or refuse an instruction asked for, before the argument is commenced or after it is concluded.

4. **Contracts—Construction of Railroads—Engineer's Estimates—Fraud.**‡—In an action for work and labor by a contractor on a rail road, against the company, under a special contract which provides that the final estimate of the engineer shall be conclusive upon the parties, if the plaintiff proves that the final estimate made by the engineer was fraudulently made, he may recover without proving further that he was unable to procure such final estimate as is required by the contract after demand on the company, or other proper exertions on his part.

5. **Same—Same—Same—Same.**§—In an action for work and labor by a contractor on a rail road against the company, under a special contract, which provides that upon receiving the full amount of the final estimate, made out agreeably to the terms of said contract, he shall give a release under seal from all claims or demands whatsoever, growing out of said contract; the giving such release is a condition precedent to his recovery, if the final estimate has been properly made out; but not if the final estimate was fraudulently made.

6. **Same—Same—Same—Same.**‖—If the rail road company has paid to the contractor the whole amount of the final estimates, the contractor cannot maintain an action for the work done under the contract, unless he can prove that there was fraud or intentional misconduct on the part of the engineer making the final estimate.

7. **Instructions—Equivocal.**¶—Where an instruction to the jury is asked which is equivocal in its meaning; which upon one construction is correct, but upon another construction is incorrect, it should not be refused, if by so doing the jury may be misled; but should be given with an explanation giving it the meaning which will make it proper.

8. **Same—If Correct, Should Be Given as Asked.****—Where a party asks for an instruction which is itself proper to be given, it is error to refuse to give it as asked; though it is given with an addition which it does not appear is based upon any evidence given on the trial.

9. **Appellate Practice—View of Premises—Record Must Show Necessity for.**—In an action by a contractor on a rail road against the company for work and labor, the plaintiffs having offered evidence tending to show that certain excavation which was a part of the work in controversy, was of solid rock, and the defendant having offered evidence tend-

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43 W. Va. 511, 27 S. E. Rep. 217. See also, Fant v. Miller, 17 Gratt. 47, and *foot-note* collecting many cases in point; *foot-note* to Crews v. Farmers' Bank, 31 Gratt. 348.

See generally, monographic *note* on "Assumpsit."

†See B. & O. R. R. Co. v. Laffertys, 14 Gratt. 478; monographic *note* on "Assumpsit."

‡**Contracts—Construction of Railroads—Engineer's Estimates—Fraud.**—See B. & O. R. R. Co. v. Laffertys, 14 Gratt. 478.

§**Same—Same—Same—Same.**—See B. & O. R. R. Co. v. Laffertys, 14 Gratt. 478; Mills v. N. & W. R. Co., 90 Va. 523, 19 S. E. Rep. 171; N. & W. R. Co. v. Mills, 91 Va. 613, 22 S. E. Rep. 556.

‖See B. & O. R. R. Co. v. Laffertys, 14 Gratt. 478.

Same—Agreement to Submit Future Disputes to Engineer—Decision of Engineer's Conclusion.—In support of the proposition that, where there is a stipulation in a contract that future disputes shall be submitted to the engineer and that his decision shall be conclusive upon the parties, the contract is binding and the decision of the engineer conclusive in the absence of fraud, see Condon v. S. S. R. Co., 14 Gratt. 302, and *foot-note*.

¶**Instructions—Equivocal.**—See principal case cited in Rosenbaums v. Weeden, 18 Gratt. 799; Ward v. Churn, 18 Gratt. 816; Phillips v. Huntington, 35 W. Va. 404, 14 S. E. Rep. 17. See also, collection of cases in *foot-note* to Rosenbaums v. Weeden, 18 Gratt. 785, and *foot-note* to Ward v. Churn, 18 Gratt. 801.

****Same—If Correct, Should Be Given as Asked.**—See principal case cited in Bertha Zinc Co. v. Martin, 93 Va. 805, 22 S. E. Rep. 869; Flick's Case, 97 Va. 778, 34 S. E. Rep. 39; Gordon v. Richmond, 83 Va. 439, 2 S. E. Rep. 727. See also, Rosenbaums v. Weeden, 18 Gratt. 799; B. & O. R. Co. v. Laffertys, 14 Gratt. 478.

Same—Misleading.—See principal case cited in N. & W. R. Co. v. Irvine, 85 Va. 217, 7 S. E. Rep. 233. See also, Boswell's Case, 20 Gratt. 860, and *foot-note*.

Same—Partially Incorrect.—See principal case cited

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ing to show the contrary; the defendant moved the court to have the jury taken to view the premises, they being about thirty miles off on the line of the road, and offered to send the jury on the train of the company, and to defray the expenses.

The court having overruled the motion,
449 the appellate court cannot *say the court below erred, unless it appears from the record that a view was necessary to a just decision; and that does not so appear.††

10. **Verdicts—Rendered in Absence of Judge—Effect.**‡‡—Parties cannot by their consent authorize a jury to render their verdict to the clerk in the absence of the judge, and be discharged. And if a verdict is thus rendered, and the jury discharged, it is no verdict.

11. **Same—Same—Action of Court on Reassembling of Jury.**—In such a case the parties agree to have the jury recalled to ascertain whether they agree to the verdict as rendered: and it appears from the statement of three of them, that they did not understand it according to its legal effect. As the question before the court was, whether the verdict delivered by the jury to the clerk should be made their verdict by their assent in open court, it was proper to hear all that the jurors had to say upon the subject, and be well satisfied whether they understood and fully concurred in the verdict. And under the circumstances the court should have ordered a new trial, or have sent the jury to their room to consider further of the verdict.

This was an action of assumpsit in the Circuit court of Marshall county brought by Polly, Woods & Co. against the Baltimore and Ohio Rail Road Company. The facts of the case and the points involved in it, are fully stated by Judge Moncure in his opinion. There was a verdict and judgment for the plaintiffs; and thereupon the company applied to this court for a supersedeas; which was allowed.

C. Robinson, for the appellant.
Russell, for the appellees.

MONCURE, J. By articles of agreement, in writing but not under seal, entered into between the appellees Polly, Woods & Co. and the appellant, the Baltimore
450 *and Ohio Rail Road Company, on the 1st day of February 1851, the appellees agreed, in consideration of the payments therein mentioned, to graduate and prepare for the laying down of the railway tracks thereon, the 172d section of said road, according to the manner and conditions set forth in the agreement. The work was to be completed on or before the 1st of October 1852; and for doing it certain prices were agreed to be paid for the different kinds of work, as classified in the agreement. Then follows a clause in the agreement in these words: "The above payments shall be made in the following manner; that is to say, during the progress of the work, and until it is completed, there shall be a monthly estimate made by the aforesaid engineer (meaning the local or resident engineer having charge of the particular work for the time being), of the quantity, character and value of the work done during the month, or since the last monthly estimate, four-fifths of which value shall be paid to the said parties of the first part, at such places as the chief engineer may appoint; and when the said work is completed and so accepted by the said chief engineer, there shall be a final estimate made by the (local or resident) engineer of the quantity, character and value of said work, agreeably to the terms of this agreement, when the balance appearing to be due to the said parties of the first part, shall be paid to them, upon their giving a release under seal to the said company, from all claims or demands whatsoever growing in any manner out of this agreement. And it is expressly understood, that the monthly and final estimates of said engineer, as to the quantity, character and value of the work done during the month, or since the last monthly estimate, and at the completion of the work, shall be conclusive between the parties to this contract; unless the chief engineer may deem it proper at any time to revise and al-
451 ter, in such manner *as he may see fit; the monthly or final estimates of said engineer, in which event the estimate of the chief engineer shall be substituted to all intents and purposes in place of the estimate of said engineer; it being, however, wholly optional with the said chief engineer to exercise such power of revision or not." Then follow other provisions, which, for the present at least, it is unnecessary to notice.

A similar agreement was entered into between the same parties on the same day in regard to the 182d section of the said road; except that the prices agreed to be paid for the different kinds of work were generally different in the two agreements, and the appellees used the style of Woods, Polly & Bro. in regard to the latter agreement, while they used that of Polly, Woods & Co. in regard to the former.

The work on the 172d section was finished on the 4th of December 1852, and that on the 182d section on the 5th of September 1852. The monthly and final estimates were made of the quantity, character and value of the work done on each section, as provided for in the said agreements.

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in Alexandria, etc., Inst. v. McVeigh, 84 Va. 46, 3 S. E. Rep. 885; Gas Co. v. Wheeling, 8 W. Va. 372. See also, Peshine v. Shepperson, 17 Gratt. 472, and *foot-note*.

See generally, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

††Code, ch. 142, § 10, p. 629. "The jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision; provided the party making the motion shall advance a sum sufficient to defray the expenses of the jury, and the officers who attend them in taking the view; which expenses shall be afterwards taxed with the legal costs."

‡‡**Verdicts—Rendered in the Absence of Judge—Effect.**—See generally, monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

In August 1853 the appellees instituted an action of assumpsit against the appellant. The declaration contained but two counts, which were the common counts for work and labor, &c., and on an account stated. The bill of particulars filed with the declaration was for the work done on the said two sections of the said road. After various proceedings were had in the action, a verdict was found for the appellees on the general issue, for fifteen thousand six hundred and thirty-two dollars and seventy-six cents, with interest on fifteen thousand one hundred and sixty-one dollars and fifty-four cents from the 4th day of December 1852 until paid; and judgment was rendered accordingly on the 18th of November 1854. The appellant obtained a supersedeas to the judgment.

452 *The first error assigned in the petition for the supersedeas, is founded on the first and second bills of exception, taken by the appellant to opinions of the court rejecting three special pleas which were offered on the 23d of June 1854, and again on the 10th of November 1854.

In each of these three special pleas, it is averred that the work, &c., mentioned in the first count of the declaration, so far as the same had been done, &c., by the appellees, was so done, &c., under and by virtue of the two written agreements of the 1st of February 1851.

In the first special plea it is further averred, that a final estimate was made of said work, &c., according to said agreements, amounting to a certain aggregate sum; the whole of which had been paid, except five thousand three hundred and fifty dollars and ninety-nine cents, which the appellant offered to pay into court on account of what is claimed by the appellees in the action, upon receiving their release under seal from all claims or demands growing out of said agreements; and that the appellant is not indebted to the appellees in a greater amount than the sum last mentioned.

In the second plea it is further averred, that the appellees did not complete the work on or before the day of : meaning no doubt the day fixed for its completion in the agreements.

In the third plea it is further averred, that at the completion of the work and the acceptance thereof by the chief engineer, as in said agreements provided, a final estimate under each of them was made by the chief engineer, of which the appellees had notice; yet that they would not give to the appellant a release under their seals from all claims or demands growing out of said agreements, though specially requested by the appellant so to do.

453 *Without expressing any opinion upon the question as to the time of offering these pleas, I think, if they present any defences at all, they amount to the general issue, and were therefore properly rejected. A plea amounts to the general issue when it traverses matter which the plaintiff avers, or must prove, to sustain his action; whether such traverse be direct or argumentative. Indebitatus assumpsit will lie to recover the value of work done under a special contract, if it be fully executed on the part of the plaintiff, and nothing remain to be done under it but the payment of a sum of money by the defendant. The existence of this state of facts raises an implied promise to pay the money. The plaintiff must prove the facts to sustain his action; and a plea traversing any of them or averring facts inconsistent therewith, must therefore amount to the general issue. If the plaintiff in such case should declare specially on the contract, expressly averring the performance of all conditions precedent; a plea denying such performance would of course amount to the general issue. The effect is the same under an indebitatus count, which is allowed in such cases to avoid prolixity in pleading, and which implies an averment of the performance of all conditions precedent, the performance of which is necessary to entitle the plaintiff to maintain his action. Matter which amounts to the general issue cannot be pleaded specially. "But there are instances (says Bayly, J., in Carr v. Hinchliff, 10 Eng. C. L. R. 408), in which the defendant has the option to giving his defence in evidence under the general issue, or of putting it on the record. One of them is when the plaintiff's right of action is confessed and avoided by matter ex post facto; e. g. by a plea of payment, or accord and satisfaction. The other is when the plea does not deny the declaration, but answers it by matter of law;" as for instance, gaming. See also Hayselden v. Staff,

454 31 Id. 307; Morgan, &c., v. *Pebrer, 32 Id. 202; Cousins v. Padden, 2 Cromp. Mees. & Ros. 547; Jones v. Manney, 1 Mees. & Welsb. 33; Grounsell v. Lamb, Id. 352; 1 Chit. Pl. 477-479, 526-528, 714, 738 and 742. The defence presented by each of the special pleas in this case is, that the action, though indebitatus assumpsit, is founded on a special contract subject to a condition precedent which has not been performed by the plaintiffs.

But it is contended that the pleas were good, because they set forth matter of law proper for the consideration of the court and not of the jury; and that in every such case the matter may be specially pleaded. I do not understand that any thing can be pleaded specially which amounts to the general issue, whether it be matter of law or not. Infancy, coverture, usury and gaming, are matters of law which may be pleaded specially or given in evidence under the general issue, at the option of the defendant. But they do not amount to the general issue; because they do not traverse any matter which the plaintiff must prove to sustain his action. They give color of action to the plaintiff, as every good special plea must, although they show that in law he never had a good cause of action. In this respect only they differ from matters in confession and avoidance; which admit that the plaintiff once had a

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good cause of action, but show that it has since been discharged. All matters of defence which give color of action to the plaintiff, may be pleaded specially; and all matters of defence which do not give such color of action, amount to the general issue, and must be given in evidence under it. 1 Chit. Pl. 526, 530.

That a plea amounts to the general issue, is a sufficient reason for rejecting it, especially when offered out of time and as an additional plea to that of the general issue already pleaded. Warner v. Wainsfort, Hob. R. 127; Gardner v. Webber, 17 Pick. R. 407.

455 *The second error assigned in the petition is presented in the third bill of exceptions. Upon the trial of the cause, the plaintiffs, in opening the case, having offered testimony tending to prove that they had done and performed for the defendant work and labor upon sections 171 and 182 of said rail road, and the price or value thereof; thereupon, in the same connection, offered further testimony to prove, independently of any special contract, the quantity, quality and kind, in proper classification of said work. To the introduction of which testimony the defendant objected, and with a view to its exclusion, moved the court to suspend the reception of the plaintiffs' opening testimony, and offered to prove the execution of said contract, that said work was done under it, and that the same was not complied with in certain particulars. But the court overruled the objection, and admitted said testimony as offered by the plaintiffs. To which opinion and action of the court the defendant excepted.

In an action of indebitatus assumpsit, the plaintiff may approve that work was done at defendant's request, and the value of it. If it appear, in the course of his evidence, that the work was done under a special contract, which remains in full force and which ascertains the price, he has no right to prove the value of the work, and can only recover the price of it, as ascertained by the contract, upon proving that the conditions of the contract have been complied with, and that nothing remains to be done in execution of it, but the payment of the price by the defendant. So, if it appear from the plaintiff's evidence, that the work was done under a written contract, he will be required, before he goes any further, to produce the contract, or duly account for its non-production, and prove its contents by secondary evidence. Or, if it appear, for the first time, in the cross-examination of the plaintiffs'

456 *evidence, or by the defendant's evidence, that the work was done under a special contract, or that the contract was in writing, the plaintiff will then be required to proceed in the same way as if the fact had appeared in the course of his own evidence in chief.

But a defendant has no right to arrest the plaintiff in the course of making out his case, by an offer to show that the work was done under a special contract, it not having appeared from any thing proved by the plaintiff, that there was any such contract. It devolves on the plaintiff to make out his case, and then on the defendant to make out his defence. Until the plaintiff has ended, the defendant has no right to begin.

Whether evidence is admissible or not, is certainly a question for the court and not the jury to decide. The court must, therefore, decide all questions of fact necessary to enable it to decide the question of admissibility. When a witness is offered by the plaintiff, the defendant may object to him as incompetent before he is examined, and, if need be, offer evidence of his incompetency. This is naturally, if not necessarily, a preliminary enquiry to be made before the witness is examined.

So, also, upon the same principle, if the defendant object to evidence as inadmissible for any other cause, the question of admissibility seems, naturally, to be a preliminary question, to be disposed of before the evidence is heard. It is desirable, as far as possible, that irrelevant and improper evidence shall not be heard by the jury, as it may not be possible entirely to remove the effect of it by its subsequent exclusion.

But it is impossible always to determine, a priori, whether evidence is admissible or not. It very often consists of many links, forming together one connected chain. These links must be offered separately; and until the case is closed, it cannot

457 generally be determined *whether the chain will be perfect or not. If it be not, then all the links which have been received may be thrown out.

It follows that a great deal must be left to the discretion of the court in this matter. It is desirable, as before stated, that the jury should not hear illegal evidence; but it is often convenient, if not necessary, that they should first hear it, and that it should be excluded afterwards. If the court does right in excluding it afterwards (on motion made for that purpose), the judgment will not be reversed because it might or ought not to have been heard at all. I therefore think the court did not err in overruling the objection of the defendant, and admitting the testimony offered by the plaintiffs, as mentioned in the third bill of exceptions.

The next assignment of error which will be noticed, is the fifth; which, though not next in order of numbers, appears to be next in chronological order, and to be governed by somewhat the same principle which governs the one last considered. It is founded on the sixth bill of exceptions which was taken to the opinion and action of the court in overruling the motion of the defendant to act upon the five instructions asked for by him, or to give such other as the court might deem proper, before the argument of the cause was entered upon, and in declining to act upon said instructions or to give any other until the argument was closed.

As it is desirable that no illegal evidence should be heard by the jury, even though

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it be excluded afterwards, so it is also desirable that the case should not be argued on such evidence before them, even though they be properly instructed in regard to it afterwards. The effect of it, to some extent, is to excite their prejudice and draw away their minds from the matter in issue. But human institutions cannot be perfectly *free from exception, and we must be content to make the nearest approach to it which the nature of things will permit. We must give the court and the jury credit for intelligence and fidelity in the discharge of their respective functions. It is the duty of the court to decide all questions of law which may be pertinent to the case and be referred to its decision by any party. But it may exercise its discretion as to the time of deciding them: And if it can better decide them after the argument of the case than before, it has a right to postpone the decision until after the argument. We must presume in this case that the court properly exercised its discretion in declining to act upon the instructions asked for by the defendant, or to give any other, until the argument was closed; and I am therefore of opinion it did not err in doing so.

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The next question in order is, Did the court err in refusing to give the five instructions asked for by the defendant, and in giving the third and fourth of them in a modified form? This is the appellant's third assignment of error, and is founded on his fourth bill of exceptions. That bill states that the defendant having introduced evidence tending to prove that the work and labor declared for in the first count of the declaration, was done by the plaintiffs, under the two written contracts of the 1st of February 1851, before mentioned; that during the progress of said work, regular monthly estimates of the work done were made out and paid by the defendant to the plaintiffs; and that at the completion of said work a final estimate was made out, and the amount thereof communicated to the plaintiffs; and the plaintiffs having offered evidence tending to prove unfairness and fraud on the part of the engineer who made out said estimates; and that during the progress of said work on section No. 182, one of the plaintiffs, to wit, Charles Polly, assigned his interest in the contract referring to *the work on said section, to a third person. The defendant thereupon moved the court to give to the jury the five instructions aforesaid.

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First; the court was asked to instruct the jury that if they believed from the testimony that the work, &c., set out in the first count of the declaration, and charged in the bill of particulars, was done by the plaintiffs under the said two written contracts, then, although they may believe that no sufficient final estimates have been made in pursuance of the terms of said contracts, yet the plaintiffs are not entitled to recover in their action, so far as said count for work, &c., is concerned, unless they further find that the plaintiffs, after demand of the defendant, or other proper exertions on their part, have been unable to procure such a final estimate as is required by said contracts.

Parties competent to enter into a contract are always bound by their contract, if it be not repugnant to any rule or policy of the law. Contracts for the construction of railroads usually contain similar provisions to those which are contained in the contracts in this case in regard to monthly and final estimates of the quantity, character and value of the work, to be made by the engineer having charge of the work. Such provisions are dictated by convenience if not by necessity, and tend to do justice to both parties. An engineer is an indispensable agent and officer in the construction of a rail road, and it is the duty as well as the interest of the proprietors of the road to employ honest and competent persons as engineers. An honest and competent engineer having charge of the work, is certainly the most suitable person to estimate its quantity, character and value. Indeed, he can do it with almost perfect accuracy. He is well acquainted, from his pursuits, with the character and value of such work. He superintends it in its entire progress. He sees and can properly, classify and accurately *measure all the variety of material encountered in the progress of the work. After the work is done and the excavated material or most of it covered up, it is impossible for any other person, even the most competent engineer, to estimate the quantity, character and value of the work with any thing like accuracy. These provisions should therefore be upheld and encouraged, if they be not unlawful. It was at one time supposed that they might be unlawful, as tending to oust the courts of law and equity of their jurisdiction, according to the principle of the cases of Kill v. Hollister, 1 Wils. R. 129; Thompson v. Charnock, 8 T. R. 139; and others of that class. That principle is that an agreement to refer to arbitration, until it is executed by the making of an award, is not a good bar to an action or suit upon the matter agreed to be referred. But it is now well settled, that provisions of the kind in question do not contravene that principle and are lawful and binding provisions. This subject has recently undergone very full consideration in England in the case of Scott v. Avery, decided first by the Court of exchequer, 8 Welsb. Hurl. & Gord. 487; then by the Court of exchequer chamber, Id. 496; and lastly by the House of lords, 36 Eng. L. & E. 1. It has also been recently considered by this court in the case of Condon v. The South Side Rail Road Company, ante, p. 302. The provisions for the final estimates in this case then created a valid condition precedent to the payment of the balance appearing to be due to the plaintiffs. And now let us recur to the question presented by the first instruction asked for by the plaintiffs.

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A condition precedent, if it be possible

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and lawful, however unreasonable it may be, must generally be strictly performed, to give the right of action which depends upon it. We have an instance of this kind in Dorsley v. Wood, 6 T. R. 710; an in-
461 surance case, *in which it had been stipulated that "persons insured should give notice of the loss forthwith, deliver in an account, and procure a certificate of the minister, &c., of the parish, importing that they knew the character, &c., of the assured, and believed that he really sustained the loss, and without fraud." It was held that the procuring of such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial that the minister, &c., wrongfully refused to sign the certificate. "It is perfectly immaterial (said Ashurst, J.) whether they have entered into an improvident contract; if they choose to take the burden upon themselves, they cannot call on the insurance office until they have complied with the condition." "The cases (said Grose, J.) are strong to show that if a person engage for the act of a stranger, he must procure that act to be done." See also Morgan v. Birnie, 23 Eng. C. L. R. 414; and Grafton, &c., v. The Eastern Counties Railway Company, 8 Welsb. Hurl. & Gord. 699, 22 Eng. L. & E. 557; Glenn v. Leith, Id. 489.

But there are cases in which the performance of a condition precedent may be dispensed with; when the party seeking the enforcement of the contract has done every thing that could be done on his part to carry it into effect. In the United States v. Robeson, 9 Peters' R. 319, payment had been contracted to be made on "producing duplicate certificates of the commanding officer." The court said, "Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done every thing on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that
462 by time or accident he *is unable to do so. And as this was not done by the defendant in the District court, no evidence to prove the service other than the certificates should have been admitted by the court. Had the defendant proved that application had been made to the commanding officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim." In Wilson v. York and Maryland Line Rail Road Company, 11 Gill & John. 58, Stephen, J., said, "It cannot be left to the jury to make the estimate upon other evidence than that stipulated by the parties, without the plaintiff's showing that the proper evidence was not attainable after he had used proper and reasonable endeavors to obtain the same without effect." Wherever the defendant by his own act or neglect prevents the performance of the condition precedent, he thereby excuses it, and the plaintiff may recover as if he had performed the condition. 1 Chit. Pl. 326.

In this case the final estimate could only be made by the engineer of the defendant, and the duty of appointing one therefore devolved on it: and when appointed he was its agent and officer. If the plaintiffs had been unable to obtain a final estimate by reason of the failure of the defendant to appoint an engineer, or the refusal of the engineer to make an estimate, proof of that fact would have excused the performance of the condition precedent, and they would have been entitled to recover without a final estimate. Herrick v. Belknap's est. & Vermont Central R. R. Co., 27 Verm. R. 673; Redfield on Railways 214, note. So also, upon the same principle, if the plaintiffs had been unable to obtain a sufficient final estimate by reason of unfairness and fraud on the part of the engineer, they would have been entitled to recover. The first instruction as asked for by the defendant, seems to concede this, but exacts of the plaintiffs, in case of an insufficient
463 *final estimate having been made, the necessity of proving that they demanded of the defendant, or used other proper exertions to procure such a final estimate as is required by the contracts, but without effect. Two questions seem to be involved in the instruction. First, whether fraud on the part of the engineer in making the final estimate, renders it legally insufficient; and if it does, secondly, whether it is incumbent on the plaintiffs to demand of the defendant, or use other proper exertions to procure a sufficient final estimate. The importance of having an estimate made by a competent engineer in charge of the execution of the work, and the fact that the contract expressly requires it, render it improper to deprive the defendant of the benefit of such an estimate, unless it be very clear that it has been forfeited by the defendant's own act or default. It is not likely that an engineer would be guilty of fraud in making an estimate. But he possibly may be. And if he is, there can be no doubt the fraudulent estimate would be invalid in equity; but whether at law or not, may admit of question. If the final estimate be considered as an award, it cannot be avoided at law by proof of fraud or corruption on the part of the engineer in making it: the only mode of obtaining relief against an award on the ground of fraud or corruption on the part of the arbitrators, being by bill in equity; unless the reference was by order of court in a pending suit or under the statute; in which case the award may be set aside on that ground in a court of law. A final estimate certainly does bear some analogy to an award. But the analogy is not complete. The engineer is not an indifferent person, but the officer and agent of the defendant. He may be a stockholder in the company which employs him, and be thus interested in the

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work which he estimates, and yet is legally competent to discharge the duty con-
464 fided to him. Ranger v. The *Great Western Railway Company, 27 Eng. L. & E. 35; Monongahela Navigation Company v. Fenlon, 4 Watts & Serg. 205. The principle discussed in the case of Dims v. The Grand Junction Canal Company, 16 Eng. L. & E. R. 63, that a person cannot be a judge in his own cause, does not apply to this case. 27 Id. 45. By the express contract of the parties, the final estimate of the defendant's engineer is made the condition precedent of the defendant's obligation to pay for the work; and there is nothing unlawful in the contract. But while the defendant is bound only to pay the amount of the final estimate of its own engineer, that estimate must be valid in equity as well as at law. If it be a fraudulent estimate, the defendant cannot take advantage of it. To do so would be, in a manner, taking advantage of the defendant's own wrong. A principal cannot take advantage of the fraud of his agent, even though he did not actually participate in the perpetration of the fraud. The difference between an ordinary award and such a final estimate as was stipulated for in this case is, that in the former case a cause of action is supposed already to exist, which is referred to the decision of arbitrators instead of a court, and the award of the arbitrators is like the judgment of a court; whereas, in the latter case, the final estimate is itself a part of the cause of action and a condition precedent, the performance, or a sufficient excuse for the non-performance, of which must be proved by the plaintiff to maintain the action. The performance of the condition in this case devolved on the defendant, not on the plaintiffs; although the obligation of the defendant to the plaintiffs was dependent thereon. If the defendant's engineer has made a fraudulent final estimate, it is not a good performance, and is therefore legally insufficient. We cannot know, and it is not for us to know, whether the estimate was in fact fraudulent or not. It was the province of the jury to decide
465 *that question upon the evidence before them; though they ought certainly to have been well satisfied of the fraud to have been justified in disregarding the final estimate. The bill of exceptions states that the plaintiffs offered evidence tending to prove unfairness and fraud on the part of the engineer who made out the estimate, and we must consider the case as if the fraud were fully proved. Considering the fraud as proved and the estimate as insufficient, the remaining question is, Was it incumbent on the plaintiffs to show that they had, without effect, demanded of the defendant or used other proper exertions to procure a sufficient final estimate, in order to complete their excuse for the non-performance of the condition precedent, and to enable them to maintain the action? In my opinion, it was not. The final estimate required by the contract could only be made by the engineer having charge of the work. If the final estimate made by him was fraudulent, he was wholly unfit to make another; and it would not be right to subject the plaintiffs to another made by him, which might be as little reliable as the first. It was the fault or the misfortune of the defendant to have a fraudulent engineer. The chief engineer had power under the contracts to revise and alter the estimates of the local or resident engineer, but it was wholly optional with him to exercise such power or not; and I do not think it was incumbent on the plaintiffs to invoke the exercise of that power in regard to a fraudulent estimate. In my opinion, therefore, the court did not err in refusing to give the first instruction asked for by the defendant.

In Milner v. Field, 5 Welsb. Hurl. & Gord. 829, 1 Eng. L. & E. 531, cited in 2 Rob. Pr. (new) 411, a building contract between A and B contained a proviso, that the payments thereby agreed to be made by B, should only be due provided the certificate of the surveyor of B, for the time
466 being, should first be obtained. *A having sued in indebitatus assumpsit for the balance alleged to be due, it was held, that under the general issue, the absence of the certificate was a good answer to the action, and that the plaintiff was not at liberty to show that it was withheld fraudulently and in collusion with the defendant. Pollock, C. B., in delivering the judgment of the Court of exchequer, said, Even if the certificate "is withheld by fraud, that is only the subject of a cross-action." This is the only case I have seen which goes to that extent, and is contrary to what I think is the more reasonable and convenient rule laid down or recognized in the cases already cited from 9 Peters 319, 11 Gill & John. 58, and 27 Verm. 673.

Second; the court was asked to instruct the jury that if they believed from the testimony that the said work, &c., was done, &c., under the said two written contracts, then the plaintiffs are not entitled to recover in this action for such work, &c., unless the jury further believed from the evidence that the plaintiffs had given or offered to give to the defendants, upon their receiving the full amount of final estimates, properly made out, under the terms of said contracts, a release under seal from all claims or demands whatsoever growing in any manner out of said contracts.

I think the meaning of this instruction is somewhat equivocal. It may mean that the giving or offering to give a release was a condition precedent, whether the final estimates which the defendant's evidence tended to prove were in fact made out, were properly made out under the terms of said contracts or not; or it may mean, that the giving or offering to give a release was a condition precedent, supposing, or if the jury should believe, that the said estimates were so properly made out; that is, were not fraudulent estimates. In the former sense, the instruction would have been improper, and was rightly refused. In

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467 the latter, it *was a proper instruction, and ought to have been given. The making of the final estimates and giving releases for the amount due thereon, were both conditions precedent, but the latter is dependent on the former. If there were no estimates, there could have been no releases; and fraudulent estimates were as none at all in this respect. If the fact that the final estimates made out were fraudulent, excused the plaintiffs from using any exertions to procure any other, a fortiori it excused them from giving or offering to give releases. I think the refusal of the court to give the instruction was at least calculated to mislead the jury; and that it ought to have been given with such an explanation of its meaning as to cause its being understood by the jury in the latter of the two senses above mentioned. The Baltimore & Ohio R. R. Co. v. McCullough, 12 Gratt. 595, shows that the giving of the releases in this case was a condition precedent to the plaintiff's right of action for the balances appearing to be due on the final estimates.

Thirdly; the court was asked to instruct the jury that if they believed from the testimony that the said work, &c., was done, &c., under the said two written contracts, and that in accordance with said contracts, final estimates as to the work, &c., done under each had been made out by the engineers therein designated to perform that duty; and further, that the full amount of said final estimates had been paid to the plaintiffs, the greater part before the institution of this suit, and the residue into court to the credit of this suit, with costs up to the time of such payment; then, unless they believed further from the testimony that there was fraud or intentional misconduct on the part of the engineers making up such estimates, they ought to find for the defendant on the first count of the declaration.

The court refused to give this in-
468 struction as asked *for; but gave it with the following addition: "But the jury may from the evidence correct any intrinsic errors apparent on the face of the said estimates, and as to any work and labor done and materials furnished by plaintiffs to and for defendant not specially provided for in the said contracts, the jury will find according to the facts as proved before them. Which said last named instructions were given to the jury by the court, superadding orally that if the jury undertook to correct any errors intrinsic and apparent on the face of the estimates, they must confine themselves to the estimates alone, and not take into consideration any extrinsic facts or any proof in the case, and that they were confined to the correction of errors apparent on the face of the final estimates, or that they must be satisfied that the final estimates were produced by the corruption of the resident engineer, before they could disregard the said final estimates."

I think the court erred in refusing to give the instruction as asked for, and also in making the addition it did thereto. When a party asks for a proper instruction, it is the duty of the court to give it substantially as asked for. The third instruction asked for by the defendant in this case was proper and unexceptionable: The addition made thereto by the court was calculated to mislead the jury. It does not appear that there were any intrinsic errors apparent on the face of the estimates; nor does the bill of exceptions show that there was any evidence before the jury as to any work, &c., not specially provided for in the said contracts. What is said on those subjects, is, therefore, an abstraction. If intrinsic errors had been apparent on the face of the estimates, the court ought to have pointed them out specifically to the jury. The addition made to the instruction, taken in connection with what was superadded orally
by the court, was contradictory and
469 conflicting in itself; in *saying, first, that the jury may from the evidence, correct any intrinsic errors, &c.; and then, that if they undertook to correct any intrinsic errors, &c., they must confine themselves to the estimates, and not take into consideration any extrinsic facts, or any proof in the case.

Fourthly; the court was asked to instruct the jury that if they believed from the testimony that the said work, &c., was done, &c., under the said two contracts; that final estimates had been properly made out in pursuance of said contracts; and that the plaintiffs had submitted themselves to the action of the engineers designated in said contracts, both as to the monthly estimates and final estimates therein provided, in every particular, except that they objected to the final estimates when made known to them; then, in the absence of proof of any fraud or other misconduct on the part of said engineer, the jury can only find for the plaintiffs under the first count, upon the basis of taking said final estimates to be conclusive between the parties.

The court refused, also, to give the instruction as asked for, but gave it with this addition: "Unless there is error apparent on the face of the estimates, or the jury are satisfied that said estimates were fraudulently made up by the engineers, as explained in giving the third instruction, to which reference is had, and the same is herein incorporated."

Most of the observations made in regard to the third instruction and the addition thereto, equally apply to the fourth instruction and the addition thereto. The fourth instruction is unexceptionable in form and substance, and the court erred in not giving it, without the addition. See Kidwell v. The Baltimore and Ohio Rail Road Co., 11 Gratt. 676.

The fifth instruction asked for by
470 the defendant was *intended to present the proposition that one of the plaintiffs having during the progress of the work assigned his interest in one of the contracts to a person not a party to the suit, therefore

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the plaintiffs are not entitled to recover in this action for any work done under that contract. As this point was not relied on in the argument, no other notice will be taken of it than to say that it is certainly not maintainable, and that the court did not err in refusing to give the instruction.

The fourth error assigned is founded on the fifth bill of exceptions, from which it appears that on the trial of the cause, the plaintiffs having offered evidence tending to show that certain excavation, constituting part of the work in controversy, was of solid rock, and the defendant having offered evidence tending to show the contrary; the defendant thereupon moved the court to have the jury taken to view the premises; having shown to the court that the points of examination were situated in the county of Marshall, on the line of the said rail road, about thirty miles from Wheeling; and having offered to send the jury to the said points whenever desired, upon the trains of the defendant, or by any other mode of conveyance, and to defray all expenses incident to the taking of said view. But the court overruled the motion; and the defendant excepted.

This motion was no doubt founded on the Code, p. 629, ch. 162, § 10; which provides that "the jury may in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision; provided the party making the motion shall advance a sufficient sum to defray the expenses
471 of the jury, and *the officers who attend them in taking the view; which expenses shall be afterwards taxed like other legal costs."

This court cannot say that the Circuit court erred in overruling the motion, unless it appears from the record that a view was necessary to a just decision. It does not so appear. It only appears that evidence was offered, by one party tending to prove one thing, and by the other the contrary. It does not appear that there was any difficulty in deciding the question on the whole evidence, even if it appears that had any such difficulty existed, it might have been removed by a view. The court might have had good cause for believing the evidence on one side, and not believing that on the other.

The fifth assignment of error has already been considered. The sixth is, in the action of the court, as set forth in the defendant's seventh bill of exceptions; as to which it is contended, that upon the fact there disclosed, the court ought either to have set aside the verdict, or permitted the jury, if so disposed, to correct it. The facts, so far as deemed material, are substantially as follows: When the jury were retiring on Saturday morning the 18th of November 1854, the judge of the court having official occasion to be absent from the court-house during the day, at his suggestion it was agreed by the court and counsel on both sides, that in his absence the clerk of the court should receive the verdict and discharge the jury; such being a customary practice in the court. While the jury were in their room they sent for the clerk, who declined going, informing them through the sheriff, that in the absence of the court and counsel, he could have no communication with them. Late in the evening of that day, the court not being adjourned, the jury agreed upon their verdict and returned it. There was no exception to the form, or time or manner of returning
472 *it; and the clerk received and recorded it, and discharged the jury. The court did not sit on Monday the 20th of November. At its sitting on Tuesday morning the 21st, the defendant's counsel suggested to the court that a portion of the jury had made a mistake in the verdict which had been rendered at a late hour on Saturday evening, or had misunderstood its effect, and requested that the jury might be recalled together for the purpose of enquiring of them as to their understanding of the verdict. The court objected but the counsel for the plaintiffs consented that the jury might be reassembled. In the afternoon of the 21st of November, the jury came into court. The counsel for the plaintiffs consented that the jurors might be asked simply, "Is this your verdict?" but objected to their being asked any question as to their understanding of its legal effect. The court directed the jury to be polled and the question put, after the verdict being read to them: "Is this your verdict?" without the jurors being sworn. To which question they all replied that they had assented to the verdict. But three of the jurors went on to state that their understanding when they rendered it was that the sum mentioned in the verdict was subject to a reduction by the sum of five thousand three hundred and fifty dollars and ninety-nine cents paid into court by the defendant at the last term; and one of them went on further to say that since the jury had been discharged he had conversed on the subject of this understanding of the jury with one of the counsel for the defendant. The counsel alluded to then stated to the court that, after the discharge of the jury, he had conversed with two of them, and ascertained from one that he understood the verdict was to be reduced as aforesaid, and from the other that he did not. The court interposed, and spoke of the impropriety of polling the jury after it had been discharged, &c. The counsel for
473 the defendant *then, for the first time, objected to the verdict, that it was invalid, because it was received by the clerk instead of the court, notwithstanding the consent of the counsel of the parties previously given, that it should be so received. The said counsel said they would insist on the point, or at least would not waive it, and that the matter was in the hands of the court. The court decided that the reception of the verdict by the clerk and his

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discharge of the jury was regular and proper, and that it could not interfere with the verdict so rendered and entered up, except in some one of the regular methods appointed by law. To which action of the court the defendant excepted.

A verdict is not complete and valid until it is rendered in open court by the jury, and received and recorded by the clerk. Until then any juror may change his opinion and withdraw his assent to the verdict. The jury may be polled by the court, and ought to be if requested by either party, for the purpose of ascertaining, with certainty, whether all the jurors understand and agree in the verdict. When a jury in a civil case, or a case of misdemeanor, agree in their verdict during a recess of the court, and wish to separate before the court will sit again, it is the practice in England to permit them to do so, upon their giving a privy verdict to the judge at his chambers; and it is the practice in New York and some other states, to permit them to do so, upon their sealing up their verdict. But in either case, and although the parties expressly agree that the jury may deliver a privy or a sealed verdict, it is of no validity until it is delivered and assented to by the judge in open court; and the same right then exists to have them polled as in the case of a general verdict. Any of the jurors may then dissent from the verdict to which they had previously agreed, and the jury may find a different verdict. 10 Bacon's Abr. Verdict, B; Bunn v. Hoyt, 3 474 John. R. *255; Root v. Sherwood, 6 Id. 68. In that case, the court said, "There is no verdict of any force but a public verdict given openly in court. The previous agreement that the jury might seal up their verdict, did not take away from the parties the right to a public verdict duly delivered." Blackley v. Sheldon, 7 Id. 32; Fox v. Smith, 3 Cow. R. 23; Douglass v. Tousey, 2 Wend. R. 352; Lawrence v. Stearns, 11 Pick. R. 501. In that case, Shaw, C. J., delivering the opinion of the court, said: "The only verdict which can be received and regarded as a complete and valid verdict of a jury, upon which a judgment can be rendered, is an open and public verdict given in and assented to, in open court, as the unanimous act of the jury, and affirmed and entered of record, in the presence and under the sanction of the court. A convenient practice has been adopted in this country, authorizing the jury, when they agree during the adjournment of the court, to seal up their verdict and separate, and come in and affirm it at the next opening of the court. But in such case the verdict is to be affirmed in open court as the unanimous act of the jury, and in presence of the whole panel, so that each juror has an opportunity to express his dissent to the court in case his decision has been mistaken or misrepresented by the foreman or his fellows; or in case he has been forced into acquiescence by improper means. Such an affirmation is the only evidence the court can receive of the free and unanimous assent of the jury to the verdict."

The practice which prevails in the Circuit court, of authorizing the clerk, with the consent of the parties, to receive the verdict and discharge the jury, during a recess of the court, is not sanctioned by any authority, legislative or judicial. The ill effects of it is strongly illustrated in this case. The consent of parties, which certainly can cure many errors and irregularities, cannot, I think, legalize this 475 practice. Parties *may refer their disputes to the decision of arbitrators, and may prescribe their mode of proceeding; but when they resort to the tribunals constituted by law, they cannot, at pleasure, change the modes of proceeding which the law has prescribed for the government and direction of those tribunals. They cannot change the relative functions of the court and jury, nor authorize the court to delegate an important part of its functions to the clerk. Consent cannot give jurisdiction to a court having no jurisdiction of the subject matter, nor annex repugnant conditions to an estate. Upon the same principle, consent cannot authorize a clerk, in the recess of the court, to receive a verdict and discharge the jury. If the irregularity does not appear upon the record, of course no advantage can be taken of it in an appellate court. But if the objection be made at the proper time and place, and be put upon the record, it must prevail, notwithstanding the previous consent of the parties.

I am therefore of opinion that it was not competent for the parties, by their consent, to authorize the clerk to receive the verdict and discharge the jury during the recess of the court. But if it was, certainly it was competent for them, by their consent, to have the jury, after such discharge, reassembled in court and polled, for the purpose of ascertaining whether they assented to the verdict. This was done; and it was thereby ascertained that at least three of the jurors did not assent to the verdict in the literal terms in which it was written, but understood that the sum mentioned therein was subject to the heavy reduction of five thousand three hundred and fifty dollars and ninety-nine cents, which had been paid into court. The defendant was certainly entitled to credit for that large sum. But it is quite natural that, having been paid into court pending the suit, 476 it should have been *overlooked by the jury, or they should have supposed that it was not necessary for them to allow the credit, and that it would be allowed by the court as a matter of course. That the credit was not given by the jury, is extremely probable, from the further fact that interest was allowed by the jury from the 4th day of December 1852, the day when the work on the 172d section was finished according to the final estimate; which is inconsistent with the deduction of any subsequent credit. It is true that a court will not, generally, set aside a verdict on the

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statement or affidavit of a juror that he did not understand the verdict. But here there was no motion to set aside a verdict. There was in fact no verdict. The question was, whether that which the jury had agreed and had delivered to the clerk, should be made their verdict by their assent in open court. It was proper for the court, therefore, to hear all that the jurors had to say upon the subject, and to be well satisfied whether they understood and fully concurred in the verdict. Under these circumstances, I think the court ought to have ordered a new trial, or at least to have sent the jury back to their room to consider further of their verdict.

The seventh and last assignment of error is, that the court erred in overruling the motion for a new trial, upon the ground that the verdict was contrary to the evidence, and the law as applicable to the evidence.

There is not such a certificate of facts in this case as will enable this court to revise the judgment of the Circuit court, on the motion for a new trial. The certificate, in part at least, is of the testimony and not the facts; and as to much of the testimony, it is certified that it was conflicting. It is impossible, therefore, for this court to say whether the Circuit court erred or not in overruling the said motion.

477 *But for the other errors before mentioned, I am of opinion that the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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478 *Baltimore & Ohio R. R. Co. v. Laffertys.

July Term, 1858, Lewisburg.

1. **Pleading and Practice—Special Plea—General Issue.***—In *assumpsit* upon the count for work and labor, &c., defendant offers a special plea, setting out a special contract, and averring that the work sued for was done under it, and every thing to be done by defendant was done. The special plea, if it contains a defence to the action, only amounts to the general issue; and should be rejected.
2. **Same—Assumpsit—Evidence—Special Contract.***—On the trial of such an action the defendant has no right to arrest the plaintiff in the course of making out his case, by an offer to show that the work was done under a special contract, it not having appeared from the plaintiff's evidence that there was any such contract.
3. **Contracts—Construction of Railroads—Engineer's Estimates—Fraud.***—In an action for work and labor by a contractor on a rail road against the company, under a special contract which provides that the final estimate of the engineer shall be conclusive upon the parties, if plaintiff proves the final estimate was fraudulently made, he may recover without proving further that he was unable to procure a proper final estimate after demand upon the company or other proper exertions on his part.
4. **Same—Same—Same—Same.***—In such a case the special contract provides that upon receiving the full amount of the final estimate made out agreeably to the terms of said contractor, the contractor shall give a release under seal from all claims or demands whatsoever growing out of said contract. The giving such release is a condition precedent to the plaintiff's recovery, if the final estimate has been properly made out; but not if the final estimate was fraudulently made.
5. **Same—Same—Same—Same.***—In such a case, if the final estimate has been made out in accordance with the contract, and the full amount thereof has been paid to the contractor, then, in the absence of any proof of fraud or other misconduct on the part of the engineer, the action cannot be maintained.
6. **Instructions—If Correct, Should Be Given as Asked.***—Instructions which are correct in themselves, should be given as asked. And it is error to substitute for them another instruction which, though it may state the law correctly, is long and complicated, calculated to mislead the jury, and does not cover the points of the instructions asked for.

This was an action of assumpsit in the Circuit court of Ohio county, instituted 479 by John and William J. *Lafferty against the Baltimore & Ohio Rail Road Company. The case is very like the case of Polly, Woods & Co. against the same defendant, the report of which immediately precedes this. The facts are stated by Judge Moncure, in his opinion. There was a verdict and judgment for the plaintiffs; and the rail road company applied to this court for a supersedeas; which was allowed.

C. Robinson, for the appellant.
Russell, for the appellees.

MONCURE, J. An agreement was entered into between the appellees and the appellant in this case, similar to those which were entered into between the appellees and the appellant in the case just decided, of The Baltimore & Ohio Rail Road Company v. Polly, Woods & Co., except that in this case the work to be done was on the 161st and 162d sections of said road. The agreement bears date on the 20th day of January 1851, the work was to be completed on or before the first of June 1852, and the prices agreed to be paid for the different kinds of work were generally different from the prices agreed to be paid for similar work in that case.

The work was finished on the 1st of December 1852. The monthly and final estimates were made of the quantity, character and value of the work, as provided for in the said agreement.

In June 1853 the appellees instituted an action of assumpsit against the appellant. The declaration contained but two counts, to wit, the indebitatus count, and the account stated. No bill of particulars appears

*As to each of the propositions contained in the syllabus above, see the preceding case, B. & O. R. R. Co. v. Polly, 14 Gratt. 447, and *foot-note*.

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in the copy of the record which is before this court; though it is probable that one was filed with the declaration. After various proceedings were had in the action, a verdict was found for the appellees
480 on the *general issue, for fifteen thousand three hundred and seven dollars and sixty cents, with interest thereon from the 20th day of December 1852 until paid; and judgment was rendered accordingly on the 5th of July 1854. The appellant obtained a supersedeas to the judgment.

The first error assigned in the petition for the supersedeas, is the rejection by the court of three special pleas which were offered by the defendant. They are similar to the three special pleas which were offered and rejected in the case of The Baltimore & Ohio Rail Road Company v. Polly, Woods & Company; except that the first special plea in this case avers full payment of the amount ascertained by the final estimate. And for reasons assigned in that case, I am of opinion that the court did not err in rejecting the three special pleas in this.

The second assignment of error is founded on the defendant's second bill of exceptions. On the trial of the cause, the plaintiffs having offered evidence of work done by them for the defendant, proposed to examine a witness (Charles De Hass) as to the amount and value of the work; and thereupon the defendant objected to the admissibility of such evidence, and offered to prove that the whole of said work was done under a written contract, duly executed by the plaintiffs and defendant (and set out in hæc verba in the bill of exceptions); and that a final estimate of said work had been made according to the provisions of said contract; which objection the court overruled, and the defendant excepted.

The question presented by this assignment of error, is the same in effect with the question presented by the second assignment of error in the case above referred to: and for reasons given in that case, I am of opinion that the court did not err in overruling the objection above mentioned.

481 *The third and last assignment of error is, the refusal of the court to give the three instructions asked for by the defendant, and the giving of certain other instructions in lieu of the second and third. This assignment of error is founded on the defendant's third and plaintiffs' second bills of exception, which refer to each other, and are to be taken together. From which it appears that on the trial of the cause the plaintiffs having offered evidence tending to prove the cause of action as declared upon, and the defendant having proved the written contract aforesaid, and offered evidence tending to prove that the work in the declaration mentioned was done under that contract; and having further offered in evidence papers purporting to be monthly and final estimates of the local or resident engineer mentioned in said contract; and the plaintiffs having offered evidence tending to impeach said estimates, and show mistake and error on the face of them; and the defendant having offered evidence to sustain them; and the plaintiffs and defendant having proved facts tending to show a waiver in the times of the performance of said contract and alteration of some of the terms thereof; the defendant thereupon moved the court to instruct the jury as follows, viz:

1st; that if they believe from the testimony that the work, &c. set out in the first count of the declaration, and charged in the bill of particulars, was done by the plaintiffs under the said written contract; then although they may further believe from the testimony that no proper and sufficient final estimate of said work has been made by the engineer charged with that duty, according to the terms of the contract, the plaintiffs are yet not entitled to recover under said first count, unless they further show that, after a demand or other proper exertions on their part, they have been unable to procure such a final estimate as is required by the contract.

482 *2nd; that if they believe, &c. (as above); then that the plaintiffs are not entitled to recover under said count, unless they have further shown, either that they had given or had offered to give to the defendant a release under seal, from all claims or demands whatsoever growing in any manner out of said contract.

3d; that if they believed, &c. (as above); and further, that in accordance with said contract, a final estimate of said work, &c. has been made out by said engineer; and that the full amount of said estimate has been paid by the defendant to the plaintiffs; then, in the absence of any proof of fraud or other misconduct on the part of said engineer, they ought to find for the defendant so far as said first count is concerned.

These instructions the court refused to give; but in lieu thereof, or of the second and third, gave the following:

"The contract between plaintiffs and defendant, provides for the performance of certain kind of work for the defendant, and the mode and times of ascertaining the quantity and nature of such work as the same shall have been executed, and fixes the compensation for each respective kind. The contract provides for embankment, earth excavation, loose rock excavation, and solid rock excavation; and the character of these different kinds of work, besides this general classification, are again more specially defined in the contract. From the general language used in their classification, and from the very nature of the subject, it is apparent that at no stage of the work, where there is any gradual change in the character of the material to be removed, there can be a precise admeasurement or ascertainment, by any agency or method which might have been adopted, of the quantity, and especially of the character of either or each class; but something must be left to the judgment of one or the

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other party, or to some proper substitute. Hence, *in the provision for
483 ascertaining quantities and classification, the term "estimate" is properly used, rather than the more precise and definite term of "admeasurement," as the amount of the respective classes of work could not be ascertained in advance, and it was desirable that the plaintiffs should be paid in whole or in part for their work as it progressed; and as it was necessary for the defendant that its work should be done in a given order of time and in a sufficient and proper manner, it became essential to the convenience and conducive to the ascertainment of the rights of the parties, that a "mutual agent" of the plaintiffs and defendant should be appointed for the purpose of making these estimates at stated intervals, and with diligence, fidelity and skill. By the contract, this mutual agent was the local or resident engineer.

"This mutual agent having been provided by the contract, you should receive and adopt his estimates as correct, and the onus or burden of proof to impeach them is thrown upon the plaintiffs. But it is competent for the plaintiffs to show that those estimates are produced by fraud and corruption, or they may show mistake or error, patent or open to inspection on the face of the estimates; but that it is not competent by extraneous proof, to show mere error of classification or ascertainment of quantity. You are to ascertain whether there was a waiver of the contract by the parties; and for this purpose you will weigh all the circumstances of the transaction, the relative position of all the parties, and any other circumstances of forbearance or oppression which you may find touching this matter in the testimony, to ascertain the fact and character of this waiver, and to what extent there has been any deviation or alteration therefrom by common consent, viz: in the time of performance and in the joint mode of executing the same by the plaintiffs and the defendant.

484 *"If you shall find that there was a waiver of time in the performance of the contract, and you are further satisfied that the plaintiffs have a right, under the instructions herein given, as to fraud, corruption or mistake, to recover, then the terms of compensation fixed in the contract, will govern your finding as to all the work to which its terms apply, and which was performed by the plaintiffs. If from the facts and circumstances of the case you find there was a waiver of the time of performance, and that thereby the defendant reserved to itself authority to place a force on the work to complete the execution thereof, in the manner in which the same was done by the defendant, then you will charge the plaintiffs with the cost of the work so done by the company, its agents and laborers. The court is of opinion that the monthly estimates are divisible contracts, whereby it was provided that those estimates should be made and fixed by the contract, and these estimates or divisible contracts are governed by the principles herein stated.

"That in the presence of fraud or patent error, the final estimate of the engineer, as in the case of monthly estimates, is not conclusive, but to be governed by the like principles of investigation herein given you in charge. But in ascertaining whether there was any fraud or corruption on the part of the resident engineer, you will weigh all the testimony before you, treating the estimates of the resident engineer as prima facie correct, and consider opinions, knowledge and facts of the scientific witnesses as delivered in testimony on either side, and give them such weight as in your judgment they may be justly entitled to. If you find no fraud or corruption in the resident engineer, nor any error and mistake on the face of the estimates, you should find for so much and to such extent in favor of the defendant. If, on the other hand, you find mistake and error on
485 the face of those estimates *you will correct such estimates to the extent of such error and mistake; and if you find fraud and corruption in the resident engineer, then you will apply the testimony to the case, and ascertain, as far as practicable, the actual amount of work done by the plaintiffs, its classification, and allow them therefor according to the terms of the contract. These instructions apply to the first count in the declaration."

The three instructions asked for by the defendant are very much like the first three instructions asked for by the defendant in the case of The Baltimore & Ohio R. R. Co. v. Polly, Woods & Co. before referred to. The first instruction in this case is identical, in substance at least, with the first in that; and for reasons assigned in that, I think the Circuit court did not err in refusing to give it. It is stated in the bill of exceptions that the plaintiffs offered evidence tending to impeach the final estimate. They might have impeached it by proving fraud in th engineer in making it out; though certainly such proof ought to have been very clear to have had that effect. If so impeached, I think, as I said in that case, that it was not incumbent on the plaintiffs to show that they demanded, or used other exertions to procure any other final estimate.

The only difference between the second instruction asked for in this case and the second asked for in that, is, that while both treat the giving or offering to give a release as a condition precedent to the action, the words "upon their receiving the full amount of final estimates properly made out," &c. are inserted in the latter, but not in the former. These words are of some importance, and their insertion in the second instruction asked for in this case would have rendered it less objectionable in form than it is. But still I think the refusal of the court to give the instruction was calculated to mislead the jury, and make them believe that, under no circumstances
486 and with no qualification, *was the

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giving or offering to give a release a condition precedent. The instruction should have been given with a slight modification, basing it upon the further belief of the jury, "that a final estimate was made according to the contract, and without fraud."

The third instruction asked for in this case is the same, in substance, with the third asked for in that, and ought to have been given in the form in which it was asked for. The only question as to the propriety of doing so arises from the fact that it does not expressly appear from the bill of exceptions that any evidence was offered to prove payment of the amount of the final estimate, or any part thereof; and therefore it may be said that the instruction involves an abstract proposition. This ground was not relied on by the Circuit court, nor was it taken by the counsel of the appellees, in the argument before this court, doubtless because there was in fact evidence before the jury of the payment of the whole amount of the final estimate. It was not expressly stated in the bill of exceptions that evidence of the fact had been offered, probably because the fact was not denied. It was not one of the controverted questions in the case. But though it was not so stated, I yet think it sufficiently appears that there was evidence of payment before the jury to authorize the giving of the instruction. There was evidence before them that the monthly estimates required by the contract were regularly made; and the object of requiring them was, that four-fifths of the amount of each, as made, might be paid to the plaintiffs. The amount of the verdict is not one-third as large as the amount of the final estimate.

I also think the Circuit court erred in giving the instruction which it did in lieu of the second and third instructions asked for by the defendant. The instruction given was very long and complicated, and calculated to mislead the jury. The
487 second and third instructions *asked for presented, or were obviously intended to present, two simple propositions, upon which the defendant had a right to have the opinion of the court briefly and plainly expressed to the jury. The second required only a slight modification; the third none at all, and could not well be improved, in form or substance. In the long instruction given in lieu of them, not a word is said about the release, which is the gist of the second, nor the payment, which is the gist of the third. The court might properly have embodied the substance of the two in one instruction, in the form or to the effect following, to wit:

"If the jury believe from the evidence that the contract offered in evidence was entered into between the parties, that the work, &c. set out in the first count of the declaration, was done, &c. under and by virtue of that contract, and that a final estimate was made according to the said contract, and without fraud; then the plaintiffs are not entitled to recover under the said first count:

1st; without proving that before this action was instituted they gave or offered to give to the defendant, upon receiving the balance appearing to be due on the said final estimate, a release under seal from all claims or demands whatsoever growing in any manner out of the said contract. Nor

2d; if the jury believe from the evidence that before the action was instituted the amount of said final estimate was paid by the defendant to the plaintiffs."

The plaintiffs also excepted to the instruction given by the court; but I do not think it was prejudicial to them. I do not mean to deny the correctness of any of the legal propositions stated therein. Most if not all of them may be correct; though I express no opinion as to that. I consider the instruction objectionable, as a substitute for the second and third asked for
488 *by the defendant, as being abstract in some respects, and as being calculated to mislead the jury.

There is another bill of exceptions in the case, which perhaps ought to be briefly noticed. The defendant having offered in evidence certain papers, purporting to be such monthly and final estimates as are provided for in said contract, the plaintiffs objected to their admission, and the defendant offered certain evidence of witnesses to show their admissibility; whereupon the court excluded one of them, to wit, the paper purporting to be the monthly estimate of March 1852, but admitted all the rest, and both parties excepted: the defendant, to the exclusion of one of the papers, and the plaintiffs, to the admission of the rest. I think the Circuit court did not err in either respect.

But for other errors before mentioned, I think the judgment ought to be reversed, the verdict set aside, and the cause remanded for a new trial.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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489 *Hale v. Marshall.

July Term, 1858, Lewisburg.

1. **Delinquent Land — Statute — Possession within Meaning of.**—Upon the question whether land has been forfeited under the act of 1835 for the failure of the owner to have it placed upon the books of the commissioner of the revenue and pay the taxes due thereon, or whether it was within the exception to the second section of that act, it appears that a person under whom the defendant claims was in possession of the land at the time of the passage of the act. The defendant may rely upon his possession to defeat the forfeiture, if his possession was such as the statute describes.

2. **Land—Possession under Equitable Title—Presumption of Grant.***—After twenty-five years' possession of land under a complete equitable title derived

*See the principal case cited in Davis v. Settle, 43 W. Va. 39, 26 S. E. Rep. 567. See also, Matthews v. Burton, 17 Gratt. 312, and *foot-note*.

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from the patentee, the patentee himself living in an adjoining county for years, and neither he nor any person claiming under him setting up any claim to the land against the equitable title, a conveyance of the legal title may be presumed in favor of the party in possession, to prevent a forfeiture of the land, if the legal title is necessary.

3. **Delinquent Land—Statute—Possession under Equitable Title—Effect.**—A party in possession of land claiming it under a good equitable title, is within the exception to § 2 of the act of February 27, 1835, p. 12, concerning delinquent lands.*

This was an action of ejectment in the Circuit court of Carroll county, brought by Fielden L. Hale against Edmund Marshall. The case is stated by Judge Lee, in his opinion.

Cook, for the appellant.
Floyd, for the appellee.

LEE, J. This was an action of ejectment brought by the plaintiff in error against the defendant, in the Circuit court of Carroll county. The plaintiff claimed under a grant from the commonwealth
490 to himself for *eleven hundred and ninety-four and a half acres of land in Carroll county, bearing date on the 31st of October 1846. The defendant claimed under a grant to one William Garrott for four hundred acres of land in Montgomery county, bearing date on the 12th of October 1790, and several intermediate successive contracts for the sale of the same between different persons claiming under that grant, and through whom he sought to connect himself with the patentee. The land embraced by this grant lies wholly within the boundary of the grant to the plaintiff, and he insisted that it had been forfeited to the commonwealth prior to the emanation of his grant by reason of the failure of the owner to comply with the provisions of the act of the 27th of February 1835 requiring the owners of lands omitted from the books of the commissioners of the revenue to cause the same to be entered in the proper counties and charged with taxes, and to pay all such as would not have been relinquished under the provisions of the act of the 10th of March 1832 had they been returned delinquent prior to the passage of that act. The defendant pleaded the general issue, and upon the trial, the jury found a special verdict setting out all the facts proved; and upon that verdict the court gave judgment for the defendant. To this judgment a supersedeas has been awarded by a judge of this court.

The county of Carroll was formed of part of the county of Grayson by an act passed on the 17th of January 1842. The county of Grayson was formed of part of the county of Wythe by an act passed on the 7th of November 1792; and the county of Wythe was formed of part of the county of Montgomery by an act passed on the 1st of December 1789. So that the land granted to Garrott though described as lying in the county of Montgomery, in fact was situate at the date of the grant in the
491 county of Grayson which *had been created after his entry and survey were made, but before the same were carried into grant. It does not appear whether it was ever upon the books of either the county of Montgomery or the county of Wythe, but it is found that it was never on the books of Grayson county up to the time of the formation of Carroll county, nor on those of the latter prior to the year 1847. Thus it was ascertained to be omitted land in regard to which the directions of the act of 1835 had not been complied with. But the defendant contended that his case came within the exception contained in the second section of that act, which exempted from the forfeiture which it declared, all lands which at the date of the act were in the actual possession of the owners or proprietors thereof.

I think the special verdict sufficiently ascertains that at the time of the passage of the act of 1835, the land in question was in the actual possession of a party under whom the defendant claimed title. The land had been claimed by one William Moore under the Garrott title, and he is found to have been in the actual possession of it during his lifetime. He died in 1820, and upon the division of his estate it was allotted to his son Samuel D. Moore. In December 1820 Samuel D. Moore contracted by bond to convey the same to one Harden H. Moore, and the latter used the land as a cattle farm and had tenants whom he permitted to reside upon it in consideration of their taking care of his stock. And this possession he kept up from the time of his purchase till the year 1843 when he assigned the title bond under which he held it to one John Boyd. Nor can there be any question that the defendant may avail himself of the possession of any party under whom he claims title and with whom he can connect himself, for the purpose of repelling the forfeiture sought to be set up against him, just as he might for the purpose of
492 making out a bar under the *statute of limitations. The possession of those under whom he claimed was for these purposes, his possession acquired by him as an incident to his purchase from his vendor as each vendee who preceded him, in succession acquired it of the party from whom he purchased. So that if the possession of Harden Moore sufficed to protect the land from forfeiture under the act of 1835, that protection enures to the benefit of all who took the land after him under his title.

Actual possession of this land under the Garrott title being thus held in 1835, there could be no forfeiture under the second section of the act of the 27th of February of that year, if Harden Moore who thus had the possession was the owner or proprietor of the land within the meaning of that section. The words of the act are "and upon their failure to do so" (the failure of the owners or proprietors of omitted lands to have the same entered upon the commis-

*See JUDGE LEE'S opinion for the statute.

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sioner's books and charged with taxes, and to pay such taxes as were found due), "all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself or his tenant in possession shall become forfeited to the commonwealth, &c." Was he such owner or proprietor, or tenant in possession of the true owner?

Moore claimed through several intermediate sales under that made by Bott as attorney in fact for Garrott the patentee, to Oldham, but no conveyance from Bott is shown, nor does it appear that any was ever executed. But he received the full consideration for the land in a slave taken at three hundred dollars, and delivered the possession to Oldham. Oldham sold the land to John Bott, and delivered the possession to him; and it was subsequently purchased by William Moore who acquired the actual possession, and continued to hold it until his death, which occurred in 1820, some six or seven years after his purchase. The
493 contract *of sale by Bott was, it is true, by parol, but that was no departure from his letter of attorney. The execution of the broader power conferred to sell, convey and make lawful right in fee simple, presupposed and necessarily imported a power to make a parol contract of sale, to be afterwards fully executed by the conveyance of the title. And neither Garrott nor any person claiming under him, has ever set up any pretension of right to the land adverse to any of the parties claiming under the sale from Bott to Oldham. The contract was fully executed on the part of the latter, and Harden Moore and those through whom he claimed under that contract, at the passage of the act of 1835 which speaks as of its date of the lands exempt from forfeiture, had had actual possession by themselves and their tenants without let or molestation from any quarter, for certainly twenty-one or twenty-two years, and probably for several years more; for William Moore's possession commenced in 1813 or 1814 and it appears that Robinson (from whom no doubt it took its name of the "Robinson Place") Harris and Bunch, John Bott and Oldham his predecessors in the ownership of the land under the sale by Garrott's attorney, all had actual possession of the land, and had paid the purchase money contracted to be paid by them, respectively. Any action whatever that could have been brought against Harden Moore for the recovery of the land by Garrott himself would have been effectually defeated by the statute of limitations, and even if Garrott were dead and a writ of right had been brought in the names of his heirs relying upon the seizin of their ancestor, there is the strongest probability that it would have been barred also. For the power of attorney authorizing Bott to sell the land bears date in 1802, and although the date of his sale to Oldham does not appear yet as there had been four successive sales of the property before the
494 sale to William Moore in *1813 or 1814, and as all these purchasers paid their purchase money and in turn had held actual possession of the land for some time, longer or shorter, it might be reasonably inferred that the entire possession previous to the passage of the act, had continued for a period not less than twenty-five years, and this would have barred any action in any name or upon any seizin whatever. Connecting this with the fact that Garrott lived in an adjoining county, and the absence of any pretence of claim whatever on his behalf or of any one claiming under him, I think the circumstances are such as may fairly raise the presumption of a grant or conveyance of the legal title to Harden Moore. That a grant may under circumstances be presumed for the purpose of quieting the possession is a well settled and familiar doctrine, and it applies as well to corporeal as to incorporeal hereditaments. Mayor of Kingston upon Hull v. Horner, Cowp. R. 111; Foley v. Wilson, 11 East. R. 56; Sumner v. Child, 2 Conn. R. 607; Eldridge v. Knott, Cowp. R. 214; Archer v. Saddler, 2 Hen. & Munf. 370; Ricard v. Williams, &c., 7 Wheat. R. 59. And if it may be presumed for this purpose, certainly the reason is not less strong where the purpose is to protect the party against a forfeiture of his estate which the courts are never inclined to favor, by giving him the full benefit of his possession so as to invest him with the legal title, if that be necessary, to bring him within the exemption which it was the intention of the act to secure in favor of such actual possession. In this view conceding the position taken by the plaintiffs' counsel to be correct that the possession must be accompanied with the legal title, there is an end of the question.

It may be objected, however, that the presumption of a grant is one of fact to be made by the jury, and which cannot be made by the court upon the facts found, however well they might have justi-
495 fied the *jury in presuming a grant and finding accordingly. And such an objection would seem to be countenanced by the case of Archer, adm'r, &c. v. Saddler, above cited, 2 Hen. & Munf. 370. But if this be conceded, it would only lead to a venire de novo in order that the jury might make the presumption; and taking the special verdict as it is, I think we can now pass definitely upon the case, and that the result will be in effect the same as if a grant had been actually found.

If Harden Moore cannot in the absence of such a finding be taken to have been invested with the legal title under the patent to Garrott at the passage of the act of 1835, he had, as we have seen, a clear equitable title under a contract of sale fully complied with on the part of the vendee, and so far performed on the part of the vendor that a court of equity would have enforced full and specific performance by its decree. And it might be said with great propriety that Harden Moore was the tenant in possession

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of the holder of the legal title within the meaning and spirit of the act, and that thus the case is brought within the exception which the act provides. But without dwelling upon this view, I pass on to remark that there is no just reason for imputing to the legislature any intention to discriminate between the owners or proprietors of lands under legal titles and such owners or proprietors with equitable titles only. There is nothing in the terms of the act to restrict the exemption which it provides to the former to the exclusion of the latter. It applies to every owner or proprietor in actual possession by himself or his tenant, and no reference is made to the nature of his title whether legal or equitable, in the section which declares the forfeiture subject to the exemption which it embodies. Nor is there any thing in the policy of the law as disclosed by the preamble to create any discrimination between these two classes of owners. That policy was
496 to a certain *extent no doubt, to secure to the commonwealth her just dues, but in a greater degree it was to remove the obstacles to the settlement and improvement of the country growing out of the ownership of "large tracts of land" by absentee proprietors who paid no taxes upon them, and took no measures to settle and improve them or to bring them into market. This, as I think, the controlling policy of the law, could of course have no application to lands settled and held in actual possession by the owners whether their titles were legal or equitable, provided they were claimed and deduced under grants from the commonwealth. A marked feature of this act as well as of the act of April 1, 1831, upon the subject of delinquent and forfeited lands, is the benefits which they secure to the actual occupant claiming under a grant from the commonwealth. By the act of 1831 the title to land forfeited to the commonwealth for non-payment of the taxes charged thereon, and by the third section of the act of 1835 the title to land forfeited for failure to enter on the land books and have the same charged with taxes, is transferred to and vested in the actual occupant claiming under a grant and who had paid the taxes due upon his land under his title, and this, in express terms whether his title were legal or equitable. The same respect is shown to a possession under claim of title legal or equitable, in the subsequent acts upon this subject until in 1842 the legislature went further and extended the benefits of such forfeitures to the claimants of title, legal or equitable, under grants from the commonwealth who had paid the taxes on their lands from the time they acquired such their title, without requiring the condition of actual possession. And I think there is no room to doubt that when the legislature spoke of the owners or proprietors of lands in possession, in the second section of the act of 1835, they had no regard to the
497 nature or *character of the title, whether legal or equitable, by which they held them. The equitable owner in possession was substantially and for all beneficial purposes, the owner or proprietor; and while under the act of 1831 and the third section of this act, a doubt might arise whether the transfer of the forfeited legal title was intended to be made only to a party in possession having the legal title under which he claimed, or might be made to a party having only an equitable estate, to remove which it is expressly declared that it should be to either, under the second section no such doubt could exist. It described a class of lands to be exempted from the forfeiture which it denounced, and it has used terms sufficiently broad to embrace equitable estates as well as legal. That a court of law is thus called on to notice equitable rights constitutes no objection. It does so for several purposes. It must do so in passing upon questions of transfer of forfeited titles under the third section and similar provisions of other acts in the series of land laws, and it never refuses to accept an equitable title as a sufficient basis for an adversary possession on which to make out a defence under the statute of limitations. For this purpose evidence of such a title has been held clearly admissible. Shanks v. Lancaster, 5 Gratt. 110; Koiner v. Rankin's heirs, 11 Gratt. 42.

It is in vain to say that the effect of this construction will be to create a class of lands sui generis, upon which the law of forfeiture is not to operate, and that thus the commonwealth will be defrauded of her just demands for taxes upon them. If such be the effect, still we are to enquire what the law is and not what it might have been or should have been. The legislature might have gone on to provide a means by which to enforce payment of taxes upon this class of lands from the owners in possession, though they have not done so in this act. The omission however can-
498 not *vary the construction, and indeed it extends as well to lands of which the owners are in the actual possession with legal titles as to those held by equitable titles only; yet the former are unmistakably within the terms of the exception. And from the whole history of the legislation upon the subject of delinquent and forfeited lands it would appear that the legislature were looking less to the comparatively inconsiderable amount of revenue derived from taxation upon wild and unimproved lands assessed at that day at a very low not to say nominal rate, than to the evils growing out of absentee ownership in the serious check which it was found to oppose to the settlement and improvement of the country. Before the passage of this act there was no law in force declaring a forfeiture of omitted lands, the act of February 9th, 1814 having repealed all previous laws forfeiting omitted lands and released all previous forfeitures under them, and the policy of forfeiting such lands was not re-established until the act of 1835. That act describes particularly the class of lands

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intended to be forfeited, carefully excluding such as at the date of the act were in the actual possession of the owners, and none could be forfeited unless they came fully within the terms of the description.

The position taken by the counsel that the exception in the act was to be confined to such persons as had paid the taxes chargeable upon their lands, is, I think, utterly untenable. The second section did not relate at all to lands on which the taxes had been paid but to omitted lands only, on which the taxes could not have been paid: and there is no warrant whatever for interpolating the words "who shall have discharged all taxes charged or chargeable upon such lands from the time he acquired his title thereto" found in the third section after the words "owner or proprietor" in the second section.

499 Such a provision *in the second section would have been incongruous because its purpose was not to transfer the title to any other person but to forfeit it to the commonwealth where the owner was in default in not entering his lands and paying the taxes,and did not hold the same in actual possession. The purpose of the third section was to transfer such forfeited title to the person in actual possession and the legislature saw proper to require payment of his taxes as a condition of the transfer which it had not required for exemption from forfeiture under the second section.

Nor is there any thing in the idea that the act of March 23, 1836, operates an implied repeal of the second section. That act neither imposes a forfeiture nor extends the class of those liable to forfeiture under the act of 1835. Its design was to restrict not to enlarge. It gives further time to those imperiled by the last named act to comply with its provisions and thus avoid the penalty which it imposes, and it restricts its operation to lands omitted prior to 1832. Nor is there any thing either in the preamble or the enacting clauses which upon any fair construction can be held to do away with the exception in the second section of the act of 1835 in favor of the owners of lands which were at the date of that act in their actual possession.

That there is no exception in the act of March 5, 1846 (under which the plaintiff claims the land in controversy), in favor of actual occupants unless they claim title under grants and have paid all the taxes charged or chargeable upon the lands, will not help the plaintiff's case. The third section on which his claim rests applies only to forfeited lands, and before he can take any benefit from it, it devolves upon him to make out the forfeiture.

In any view of the case, and whether Harden Moore is to be considered as

500 having been invested with the *legal title or an equitable estate only in this land, I think no forfeiture accrued of the Garrott survey under the act of 1835, and that the Circuit court did not err in holding that the law upon the special verdict was for the defendant.

I am of opinion therefore to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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501 *Grove v. Zumbro.

July Term, 1858, Lewisburg.

1. **Married Women—Acknowledgments — Jurisdiction of Courts.**—Under the act of 1819, 1 Rev. Code, ch. 99, § 15, p. 365, the courts of any of the United States had authority to take the acknowledgment of a *feme covert* to her execution of a deed.

2. **Same—Same—What Certificate Must Show.***—The certificate of the court of the acknowledgment of a *feme covert*, should show the privy examination of the wife; her declaration that she did freely and willingly seal and deliver the said writing, and wished not to retract it; and that she then acknowledged the said writing so again shown to her, to be her act. If it omits the fact, "that she did not wish to retract it," it is fatally defective.

This was a bill filed in the Circuit court of Augusta county, by Mary Zumbro against Henry Grove. The object of the suit was to recover the plaintiff's share of a tract of land which had descended to her as one of

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***Married Women—Acknowledgments—Certificate—Requisites.**—The proposition of the principal case that the certificate of the acknowledgment of a married woman which omits her declaration, that she does not wish to retract what she has done, is fatally defective, was approved in Leftwich v. Neal 7 W. Va. 573; McMullen v. Eagan, 21 W. Va. 244; Watson v. Michael, 21 W. Va. 572; Henderson v. Smith, 26 W. Va. 829; Laidley v. Land Co., 30 W. Va. 514, 515, 4 S. E. Rep. 709, 710; Arnold v. Bunnell, 42 W. Va. 484, 26 S. E. Rep. 363. See also, in accord, Bartlett v. Fleming, 3 W. Va. 163; Linn v. Patton, 10 W. Va. 198; Blair v. Sayre, 29 W. Va. 604, 2 S. E. Rep. 97.

See generally, monographic *note* on "Acknowledgments."

Same—Conveyance of Real Estate.—In Wynn v. Louthan, 86 Va. 947, 11 S. E. Rep. 878, JUDGE FAUNTLEROY, delivering the opinion of the court, said that the mode prescribed by statute, whereby married women may part with real estate, or any interest therein, is specific, imperative, and indispensable, allowing of no deviation; and that no defective execution of a deed of a *feme covert* can be set up, cured or affected, by a court of equity; citing the principal case; Hairston v. Randolphs, 12 Leigh 445; Bolling v. Teel, 76 Va. 487; Rorer v. Roanoke National Bank, 83 Va. 589, 4 S. E. Rep. 820; National Bank v. Paul, 75 Va. 594.

But, while the requisitions of the statute must be *substantially* complied with, there need not be a *literal* compliance. See principal case, pp. 513, 514, citing Harvey v. Borden, 2 Wash. 156; Ware v. Cary, 2 Call 263; Langhorne v. Hobson, 4 Leigh 224; Tod v. Baylor, 4 Leigh 498.

See, in accord, Hockman v. McClanahan, 87 Va. 87, 12 S. E. Rep. 230; Laidley v. Central Land Co., 30 W. Va. 515, 4 S. E. Rep. 710.

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the seven heirs at law of Isaac Moore. The land had been sold to the defendant in 1833, and John Zumbro the husband of the plaintiff and herself, then living in the state of Tennessee, united in a deed bearing date the 14th day of October 1833, by which they conveyed their interest in the land to Henry Grove. This deed was acknowledged before the Rutherford Circuit court, and the certificate of acknowledgment is as follows:

"The state of Tennessee, Rutherford Circuit court, October term 1833: The within deed of conveyance was presented in one court, and acknowledged by the said John Zumbro, to be his act and deed for the purposes therein contained. The court thereupon proceeded to take the private examination of the said Mary Zumbro, wife of the said John Zumbro, separate and apart from her said husband, who ac-
502 knowledged *that she executed said conveyance freely and voluntarily, and without any fear, persuasion or coercion of said husband. All which was, on motion, ordered to be certified."

This certificate was signed by the clerk of the court; and upon it the deed was admitted to record in the clerk's office of the County court of Augusta on the 28th of December 1833. The only question in the cause was whether the acknowledgment and privy examination was properly taken. The court below held that they were not properly taken, and decided in favor of the plaintiff: whereupon Grove applied to this court for an appeal; which was allowed.

Fultz, for the appellant.
Baldwin, for the appellee.

MONCURE, J. This is a suit in equity brought by the appellee Mary Zumbro, against the appellant Henry Grove, in the Circuit court of Augusta county, to have partition, and an allotment of her portion, being one-seventh, of the land in said county of which her father Isaac Moore died intestate, seized and possessed; and also to recover rents and profits. The appellant Grove claims the land by purchase from the heirs of said Moore; and especially claims the portion of said Mary Zumbro under a deed purporting to have been executed by the late husband John Zumbro and herself, bearing date the 14th day of October 1833, acknowledged by both before the Circuit court of Rutherford county in the state of Tennessee, where they then resided, certified to have been so acknowledged by the clerk and under the seal of said court on the same day, and, with the said certificate annexed, admitted to record in the clerk's office of the County court of Augusta on the 28th of December 1833. The cause came on to be heard on the 11th day of
503 June 1856; when the *court, being of opinion that the appellee's acknowledgment of the deed of her husband and herself before the court in Tennessee is incompetent and insufficient to divest her of her interest, right and title to the said land, and that therefore she is entitled to an undivided interest of one-seventh thereof, and to the rents and profits on said interest since the 18th day of May 1850, the date of the death of her said husband, decreed partition of the land and an account of rents and profits accordingly. From that decree this appeal has been obtained.

The objection taken to the jurisdiction of the court, was not relied on, but was waived in the argument; and properly so. The case involves two questions only. First, whether the Circuit court of Rutherford county in the state of Tennessee had authority to take the acknowledgment of the appellee; and if so, secondly, whether such acknowledgment was duly taken. And,

First, Had the said court authority to take the acknowledgment?

If it had, such authority must have been derived from 1 Rev. Code of 1819, ch. 99, § 15, p. 365, which was in force when the acknowledgment was taken. That section provides, that "when a husband and his wife have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, shall declare to him that she did freely and willingly seal and deliver the said writing, to be then shown and explained to her, and wishes not to retract it, and shall before the said court acknowledge the said writing, so again shown to her, to be her act, such privy examination, acknowledgment and declaration shall be thereupon entered of record in such court." The section then prescribes the manner and form in
504 which *such privy examination and acknowledgment may be taken and certified by any two justices of the peace within the United States. And then provides, that "when the privy examination, acknowledgment and declaration of a married woman shall have been so taken in court and entered of record, or certified by two magistrates, and delivered to the clerk to be recorded, and the deed also shall have been duly acknowledged or proven as to the husband, and delivered to the clerk to be recorded, pursuant to the directions of this act, such deed shall be as effectual in law to pass all the right, title and interest of the wife, as if she had been an unmarried woman."

The question is, whether the "court" authorized by the said 15th section to take such privy examination and acknowledgment, may be a court in any of the United States, or must be a court in the state of Virginia? It will be seen that previous sections of the law prescribe the mode of acknowledgment of deeds by persons sui juris. And that the 15th and 16th sections prescribe the mode of privy examination and acknowledgment by married women. The word "court" is sufficiently comprehensive to embrace courts in any of the United States, and there are no other words in the law which, expressly or by necessary implication, restrict it to courts in the state. The words, "such privy examination, acknowledgment and declaration shall be

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thereupon entered of record in such court," have not that effect. It is true that the legislature of this state cannot compel the courts of other states to enter any thing upon their records; any more than it can compel the magistrates of other states to take the acknowledgment of deeds. But it can prescribe the modes in which alone deeds may be acknowledged and authenticated out of the state for registration therein. And it can therefore require such acknowledgment, &c., of a married
505 woman made before a court *of another state to be recorded in such court as a means of having the deed recorded in this state. If any such court should refuse to permit the entry to be made upon its record, this mode of authentication would, in that case, fail of effect. It is not probable, however, that there would ever be any such refusal. There would seem to be no good reason for restricting the meaning of the word "court," in the 15th section, to courts within the state. Such privy examination and acknowledgment may be taken by two justices in any of the United States. Why not by a court of record in any of them? See 2 Lom. Dig. App. p. iv, and the note; from which it appears that the learned author is of that opinion.

But a brief review of the previous laws on the subject may serve to remove any doubt which would otherwise exist as to the meaning of the word in question.

Until 1776, there was no law of Virginia providing a mode of authenticating the acknowledgment of deeds in other countries for registration in this. At first, deeds were required to be acknowledged or proved in the General or County court in which they were to be recorded. See act of 1674, 2 Hen. St. 317; act of 1705, 3 Id. 319; and act of 1710, Id. 517. Then, two justices of the county in which a married woman resided were authorized to take her privy examination and acknowledgment, under a commission to be issued by the clerk of the General or County court. Act of 1734, 4 Id. 400; and act of 1748, 5 Id. 410. Of course this was merely a cumulative mode, intended to provide for the case of a married woman who could not conveniently travel to the General or County court. The original power of such court to take a privy examination and acknowledgment was still preserved. In October 1776 an act was passed, "to enable persons living in other countries to dispose of their estates
506 *in this commonwealth with more ease and convenience." 9 Id. 207. The 2d section of that act provided that deeds executed by persons sui juris residing in other countries, for the conveyance of land in this, might be acknowledged by them or proved by three or more witnesses before the mayor or other chief magistrate of the city, town or corporation wherein, or near to which, the grantors resided; or, if they resided in any of the states of America, and there happened to be no city or town corporate within the county wherein they resided, then they might be acknowledged by them before two justices or magistrates of the said county. The 3d section provided that where any person making such conveyance should be a feme covert, she might "personally acknowledge the same before such mayor or other chief magistrate, or before two justices or magistrates as aforesaid, according to her place of residence, and be by him or them previously examined privily and apart from her husband, whether she doth the same freely and voluntarily, and without his persuasions or threats." This act was confined to the single purpose indicated in the title.

The next act on the subject is that of 1785, entitled "an act for regulating conveyances," 12 Id. 154. This is a very important act; being an enactment of one of the revised bills which were reported to the legislature in 1779 by the committee of revisors appointed by the act of 1776. It covers the whole subject referred to in the title, and is comprised almost entirely in one unbroken section: the second section merely prescribing the day from and after which the act should be in force. It first declares that conveyances of lands shall be by deed, and directs how, when and where they are to be recorded, and how, when and where marriage contracts are to be recorded. It then makes the following provision in regard to deeds executed by non-residents of the state, or by husband and
507 *wife: "If the party who shall sign and seal any such writing reside not in Virginia, the acknowledgment by such party, or the proof by the number of witnesses requisite, of the sealing and delivering of the writing, before any court of law, or the mayor or other chief magistrate of any city, town or corporation of the county in which the party shall dwell, certified by such court or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper court to be recorded, within eighteen months after the sealing and delivering, shall be as effectual as if it had been in the last mentioned court. When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband by one of the judges thereof, shall declare to him that she did freely and willingly seal and deliver the said writing, to be then shown and explained to her, and wishes not to retract it, and shall, before the said court, acknowledge the said writing, again shown to her, to be her act, or if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the United States of America, who may be empowered by commission to be issued by the clerk of the court wherein the writing ought to be recorded, to examine her privily and take her acknowledgment, the wife being examined privily and apart from her husband by those commissioners, shall declare that she willingly signed and sealed the said writing, to be then shown and explained to her by them, and consent-

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eth that it may be recorded; and the said commissioners shall return, with the commission and thereunto annexed, a certificate under their hands and seals, of such privy examination by them, and of such declaration made and consent yielded by her: in either case, the said writing, acknowl-
508 edged also by the husband, *or proved by witnesses to be his act, and recorded together with such her privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose as if she were an unmarried woman. If the dwelling of the wife be not in the United States of America, the commission to examine her privily and take her acknowledgment, shall be directed to any two judges or justices of any court of law, or to the mayor or other chief magistrate of any city, town or corporation of the county in which the wife shall dwell, and may be executed by them in the same manner as a commission directed to two justices in the United States of America; and the certificate of the judges or justices of such court, or the certificate of such mayor or other chief magistrate, authenticated in the form and with the solemnity by them used in other acts, shall be as effectual as the like certificate of the justices in the United States of America." Then follow other provisions of the act, which it is unnecessary to notice.

I do not think there can be any serious doubt but that under this act, the "court," which was authorized to take the privy examination and acknowledgment of a married woman, was not restricted to a court within the state, but embraced every court which was authorized by the previous part of the section to take the acknowledgment of a person sui juris, whether in or out of the state. The immediate antecedent of the "court," in the provision in regard to a married woman, is "any court of law" in the provision in regard to a non-resident party; and the grammatical, as well as the reasonable construction of the act gives to the word in question the enlarged rather than the restricted sense.

509 *The next act is that of 1792, entitled, like that of 1785, "an act for regulating conveyances." 1 Stat. at Large, new series, 84. It copies, almost literally, the act of 1785, except that it embodies some additional provisions, and divides the subject, which that act comprehends in one section, into fourteen sections. The provisions of that act, which are herein before set out, are copied literally in the act of 1792 (except that the words, "or in the district or county where the lands conveyed lie," are inserted after the words, "reside not in Virginia," in the second line); that which relates to a deed executed by a non-resident party, being the 5th, and that which relates to a deed executed by a husband and wife, being the 6th and 7th sections of the latter act: the 7th section applying only to a wife whose dwelling is not in the United States. Certainly there is nothing in the act of 1792 which requires that the words in question should be construed in a more restricted sense in that act than in the act of 1785. The act of 1792 was slightly amended by an act passed in 1794, Id. 293; but the amendment is not material to the present enquiry.

By an act passed February 9, 1814, Sess. Acts, p. 35, important provisions were adopted in regard to conveyances; such as allowing them to be recorded on acknowledgment of the parties, or proof by witnesses in the clerk's office, or on acknowledgment before two justices in the country, certified in due form, under seal. And by another act, passed December 20, 1814, Sess. Acts, p. 75, it was provided, that the privy examination and acknowledgment of a feme covert might be taken without any commission, before any two justices, in any county or corporation within the United States, or the territories thereof, within which she might be.

Such, substantially, was the state of the law, so far as this case is concerned,
510 when the revision of 1819 *took place.

In that revision the law in regard to conveyances was embodied in an act entitled "an act to reduce into one act the several acts for regulating conveyances, and concerning wrongful alienations." 1 Rev. Code 361, ch. 99. The 1st, 2d, 3d and 4th sections of that act correspond, almost literally, with the same sections of the act of 1792. The 5th section of the act of 1819 is like the 5th section of the act of 1792, except that it is limited to a party residing "not in the United States, or any territory thereof;" instead of extending to a party residing "not in Virginia, or in the district or county where the lands conveyed lay;" and except also that it makes a small omission, not necessary to be noticed. The 15th and 16th sections of the act of 1819 correspond with the 6th and 7th sections of the act of 1792, relating to a deed executed by a husband and wife. The sections which in the act of 1819 intervene between the 5th and 15th, embody provisions of the act of February 9, 1814, with some amendment and some new provisions. The 15th section substantially agrees with the 6th section of the act of 1792, except the difference occasioned by the provision of the act of December 20, 1814, dispensing with a commission to take the privy examination and acknowledgment of a feme covert before any two justices within the United States, and prescribing the form of the certificate of the justices; and except a provision in regard to the effect of a covenant or warranty contained in the deed of a feme covert, which is inserted in the said 15th, but not in the said 6th section. The words of the former section are identical with those of the latter, in that part of each which relates to the appearance, examination and acknowledgment of a feme covert "in court." The words, "such privy examination, ac-

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knowledgment and declaration shall be thereupon entered of record in such court," follow in the former, but not in the
511 latter *section. But the effect of these words is merely to condense and transpose a provision contained in the succeeding section of the act of 1792, and not to alter the sense.

If the acts of 1785 and 1792 authorized a court of law of any other state or country in which a married woman might reside, to take her privy examination and acknowledgment to a deed for land in this state, the act of 1819 did the same thing. The words in the former acts which conferred such authority, were literally copied in the latter, and must have the same meaning in each. That the 5th and 15th sections of the act of 1819, which correspond with the 5th and 6th sections of the act of 1792, are separated from each other by several sections compiled from intervening legislation, can certainly make no difference. Nor can it make any, so far as this case is concerned, that the 5th section of the act of 1819 is restricted to a party residing "not in the United States, or any territory thereof," instead of "not in Virginia, or the district or county where the lands conveyed lie," as in the 5th section of the act of 1792. The effect of that change in the act of 1819 was to repeal so much of the act of 1792 as authorized a court out of this state, but in the United States, to take the acknowledgment or proof of a deed executed by a person sui juris for land in this state. It was at one time contended that such authority still existed under the act of 1792, notwithstanding the act of 1819; and that the latter did not repeal the former act in that respect. But this court decided otherwise in Lockridge v. Carlisle, 2 Leigh 186. Shortly before that decision was made, and probably while the case was pending in this court, an act was passed expressly authorizing any court of record in the United States, or any territory or district thereof, to take such acknowledgment or proof. Sup. Rev. Code, p. 213, ch. 155. That act would
512 doubtless *have authorized any such court to take the privy examination and acknowledgment of a married woman also, if the legislature had not supposed that such authority already existed under the act of 1819. There was the same reason for the existence of the authority in the one case as in the other.

I am therefore of opinion that, even looking to the act of 1819 by itself, but especially tracing it to its source, and viewing it in connection with antecedent acts on the same subject, the Circuit court of Rutherford county had authority to take the acknowledgment in question. The propriety, and often the necessity of so tracing an act to its source, and viewing it in connection with antecedent acts for the purpose of ascertaining its meaning, is manifest, and has often been asserted by this court. In Shirley v. Long, 6 Rand. 744, Judge Carr, speaking upon this subject, in its application to that case, says: "When we look at these consequences, I think we are bound to conclude that no change in the application of the words was intended; but that this blending of the two subjects (real and personal estate), has proceeded from inattention, added to that desire to condense, so visible in our revisals, and which, in other instances, is carried so far as to sacrifice, in some degree, clearness to brevity. This renders it often necessary to the understanding of a law, that we should look back to its origin, and trace its progress; and for this purpose the Statutes at Large by Hening are invaluable." The conclusion to which the court was led by the application of this rule of construction to that case, was opposed to the literal terms of the law in question. The conclusion to which we are led by the application of the rule to this case, is consistent with the letter as well as the spirit and reason of the law.

I have considered this question so much at length, not because it was neces-
513 sary to do so for the purposes *of this case, but because of the importance of the question generally. I am informed that many deeds of married women for land in this state, have been recorded on certificates of their privy examination and acknowledgment before courts of record in other states; and that this course was pursued (in the belief that it was authorized by the acts of 1785, 1792 and 1819) down to the period when the present Code went into operation. If the fact be so, it is a matter of the first importance that those who hold lands under such deeds, should be quieted in their titles by the judgment of this court. And this is especially proper, since the present Code, p. 513, § 4, authorizes no other court to take the privy examination and acknowledgment of a married woman to a deed, but a court authorized to admit such deed to record. While the Code plainly announces this rule for the future, it seems to increase the doubt as to the pre-existing law, and makes it more proper that the doubt should be removed.

Having ascertained that the Circuit court of Rutherford county in the state of Tennessee had authority to take the acknowledgment of the appellee, the remaining enquiry is,

Secondly, Was it duly taken?

At common law a married woman is considered to be under the power of her husband, and can make no valid deed or other contract. The statute law enables her to convey her interest in real estate in a certain mode, prescribed mainly with a view to protect her against the coercion, persuasion or deception of her husband. It has long been held that the requisitions of the statute need not literally, but must substantially be complied with. To demand a literal compliance with them, would be, unnecessarily, to obstruct the alienation of property and throw a cloud over titles. To dispense with the substance of any of
514 them, would *be to deprive the wife of some of those safeguards which the

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law has provided for her protection. Several cases are to be found in our reports, in which a substantial, has been accepted in lieu of a literal compliance with these requisitions. Harvey & wife v. Borden, 2 Wash. 156; Ware v. Carey, 2 Call 263; Langhorne v. Hobson, 4 Leigh 224; and Tod v. Baylor, Id. 498, are cases of that kind. In the first two cases, it did not expressly appear from the commission or certificate, that the persons who took and certified the acknowledgment were justices; and yet the fact was presumed by the court, in the absence of evidence to the contrary. The last two cases occurred under the statute of 1792, and were cases of acknowledgment before justices of the peace under a commission. In Langhorne v. Hobson, most of the words used in the certificate of the justices were different from the words used in the law; and yet they were held to be equivalent. In Tod v. Baylor, it was not stated in the certificate that the deed was shown and explained to the wife by the commissioners; and yet it was held that the requisitions of the law were sufficiently complied with; the court being of opinion that the act of 1792, while it required the commissioners to show and explain the deed to the wife, did not require them to certify that they had done so: Though Tucker, P., was of opinion that it ought to appear from the certificate that she understood the deed, and that the fact did so appear in that case. On the other hand, Hairston v. Randolphs, 12 Leigh 445, is a case in which it was held that the requisitions of the law were not sufficiently complied with. That was a case of an acknowledgment before two justices of the peace, under the act of 1814 dispensing with a commission to the justices and prescribing the form of their certificate. It was conceded, that though the form of the certificate was given by law, yet it would be sufficient if to the same effect,
515 *though not in the same words. Indeed the law so expressly declared. The certificate in that case varied from the form prescribed, in several respects; but it was considered that it substantially complied with the law except in one particular; that the justices did not certify that the deed was fully explained to the wife, nor was there any thing in the certificate from which her knowledge of its contents, at the time of her acknowledgment, could be inferred. And for that defect, the deed was decided to be void as to the wife.

All the cases before cited were cases of acknowledgments before justices. There has been no case before this court, so far as I am informed, as to the sufficiency of an acknowledgment before a court. The law has prescribed somewhat different duties to be performed by a court and by justices taking the acknowledgment of a wife to a deed. But the duties in each case, whatever they are, must be substantially performed. In each case a mere authority is given by law, which must be pursued to make the act valid and binding. It must appear from the record of the court or the certificate of the justices, that this authority has been substantially pursued: though, if it so appear, the act, in either case, is generally conclusive. Harkins v. Forsyth, 11 Leigh 294; Carper v. McDowell, 5 Gratt. 212; Taliaferro v. Pryor, 12 Id. 277. As has been already stated, this is a case of an acknowledgment before a court under 1 Rev. Code of 1819, p. 365, § 15; which, or so much of which as is pertinent to the present enquiry, has already been set out in this opinion. That act required in such cases, that three things should be entered of record in such court, viz: 1st, the privy examination of the wife: that is, that she was examined privily and apart from her husband, by one of the judges of the court; 2dly, her declaration; that is, that she declared to him, that she did freely and willingly seal and deliver the said
516 writing, then *shown and explained to her, and wished not to retract it; and 3dly, her acknowledgment; that is, that, before the said court, she acknowledged the said writing, so again shown to her, to be her act. Have these requisitions been substantially complied with in this case? The certificate is in these words:

"The state of Tennessee, Rutherford Circuit court, October term 1833: The within deed of conveyance was presented in open court, and acknowledged by the said John Zumbro to be his act and deed for the purposes therein contained. The court thereupon proceeded to take the privy examination of the said Mary Zumbro, wife of the said John Zumbro, separate and apart from her said husband, who acknowledged that she executed said conveyance, freely and voluntarily, and without any fear, persuasion or coercion of her said husband. All which was, on motion, ordered to be certified. In testimony whereof," &c.

This certificate wholly omits any declaration of the wife that she wished not to retract what she had done; and contains nothing which tends to show that she made any such declaration. Her wish to retract what she had done, is perfectly consistent with every thing contained in the certificate. The law, as we have seen, expressly required this declaration to be made and entered of record; and the requisition is very material. I am therefore compelled to say that in my opinion the certificate is fatally defective in this respect, and that the privy examination and acknowledgment of the wife were not duly taken.

It does not appear from the certificate that the deed was shown and explained to the wife at the time of her privy examination. The law required this to be done; though, according to Tod v. Baylor, it did not require the fact to be certified. Tucker, P., was of opinion in that case, as before stated, that it ought at least to appear from the certificate that the wife understood
517 *the deed. But the court did not so decide; and it never has been so decided. Nor is it necessary to decide the question in this case; and I therefore ex-

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press no opinion upon it. If the fact ought to have so appeared in that case, it ought so to appear in this; for the act of 1792, under which that case occurred, used the same language in this respect as to an acknowledgment in court and an acknowledgment before justices. But the law was altered in regard to an acknowledgment before justices by the act of 1814, which prescribed the form of the certificate of the justices, in which the fact that the deed was explained to the wife is expressly stated. Hairston v. Randolphs, 12 Leigh 445, was decided under that act.

I think the decree ought to be affirmed.

The other judges concurred in the opinion of Moncure, J.

Decree affirmed.

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518 *Craig's Heirs v. Walthall & Wife.

July Term, 1858, Lewisburg.

1. **Wills—Construction of—Case at Bar.**—Testator owning a large and valuable tract of land, and leaving a widow and six infant children, describes separate parcels of the land by boundaries, one of which he gives to each of his children. As to one of these parcels he says, "It is my will that the above described part of my farm shall be owned by my son John (about thirteen), and I do bequeath it to him subject to the control of my dear wife during her widowhood, and then to my son John for life." The widow takes a beneficial interest in the land during her widowhood.
2. **Same—Jointure under Statute—Dower—Case at Bar.***—The testator devises all his land to his different children, giving the wife one of the parcels during her widowhood, which parcel has the improvements upon it. He also gives her his slaves for life, all the rest of his personal property to enjoy and use for the best interests of his children; and the interest on the bonds due him to be used by her for the benefit of his children. This will be held to be in lieu of dower under the act. Code, ch. 110, § 4, 5, p. 474-5.†
3. **Same—Same—Same—Election—Case at Bar.***—In such case the widow having been told that the provision in the will was in lieu of dower, and advised to renounce it, declines to do so, and expresses herself satisfied with the provision; and takes possession of the property and holds it for four years, until she marries.—She has elected to take under the will, and cannot then claim her dower.

*See monographic *note* on "Dower" (division VI, G) appended to Davis v. Davis, 25 Gratt. 587.

†Code, ch. 110, § 4. "If any estate, real or personal, intended to be in lieu of her dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate, or the residue thereof."

§ 5. "But if such conveyance or devise were before the marriage, without the assent or during the infancy of the *feme*, or if it were after marriage, in either case the widow may at her election, waive such jointure and demand her dower. And when she shall demand and receive her dower, the estate so conveyed and devised to her shall cease and determine."

John Craig died in August 1852, leaving a widow and six infant children. By his will, which was duly admitted to probate in the County court of Montgomery,
519 *he laid off by metes and bounds three parcels of his land; and after designating the bounds of the first, he says, "I want, I direct, I bequeath the above described or parcel of land to my daughter Mary Taylor Craig, with the exception," that he wished each of his other children to have an acre lot of the said tract near the town of Christiansburg. After setting out the bounds of the second tract, he says, "It is my will that the above described part of my farm shall be owned by my son John Craig; and I do hereby bequeath it to him, subject to the control of my dear wife, Emeline Craig, during her widowhood, and then to my son John for life." Third, he says, "I desire that part of my farm now occupied by my tenant, Ch's Furrow, and known as my Furrow place, to my daughter Melinda W. Craig." And then he directs how certain lines shall be run. Fourth, he says, "I desire that the remainder of my farm shall be divided between my three children, Eleanor Lewis Craig, Ja's Robert Craig, and Ch's Joseph Craig, so as to be equal to each in point of value, or as near as can be made."

The testator directed that all his negroes should be used by his wife Emeline Craig during her natural life; and then to be equally divided among his children then living. And he gave his wife all his personal property except slaves, to enjoy and use for the best interests of his children. And he expressed the wish that the bonds then due to him and bearing interest should be kept as long as the circumstances would allow, in the hands of good and responsible persons, bearing interest, to be used by his wife Emeline Craig for the benefit of his children. And he appointed his brother Robert Joseph Craig and his nephew James C. Taylor executors of his will; the latter of whom qualified as such.

It appears that the eldest of the testator's children was at the time of his death about sixteen years old, and the second, John, was about fourteen. It appears
520 *too that the testator owned a large tract of very valuable land; there being at least eleven hundred acres, estimated at thirty dollars per acre; and that all the dwelling-houses and out-houses were on the part given to John Craig, whose land was estimated by some of the witnesses at one-third, and by one at one-fourth in value of the whole tract. The slaves were only six in number, and three of them were so old as to be an expense. The other personal chattels were horses, cattle, and the usual stock upon a farm.

Soon after the death of John Craig, the widow was informed by the executor that there was a provision for her in the will, that the executor considered it in lieu of dower, and that it might prove insufficient for her support if she should marry again. And in view of this fact he advised her to

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renounce the provisions of the will made for her, and elect to take her third. This she positively refused to do; saying she regarded the provision in the will as being intended for her dower, and ample for her support. It was also proved that her mother advised her to renounce the will; but she indignantly refused. And she occupied the land subjected to her control during her widowhood, and held the slaves and other personal property from the death of John Craig until she married Thomas A. Walthall, in October 1855.

In December 1855 Thomas A. Walthall and his wife filed their bill in the Circuit court of Montgomery county, against the children of John Craig, the object of which was to have dower assigned to the female plaintiff in the real estate of Craig. The bill stated that she continued in possession of the mansion-house and personal property, and cultivated the farm and appropriated the proceeds to the maintenance of the children. That she never elected to take the provisions of the will, for her benefit, if they could be said to be for her benefit, in lieu of her claim for dower.

521 *The defendants answered, insisting that the female plaintiff had accepted the provisions of the will in her favor, and that they were in lieu of dower. The facts, as they appear in the record, have been already given. The cause came on to be heard in June 1857, when the court held that the female plaintiff was entitled to have her dower assigned in the real estate of John Craig; and appointed certain commissioners to lay it off and assign it to her. And from this decree the heirs of John Craig obtained an appeal to this court.

Watts and Grattan, for the appellants.
Staples, for the appellee.

SAMUELS, J. This case presents, for the first time in this court, the question as to the true construction of sections 4 and 5, chapter 110, pages 474 and 475 of the Code of Virginia. This statute differs widely from that formerly in force, 1 Rev. Code of 1819, ch. 107, § 11, 12, in regard to legal jointures; and it approaches very nearly to the law of equitable jointure, as heretofore administered by the courts of chancery.

Our case seems to turn upon the several questions:

1st. What estate may make a jointure?

2d. Has such estate been devised by Craig to his wife?

3d. Was that estate intended to be a jointure?

4th. If so intended, has the wife made a valid election, accepting the jointure and relinquishing dower?

In regard to the first question: the statute is too plain to admit of doubt. Either real or 'personal estate of itself may make a jointure: it follows that both combined may have the like effect. The question was brought to the mind of the general assembly by the revisors, whether real estate only, or personal estate as well, should make a jointure. See Report of Revisors 565, ch. 110, § 4, and note. The general as-

522 sembly *enacted that real or personal estate might make a jointure. It is not required that the jointure should begin at any particular period, or be of any particular duration of time.

Upon the second of the questions above stated, it appears that testator's whole personal estate was bequeathed to his wife in some form; the slaves for life; his goods and chattels absolutely; for on the authority of Stinson's ex'or v. Day & wife, 1 Rob. R. 435, and Dold v. Wallace, 3 Leigh 258, it cannot be held that testator's children had any interest in the goods and chattels. The interest on money due to testator was given to his wife, to be used by her for the benefit of his children. This provision far exceeded the wife's distributive share in the personal estate, in case she had asserted her claim to such share within the time and in the mode prescribed by the statutes, Code, ch. 123, § 12, p. 524; Sess. Acts 1852, ch. 28, § 1, p. 80. The argument on behalf of the appellees was chiefly directed to the purpose of proving that no beneficial interest in land was conferred by Craig's will on his widow; that her control over a portion of the real estate during her widowhood, was only as an agent or trustee for John Craig, the devisee in fee. If Emeline Craig the widow, and John Craig the son and devisee, had been strangers to the testators, I am inclined to think that the will would have conferred on her an estate during widowhood; that there is no appreciable difference between undefined control of real estate for a time, and a right to enjoy that estate for that time. However it would have been between mere strangers, yet the case affords other aids in the construction of this will: they are found in the relations of the parties, the condition of the estate, and of the beneficiaries under the will. Mrs. Craig, the widow, had a right of dower in her husband's real estate, which he could not affect without her

523 consent. *He might by law offer her a jointure of real or personal estate, or of both, in lieu of dower; and if she accepted the offer, her right of dower would be barred. The will should be construed in reference to the limits of the husband's power over his estate, and should be held to be within those limits, unless he appears to have intended to disregard them. If no property be given by this will as a jointure, then the husband exceeded his power in making present devises of his whole real estate by specific metes and bounds. This disregard must be followed by a derangement of the whole scheme of his will; for the dower in the whole estate must be assigned without regard to the metes and bounds of the specific devises. Some of the devisees must give up the whole or a large portion of their land to be held as dower, and then look to the other devisees for contribution to alleviate the burden imposed by the dower estate.

It is not shown that there is any thing in the condition of John Craig the devisee,

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which should require his property to be put under the control of his mother for an indefinite time. He was thirteen years old at the time of his father's death. If the devise had been intended for his sole benefit, it is impossible to see what interest of his would be promoted by withholding his property from him after arrival at full age; or by putting his property in the hands of another to be held for an uncertain time, without security to account for its profits. Other and younger devisees were left to the care of the law, to be exercised through guardians. It is apparent that the testator intended that his infant children should reside with their mother, the widow; thus it was necessary that she should have a dwelling-house; and it is shown by the record that the only dwelling-houses on the estate were on that part of the land put under her control during widowhood. The personal estate given to the wife,
524 consists *chiefly of slaves, live stock and farming utensils. Some of these subjects could be "enjoyed" and "used" only on a plantation. In my judgment it is clear that the widow was invested with a beneficial interest during widowhood in that part of the land put under her control.

Passing to the third question, it may be said that the second and third questions run into each other to some extent, so that a part of what has been said in regard to the second, applies to the third. The testator intended his will in all its parts to be effectual. If we suppose his intention to have been to create a jointure by means of the real and personal estate given to his wife, the will is consistent in all its parts. If, however, it be supposed that an estate in dower is yet to be carved out of the lands, then the devisees will, to some extent, be deprived of the lands devised to them respectively; and parts of the will are in conflict. If it shall be held that no jointure was intended, the widow on the death of her husband was entitled to dower, one-third part of the whole estate. Whether she would hold the land devised, and also her dower assigned out of the other land; or whether the land devised to her would be required to contribute to the estate in dower, it is not necessary to consider; for in either event, the consequences would be so much at variance with the whole scheme of the will, that I am constrained to believe that the provision made for the wife was intended to be in lieu of dower, and not in addition to it.

It only remains to consider the fourth question, whether the widow has made an election to accept the jointure in lieu of dower. On the general principles of law, a party cannot be required to make an election without such knowledge of the subjects submitted to his choice as will enable him to choose discreetly. On the same
525 principles, a party cannot be *held to have made an election without such knowledge, unless it manifestly appears that he intended to waive the benefit of accurate information; that he intended to incur the risk of making a bad choice. In our case, it is shown that the widow had full knowledge of the property given her by the will; she had it in her own possession; she repeatedly and expressly declared that she accepted and held the property as a full satisfaction of her interests in her husband's estate, and refused to take steps necessary to obtain any thing further from that estate. That an election may be made by acts in pais, seems to be well settled by the courts. 1 Lom. Dig. p. 146 of new edition, 121 of old; 1 Bright on Husband and Wife 546.

It would be hard to conceive a case in which an election could be more distinctly made than was that in our case.

I am of opinion the decree should be reversed, and the bill dismissed; giving the appellants their costs expended in this court and in the Circuit court.

The other judges concurred in the opinion of Samuels, J.

Decree reversed, and bill dismissed.

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526 *Hitchcox v. Rawson.

July Term, 1858, Lewisburg.

1. **Ejectment—Evidence—Record of Proceedings for Sale of Delinquent Land.***—On the trial of an action of ejectment, plaintiff claims under a conveyance from a commissioner of delinquent lands, and offers the record of the proceedings for the sale of the lands, in evidence. The defendant objects to it, for irregularities on its face. 1. That the land was not forfeited, because the forfeiture for non-payment of taxes was in the name of the patentee who had sold and conveyed before it was returned delinquent in 1801 and to 1814; though it was never entered in any other name. 2. Because the decree for sale was at a special term of the court. 3. Because the decree was conditional upon purchasers giving the bond. 4. Because the court on petition made an order directing the deed to be made to parties not reported to be the purchasers. 5. Because the deed was made by one commissioner of delinquent lands; though there was but one, and the order directed him. But none of these invalidate the proceedings so as to render them null as between the purchaser and a third party, in a collateral proceeding.

2. **Same—Declaration—Insufficient Description of Land.**†—A declaration in ejectment, which describes the land as a part of a larger tract owned

*Ejectment—Evidence—Record of Proceedings for Sale of Delinquent Land.—See, in accord, Smith v. Chapman, 10 Gratt. 445.

Tax Sales—Collateral Impeachment.—In Machir v. Funk, 90 Va. 289, 18 S. E. Rep. 197, the principal case was cited as authority for the proposition that, where the record of the proceedings for the sale of land delinquent for the non-payment of taxes is regular on its face, the validity of the proceedings cannot be collaterally assailed.

†Ejectment—Declaration—Insufficient Description of Land.—See the principal case cited in Moore v. Douglass, 14 W. Va. 725; Postlewaite v. Wise, 17 W. Va. 12; Carter v. The Railway Co., 26 W. Va. 652.

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by plaintiff, near certain creeks which have no public notoriety, is defective, and may be demurred to.

3. Same—Same—Same—Verdict.‡—In such a case, a verdict which finds for the plaintiff the land in the declaration mentioned, is too vague to enable the officer to deliver possession; and there must be a *venire de novo*.

This was an action of ejectment in the Circuit court of the county of Ritchie, by John Rawson against William Hitchcox. The declaration set out that the plaintiff was possessed in fee simple of a tract of land in the county of Ritchie, containing eleven hundred acres, and bounded as follows: setting out the boundaries. And being so possessed thereof, the defendant afterwards, &c. entered into the said premises, and unlawfully withholds from the plaintiff the possession of two hundred
527 acres in and adjacent to the *waters of Hughes' and Bunnell's runs; it being a portion of the above mentioned tract of eleven hundred acres of land.

On the trial of the cause, the jury found "for the plaintiff against the defendant the estate in fee simple in the land in the plaintiff's declaration mentioned." And on this verdict the court rendered a judgment, "that the plaintiff recover against the defendant the possession of the premises according to the verdict aforesaid."

The plaintiff claimed title under a sale by the commissioners of delinquent lands; and on the trial, to maintain his title, he offered in evidence the record of the proceedings of the court directing a sale of the land: and the defendant objected to it as evidence, for errors apparent on its face; but the court overruled the objection and admitted the evidence. The report of the commissioners of delinquent lands stated that ten thousand acres of land had been patented to Hugh Lenox in 1785, and that it had been forfeited in the name of Lenox for the non-payment of taxes from 1801 to 1807, and from 1809 to 1814; amounting to sixty-seven dollars and fifty-nine cents, the damages on which were one hundred and thirty dollars and thirteen cents. It also stated that Lenox had conveyed the land to Levi Hollingsworth; that Hollingsworth conveyed to Robert Morris in July 1794, and that in March 1795 Morris conveyed it to Thomas Willing, John Nixon and John Barclay, in trust for the North American land company. The land does not appear to have been entered on the commissioner's books in the name of any of these parties. The land claimed by the plaintiff is a part of this tract.

At a special term of the Circuit court in March 1841, an order was made directing a sale of the land aforesaid. And at the September term of the court for the same year, the commissioners having reported
528 that the *land had been purchased by Josiah M. Steed, on behalf of the North American land company, at the price of two hundred and fifty dollars, of which he had paid one-fourth, but had failed to give his bond for the balance, as required by the statute, the court made a decree that unless the purchaser should, within thirty days from the date of the decree, execute and deliver to the commissioners, his bond with security, &c. as required by law, the commissioners should proceed to resell the land. But if the purchaser should execute and deliver his bond to the commissioners in thirty days, then that said sale be confirmed, and upon the payment of the money mentioned in the bond the commissioners should convey to the said Steed on behalf of said company all the title of the commonwealth accruing under the forfeiture aforesaid in and to the said tract of ten thousand acres of land.

At the April term 1842 the commissioners reported that Steed had executed the bond required of him within the time appointed. And thereupon the court decreed that the decree of the last term should be unconditional, and the sale be confirmed.

At the April term 1845 the trustees of the North American land company petitioned the court, stating that the land was the property of the company, and had been purchased by Steed for them; that the tax and damages had been paid; and asking that the balance of the purchase money not consumed in the payment of the taxes and damages, might be released; and that the commissioners might be directed to convey the land to them. And at the same term of the court a decree was made in conformity with the prayer of the petition.

In the further progress of the cause, the plaintiff offered in evidence the deed from the commissioner of delinquent lands to the trustees of the North American land company; to which the defendant
529 objected: *but the court admitted the evidence. To the opinions of the court admitting the record and the deed, the defendant excepted.

After the plaintiff had introduced the evidence aforesaid, and a deed from the trustees of the land company to himself, for the tract of land herein before mentioned, the defendant introduced the deeds from Lenox to Hollingsworth, and from Hollingsworth to Robert Morris. And then he offered to prove that Robert Morris was dead; that Maria Nixon was his daughter and heir at law, and that she was married to Henry Nixon. And he then offered further to prove that Henry and Maria Nixon had, on the 17th of September 1836, caused said land to be entered on the books of the commissioner of the revenue, and charged with the back taxes and damages thereon; and offered further to prove that the said Henry and Maria Nixon had, on the 28th of October 1836, caused to be paid at the treasury office in Richmond, sixty-one

See the principal case distinguished in Holly River, etc., Co. v. Howell, 36 W. Va. 492, 15 S. E. Rep. 215.

‡Same—Same—Same—Verdict.—See the principal case cited in Holliday v. Myers, 11 W. Va. 291; Board of Education v. Crawford, 14 W. Va. 800.

See generally, monographic *note* on "Ejectment."

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dollars and fifty cents, the said back taxes and damages: It being admitted by the defendant that he did not claim by, through or under the said Nixon and wife, but adversely to them. But the court, on the motion of the plaintiff, excluded the evidence; being of opinion that the decree of the court declaring the said land to be forfeited as to said parties, was conclusive upon strangers in all collateral controversies. To this opinion of the court the defendant excepted. And on his application a supersedeas was allowed.

Hoffman, for the appellant.

Stephenson and William L. Jackson, for the appellee.

LEE, J. The various objections which have been urged in this case as grounds of error for which the judgment should be reversed, may be resolved into three. These are,

530 *1. That the Circuit court erred in permitting the record of the decree for the sale of the ten thousand acres of land granted to Hugh Lenox, as forfeited, and of the subsequent proceedings by which the commissioner was directed to make the conveyance of the same to Dundas and Kugler, together with the deed so made by him to them, to be read in evidence to the jury though objected to by the plaintiff in error.

2. That the court erred in refusing to permit the plaintiff in error to show that notwithstanding the decree for the sale of the land as forfeited, it was at the time in point of fact not forfeited under the law and not therefore liable to be sold as such.

3. That the declaration and verdict were both defective and insufficient and no judgment could properly be rendered for the plaintiff upon them.

In support of the first of these objections several reasons have been urged by the counsel in argument.

It is said that the order for the sale was made at an intermediate term of the court, and was a nullity because the court had no power at such a term to make an order of that kind.

The act of 1819, 1 Rev. Code, ch. 69, § 74, p. 243, provides that the courts at such intermediate terms might hear and determine all motions cognizable by them whether the same were depending and could have been tried at the previous term or not. And the same provision is found in the act concerning Circuit superior courts of the 16th of April 1831. Supp. Rev. Code, p. 157, § 61. And while the reasons which forbade the trial of cases that could not have been tried at the previous term could have no application to proceedings under the laws concerning delinquent and forfeited lands, it might be doing no violence to the spirit or language of the act to include ex parte proceedings of that character under the general and comprehensive term "motions." But it will be observed

531 *that by the sixth section of the act of March 15, 1838, the judges of the Circuit courts had the power to act upon the reports of the commissioners and to order sales, in vacation as well as in term, and it would seem difficult to hold that what the judge might certainly do in vacation he could not do at an intermediate term. If under a strict construction of the act, the court had not cognizance of these proceedings as a "motion," why may not its action be regarded as the action of the judge in vacation after he has signed the order? To say that his order is upon the record book and not upon the report of the commissioner savors too much of nicety and sticking in the bark.

But there is another answer to the objection, and that is that although the order for the sale was made at an intermediate term, yet the confirmation of the sale and all the subsequent proceedings in relation to the subject were had at regular terms of the court. And if there had been an irregularity in making the order for the sale at an intermediate term, I think it should be regarded as abundantly cured by the subsequent ratification and the proceedings afterwards had at the regular terms.

But it is said that the record of these proceedings was deprived of the character of legal evidence because it appeared from its face that the land was not in fact forfeited, that the case was coram non judice and the decree of sale and the proceedings under it were merely void.

The position taken by the counsel is that as this land was conveyed by Lenox to Hollingsworth as early as in the year 1794, the assessment in the name of Lenox for the years from 1801 to 1814 was illegal, and there could be no forfeiture for the failure to pay the taxes so illegally assessed.

It may not follow as a necessary consequence that an assessment of taxes

532 upon a tract of land would in *every case be illegal and void because the land had been previously conveyed to another by the party in whose name it was so assessed. But concede for the sake of the argument, that this land was improperly charged to Lenox after his conveyance to Hollingsworth, the position assumed is not made good. If the assessment in the name of Lenox is to be repudiated, there was no assessment of these lands in the name of any one before or after 1814, because the report ascertains that it had never been entered for taxation on the commissioner's books by any of the grantees claiming under Lenox; and it would then fall in the category of omitted land, as to which the provisions of the act of 1835 and subsequent laws had not been complied with. Thus, the report of the commissioners and the proceedings had upon it, quacunque via data, showed that this land was forfeited and liable to be sold. If the assessment in the name of Lenox was good, then the taxes had not been paid and the land was forfeited for the delinquency. If it was not good then the land had been entirely omitted from the books after the year 1794, and was liable to sale as forfeited

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for that cause. That the proceeding looked to a forfeiture for delinquency and not for omission from the books is not material to this enquiry. The question is of forfeiture or no forfeiture upon the face of the record and does not concern the regularity of the proceeding to enforce it.

Various irregularities are alleged to have occurred in the proceedings, the effect of which it is contended is to render the whole a mere nullity. It is said that the court had no power to direct a deed to be made to any other person than the purchaser, and the case of Walton v. Hale, 9 Gratt. 194, is cited to prove that the commissioner, who it is assumed has all the power on this subject that the court possesses, cannot execute the deed to a third person. The error in this consists
533 *in giving to the commissioner the whole power of the court. His duty is to obey the mandate of the latter, and without its order he can only convey to the purchaser. But the court might in the exercise of its ordinary powers direct the deed to be made to a third person. Whether that should be by bill, or by petition (as in this case), or on motion cannot be material to this enquiry. The court has jurisdiction to order the deed to be made to the party shown to be entitled to it, and whether that jurisdiction have been exercised with due regularity and formality, is a matter which a stranger certainly in a collateral proceeding cannot be permitted to enter into. As to him at least, factum valet, fieri non debet. And the same answer may be made to the argument that the court could not direct the deed to be made to Dundas and Kugler after it had directed it to be made to Steed the purchaser when the sale was confirmed, because when it made the order for the deed to Steed, the whole subject was disposed of and it had no longer any power over it. It is not denied that the court might by some formal proceeding to which Steed was a party, have directed the deed to be made to the trustees for the land company on whose behalf he made the purchase, and that Steed's rights were not duly respected is a matter of which third parties certainly cannot complain. It is not a question of jurisdiction but of the regularity of the mode in which the jurisdiction has been exercised; and if there be jurisdiction, whatever irregularities may have occurred in the course of the proceeding, the decree will yet be evidence, at least as against strangers in a subsequent collateral proceeding. That mere irregularities in a case of this kind, will not suffice to exclude the record as evidence in a subsequent controversy when offered by the party claiming under the sale has been expressly decided by this
534 court *in Smith v. Chapman, 10 Gratt. 445, and it cannot be considered any longer an open question.

Nor is there any foundation, I think, for the objection that the deed made to Dundas and Kugler was void because made by one of the commissioners only who made the sale, both of whom it is said were required by law to unite in the conveyance to the purchaser. This was a matter entirely within the control of the court. There was no absolute necessity for both commissioners to unite in the conveyance, and the court might require the duty of executing it to be performed by both or by one of them. The legal title was not vested in the commissioners requiring the deed of both to divest it; it remained in the commonwealth until transferred to the purchaser or those claiming by a conveyance executed by such commissioner as should be designated by the court. Chapman, the other commissioner, had resigned his office before the order for the deed was made, and it was perfectly regular and proper for the court to direct the other commissioner to make it. And if he had resigned or died before performing that duty, I can see no reason whatever to doubt the power of the court to appoint some other person to perform that duty in his stead.

This last objection, and indeed most of those made under the first head, proceed from a too narrow and restricted view of the functions and powers of the court in a proceeding for the sale of forfeited lands. It is a statutory proceeding it is true, but from the whole frame and structure of the acts upon the subject, it is plain to my mind that it was intended to give to the court the general powers of the court of chancery in executing the duty thereby imposed and in carrying out the proceeding to all its just and legitimate results; and the fourth section of the act of
535 *1837 (Sess. Acts, p. 10) expressly places the sales of those lands on the same footing as those of other lands directed to be sold by a decree of the court.

I think none of the objections urged against the admissibility of the proceeding for the sale of the land as forfeited, as evidence for the defendant in error in support of his claim, can be maintained; and without intending to say that it is absolutely such conclusive evidence of forfeiture either against those for whose default it was taken to be forfeited or against strangers, as to estop either in a subsequent suit from showing the contrary, I think it was clearly admissible as prima facie evidence at least of such forfeiture and as a link in the chain of the claimant's title. Indeed the admissibility of such a proceeding as evidence to this extent was distinctly affirmed by this court in the case of Smith v. Chapman, already cited.

Whether the record of such a proceeding is to be regarded as on the footing of a judgment in rem and so conclusive as to forbid any attempt on the part of the former owner or any third person in a collateral proceeding, to show by proof that notwithstanding the report and decree of sale, the land was in fact not forfeited and not liable to sale, was the question sought to be raised by the second bill of exceptions, and is the basis of the second ground of error as above classified. It has never been decided by

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this court, for in the case of Smith v. Chapman, cited and relied on by the counsel for the defendant in error, it did not arise and was not decided nor intended to be decided. In that case the questions in relation to this subject were as to the admissibility of the record when it showed irregularities in the proceeding upon its face, and the supposed necessity devolving upon the party who offered it of showing that every thing was regular before he could have the benefit of it. There was no offer to show that the land in controversy was in point of fact not forfeited
536 *when it was directed to be sold, and the precise question sought to be raised in this case did not and could not arise; and all that the court should be considered as having adjudicated in that case was that the existence of irregularities in the proceeding apparent on the face of the record would neither render it inadmissible as evidence nor as against strangers at least would impair the binding force and effect which it would have if free from such irregularities.

The question now sought to be raised is a grave and important one and will when properly presented, doubtless receive the careful and deliberate consideration of this court. In this case however, I do not think it necessarily or properly arises. The bill of exceptions does not state what were the years for which the Nixons had caused the land to be entered on the books and had paid the taxes charged and the damages. They of course only caused it to be entered and the taxes paid for such and so many years, as they were advised they were required to enter and pay for in order to save the forfeiture. But whether they made their entry and payment for all the years in which the land had been omitted including the years from 1801 to 1814 inclusive (treating the entry for those years in the name of Lenox as invalid) or under their construction of the act of 1835 only made their entry for the years after 1814 when the previous laws declaring lands to be forfeited for failure to enter them on the books and to pay the taxes charged upon them, were repealed and the forfeitures accrued under them remitted, or for the years which followed after the conveyance to Morris or after his death when the supposed title of Maria Nixon accrued is left entirely uncertain. It may be inferred that they did not enter and pay for the years from 1801 to 1814 because the amount that would have been due for those years alone accord-
537 ing to the cotemporaneous *assessment, with the damages, was one hundred and ninety-seven dollars and eighty-three cents, while they only paid for all the years embraced by their entry on the books, the sum of sixty-one dollars and fifty-cents as the amount of all the taxes in arrear with the damages. Now it was not sufficient for the party to offer to prove payment of the taxes and damages which the Nixons considered to be in arrear. The years for which the entry and payment was alleged to have been made should have been shown in order that the court might see that proof of the entry and payment for those years would have been sufficient to save the forfeiture or at least would have been material and relevant when considered in connection with the proofs stated to have been previously given. Totally in the dark then as to the range of the proposed proof, this court cannot see that it would have been either the one or the other; and the subject therefore comes in too questionable a shape to be entitled to challenge the consideration and adjudication of this court. I think the court should decline to express any opinion at this time upon the question so imperfectly and doubtfully presented; and I feel the less hesitation in adopting this course because in my view as will appear in the sequel, the party will not be deprived of the benefit of the question if he can present it in a proper and available form.

It remains to consider the sufficiency of the declaration and verdict. The declaration alleges that the plaintiff was possessed in fee simple of a tract of land containing eleven hundred acres more or less, of which it gives the boundaries. It then alleges that the defendant entered into the said premises and unlawfully withheld from him (the plaintiff) the possession of two hundred acres in and adjacent to the waters of Hughes' and Bunnell's runs, being a portion of the tract of eleven hundred
538 acres. Our act, Code, ch. 135, *§ 8, requires that in ejectment the premises claimed shall be described in the declaration with convenient certainty so that from such description, possession thereof may be delivered. Now in this declaration, I think there is clearly a want of that convenient certainty. Supposing that it is meant that the defendant entered into the part only, the two hundred acres, of which he is alleged to withhold the possession (although it would seem that the entry was into the whole tract) yet the portion so withheld is not described with sufficient precision. It is "two hundred acres," and it is "in and adjacent to the waters of" the two runs named. But that there are runs known by those names is only inferentially alleged, and if there be such streams within the boundaries of the eleven hundred acres, it must still be left in doubt of what land "in and adjacent to" their waters possession is to be delivered in case of judgment for the plaintiff. I think therefore the description lacks sufficient certainty and precision and that if a demurrer had been put into the declaration, it should have been sustained. There was, however, no demurrer, and the defect might have been cured by a verdict which did ascertain the subject with proper certainty and precision. Beverley v. Fogg, 1 Call 484; Lovell v. Arnold, 2 Munf. 167; Bolling v. Mayor of Petersburg, 3 Rand. 563. But the verdict found is obnoxious to precisely the same objection that applies to the declaration. It finds for the plaintiff an

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estate in fee simple in the land in the declaration mentioned, without stating in terms whether it was the whole tract or the two hundred acres only, and if the latter was meant, without specifying the boundaries or referring to any plat on which it was designated or describing it otherwise than by reference to the declaration. There is therefore no more certainty and precision in the verdict than there is in the
539 declaration, and the defect in *the latter is not cured by the former. The judgment is according to the verdict, and they no more or better enable the officer to deliver possession of the subject recovered than the declaration itself.

I think therefore the court should not have rendered any judgment upon the verdict but should have set it aside and required the parties to plead de novo; and I am of opinion to reverse the judgment and remand the cause to the Circuit court with directions to set aside the verdict and the pleadings and to award a repleader.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

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540 *Dixon v. McCue & als.

July Term, 1858, Lewisburg.

1. **Executors—Power under Will to Sell Realty—Control by Court.***—Testator by his will directs his farm shall be kept for five years and cultivated by his widow for the support of his family, and longer if his executor thinks it will promote the interests of the family; and the executor is vested with power to sell at the proper time, say after five years. And as each child arrives at the age of twenty-one years, he or she shall have his or her share of his estate. The widow lives on the farm and cultivates it for five years, when the oldest child is within a few months of being twenty-one years old; and then the executor offers the land for sale. HELD: If it was not the positive duty of the executor to sell the land in time to pay the oldest child his share of the estate, the executor acting in good faith, and being of opinion that the interests of the family require a sale, and that opinion not disproved by the evidence, it would be an uncalled for and improper exercise of power in a chancellor's interfering and undertaking to substitute his discretion in the place of that of the executor.

2. **Will—Provisions for Wife—Dower—Election.†**—The principles applicable to the case of a widow as to the necessity of electing between her right of dower, and the provisions of her husband's will, are the same as those applicable to other persons.

3. **Same—Same—Same—When Election Necessary.†**—If the widow's taking dower in the real estate will clearly interfere with the provisions of the will, she must elect.

4. **Same—Same—Same—Election—Case at Bar.**—In the case above stated, though the widow kept possession of the land for the five years and cultivated it; and took a legacy of property to the value of five hundred dollars to aid her in carrying on the farm; still she having been under a mistake as to her rights under the will, will not be held to have elected to take under it; but may still take her dower.

David S. Dixon died in April 1847, having made his will, which was duly admitted to probate in the County court of Augusta. He left a widow and ten infant children. The second, third, fourth and fifth clauses of his will are as follows:

"Secondly. I devise that my wife
541 shall retain possession *of the farm for the term of five years after my decease, that the family be kept together, and the plantation managed by my wife in the best possible manner she can; that the family, including my aged mother, be maintained and supported from the proceeds of the farm, and the education of my children attended to and paid for out of the said proceeds. And in order that my wife shall have the means of thus conducting said farm, I desire and devise,

Thirdly. That my wife shall receive and retain out of my personal estate my negro man Dick, some domestic cloth and yarn, and such other articles besides, out of my estate at valuation or appraisement, as shall amount to the sum of five hundred dollars.

Fourthly. To effectuate my wishes and desires, I do hereby vest, in my executor (hereinafter to be named) full power and authority, at the proper time, say at the expiration of five years from the time of my decease (although I desire that my wife retain possession of the farm for a longer period, if my executor shall be of the opinion that her management has been judicious, and the interests of the family promoted by such retention); at the proper time, I say, my executor is vested with full power and authority to dispose of all my real estate, in fee simple, in as full and large a manner, in every respect, as I could myself do if living; and in effecting such sales, he shall adopt such mode and terms of sale as shall best promote the interest of the estate. And after such sale is effected, I give to my beloved wife, in addition to that herein devised to her, the sum of one thousand dollars, to be paid her by my executor out of the first payment for the real estate.

Fifthly. It is my desire, as heretofore expressed, that my wife shall keep the family together during the early period of the lives of the children, and that the proceeds of the farm, whilst under her
542 control, shall *go to the maintenance of the family, and to the education of the children: and after the sale of the real estate, as directed, that the interest accruing on that which shall remain, after paying the sum devised to my wife, shall be

*See monographic *note* on "Executors and Administrators."

†See principal case cited and approved in Rutherford v. Mayo, 76 Va. 117, 123: Gregory v. Gates, 30 Gratt. 83.

See also, monographic *note* on "Dower" (division VI, G) appended to Davis v. Davis, 25 Gratt. 587.

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applied in the same way as the products of the farm have been, namely, to the maintenance of the family, and the education of the children. And my anxious desire is, that my boys, when they arrive at a suitable age, shall be bound out, by my executor, to learn good trades: but should either of my sons prefer and desire an education, and in the sound discretion of my executor, he shall deem it advisable, then a part of his share of the estate may be applied to this purpose, and such sum shall be deducted from his share, when he shall arrive at the age of twenty-one years, at which time, or age rather, it is my desire that each of my children, sharing, and sharing alike, shall receive his or her fair proportion of the whole of my real estate."

He appointed Thomas McCue his executor, who qualified as such.

In April 1852 McCue advertised the farm for sale on the 29th of May; when Mrs. Dixon the widow filed her bill in the Circuit court of Augusta county, to enjoin the sale. She set out the provisions of the will, and stated that she had remonstrated with McCue, insisting upon the necessity there was, that she should retain the land to support the younger children, who could not be supported on the interest of their shares of the purchase money; whilst she must be separated from them. That she had managed the farm judiciously, and it was then in a better state of cultivation than it was at the death of her husband; and the interests of the family would be promoted by permitting her to retain possession of it. She denies that the executor is authorized under any fair construction of the will then to sell the land. Says that had she
543 not conceived *herself entitled, under the will, to retain the farm to enable her to raise her children, she would have renounced said will, and would have taken the share of her husband's estate to which she would have been entitled by law. The prayer of the bill was, that the plaintiff might be permitted to retain the farm and cultivate it as heretofore, and thus secure a support for herself and her children; and for an injunction; which was granted.

McCue answered the bill. He said he had advertised the sale of the land by virtue of authority vested in him by the will of his testator, and in the exercise of what he considers a sound discretion. That he does not think that the interests of the family of his testator will be promoted by permitting the plaintiff to retain longer possession of the land. That she barely supports herself and those of the children who are still with her. That the oldest child will be of age in a few months, at which time, according to the will, he will be entitled to have his share of the estate; and he asks, how is that share to be given him; or how is he to be compensated for the delay in receiving his portion, upon the idea that by such delay the rest of the family will be more comfortable. It was this view of the subject which influenced the respondent in determining the question left to his discretion. He may have erred, and he is prepared to acquiesce in any thing the court may hold to be right under all the circumstances. But it is a question in which the children were interested and ought to be heard.

In June 1852 there was a motion to dissolve the injunction; which was overruled. And the court directed the children to be made parties; which was done. Afterwards, in April 1853, the oldest son, having come of age in the previous year, answered the bill, insisting upon his right to have his share of the estate; and expressing the opinion that the true interest of
544 all *the children would best be promoted by following the plan indicated by the will of his father, viz: by selling the land and dividing the money, and putting the children to respectable trades. In the next year another of the children came of age, and answered to the same effect.

A great many witnesses were examined on the questions, whether the farm had been as well cultivated by Mrs. Dixon, since the death of her husband, as it had been in his lifetime; and whether or not it was the interest of the children that the land should be sold. Of course there were differences of opinion upon both points: though it was generally the opinion of the witnesses that the interest of the elder children would be promoted by a sale. It appeared that six of the children were put out from home; there remaining there only the four youngest.

The cause came on to be heard in February 1855, when the injunction was dissolved.

After the dissolution of the injunction the plaintiff filed an amended bill, claiming dower in the land, and also the provision made for her by the will out of the personal estate. This was contested by the executor and the elder children. They insisted that the provisions in the will in favor of Mrs. Dixon were in lieu of dower: and that she had accepted them, having had possession of the land for five years under the will; and having received the legacy left her out of the personal estate.

The cause came on again to be heard, in June 1855, when the court dissolved the injunction, which had been reinstated, and dismissed the bills. Whereupon Mrs. Dixon applied to this court for an appeal, which was allowed.

Fultz, for the appellant.
Baldwin, for the appellees.

545 *DANIEL, J. I have experienced no serious difficulty in coming to the conclusion that the appellant has wholly failed to make out a case on her original bill.

I am not prepared to say that the period had not arrived when to postpone any longer a sale of the farm would have involved a plain disregard, by the executor, of the testator's intentions.

The second, third and fourth clauses of the will, as also the first portion of the fifth

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clause, would seem to indicate a purpose, on the part of the testator, to leave it to the discretion of his executor either to sell the farm immediately on the expiration of the term of five years, during which the appellant was to have the possession and management of it, or to defer a sale thereafter as long as in his opinion the interest of the family would be promoted by its being retained in the possession of the appellant. But in the last member of the fifth clause, after expressing his "anxious desire" that his boys, on arriving at suitable ages, should be bound out by the executor, to learn good trades, the testator directs that if either one of them prefers an education, the executor, if he deems it advisable, is to apply a part of the share of such son in the estate to that purpose; such part to be deducted from his share, on his attaining the age of twenty-one years: "at which time or age (the will proceeds) it is my desire that each of my children sharing and sharing alike, shall receive his or her fair proportion of the whole of my real estate."

The will of the testator was proved and ordered to be recorded at the April term of the County court of Augusta, 1847, and the advertisement of the sale of the farm is dated the 28th of April 1852. The term of five years, during which the appellant had a right to hold the farm, independent of any consent on the part of the executor, had therefore expired. The bill of injunction filed by the appellant appears to
546 have *been sworn to on the 3d, and to have been filed on the 18th of May 1852. And in the answer of the executor, sworn to and filed on the 7th of June 1852, he states, that "the oldest child is (then) nearly of age, and will be of age within a few months; at which time, according to the will, he will be entitled to receive his share of the estate." And he asks, "How is that share to be given him, or how is he to be compensated for the delay in receiving his portion, upon the idea that by such delay the rest of the family will be rendered more comfortable?" "The property (he continues) is not increasing; no profits are made. It was this view of the subject which influenced the respondent in determining the question left to his discretion." As to the fact, stated by the executor, in respect to the age of the oldest child, I take it there was no dispute. In truth, in her amended bill filed on the 27th of January 1853, Mrs. Dixon admits that Franklin Dixon, the oldest son, came of age in the month of September preceding.

In the testimony of the numerous witnesses who were examined as to the management of the farm by Mrs. Dixon, and as to whether the interests of the family would probably be promoted by her being allowed to retain the possession for a longer period, there is much conflict. Several of them, who seem to be men of observation and experience in such matters, think that the farm has been judiciously managed, and express the decided opinion that the interests of all the children would be promoted by Mrs. Dixon's continuing to retain the possession and management. On the other hand, several others of them, whose means of forming a judgment, apparent candor in stating their reasons, &c. would seem to entitle their views of the matter to an equal degree of consideration, regard the management of the farm, of the children, and of the concerns and interests of the family, *by Mrs. Dixon, as in many respects wanting in proper judgment, and give it as their opinion that the interests of all the parties concerned would be best promoted by allowing the executor to proceed to an immediate sale; whilst there are yet others, apparently equally worthy of credit, who, seeing no material difference in the management of affairs by Mrs. Dixon, from that pursued by her hubsand in his lifetime, think that the interests of the children grown and of those nearly grown, would be promoted by a sale at once, and that the interests of the younger children would be best cared for by allowing Mrs. Dixon to retain the management and apply the proceeds of the farm to supporting and rearing them; as had been done in the case of the older children.
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The charge in the bill, that the executor, in determining to make a sale of the farm, was prompted by a desire to advance his own pecuniary interest, rather than by a regard to the interests of the family, derives no support or countenance whatever from the evidence; and there is an entire absence of any thing to show that his conduct was actuated by any improper bias, or wish to advance the interests of the older children at the expense of Mrs. Dixon and the younger children.

In such a state of things there would appear, to my mind, to be a strong semblance, if not of usurpation, at least of uncalled for and improper exercise of power, in a chancellor's interfering and undertaking to substitute his discretion in the place of that of the executor.

As already intimated, it would require a very liberal interpretation of the will in favor of the pretensions of the appellant, to hold that the matter of proceeding to make a sale of the farm was, at the time of the filing of the bill, any longer optional with the executor, and had not become, by
548 reason of the approaching *majority of the oldest son, a peremptory duty. And if this difficulty were out of the way of the appellant, it seems to me quite clear that the powers with which the testator designed to clothe the executor, if not of a character purely discretionary, resting wholly on opinion and judgment, and therefore belonging to a class of powers over which courts of equity generally disclaim all control, at least partake so strongly of that character as to make the exercise of such control dependent upon its being shown that the executor was proceeding to act not upon an honest judgment and a sound discretion, but upon some fraudulent or improper motive, or clear mistake of duty.

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This has not been shown. I see nothing in the case from which to infer that the executor has not been governed by a sincere, impartial and just regard to the interests of all concerned. And I think that the Circuit court properly refused to stay a sale any longer, on the grounds taken by the appellant in her original bill.

Several questions arising upon the amended bill, remain to be considered.

The first of these is: Has Mrs. Dixon, upon a proper interpretation of her husband's will, a just claim to the provisions therein made for her, and also a right to have dower assigned her in his estate?

The general principles in reference to which this question must be considered, are few and well ascertained, notwithstanding the precedents disclose much apparent conflict in the opinions of judges engaged in the task of applying those principles to the special facts and circumstances of particular cases.

The cardinal doctrines upon the subject are clearly and concisely stated by Vice Chancellor Kindersley, in the case of Gibson v. Gibson, 17 Eng. L. & E. R. 349. The first principle (he says) is, that the
549 doctrine of *election is founded on the same reasons and governed by the same rules when applied to a widow claiming dower, as when applied to any other case. The second proposition, as applicable to all cases, is, that a person, who is entitled to any benefit under a will or other instrument, must, if he claims that benefit, abandon every right or interest the assertion of which would defeat, even partially, any of the provisions of that instrument. And applying this to the case of dower, the doctrine is, that if the testator has made such a disposition of his real estate, as that the assertion by the widow of her right to dower would prevent that disposition taking effect as the testator intended, then she must elect to abandon either her dower, or the benefit given her by the will. The third proposition is, that in no case is a person to be put to an election, unless it is clear that the provisions of the instrument, under which he is entitled to any benefit, would be, in some degree, defeated by the assertion of his other rights. And therefore, in the particular case of dower, unless it is beyond reasonable doubt that the assertion by the widow of her right to dower would prevent the giving full effect to the testator's intention, the widow shall not be put to her election. It is not enough (he continues) to say that upon the whole will it may fairly be inferred that the testator intended his widow should not have her dower; in order to compel her to elect, the court must be satisfied that there is a positive intention, either express or clearly implied, that she is to be excluded from dower. He adds, as a fourth proposition, that the intention to exclude the widow from dower must be apparent on the face of the will itself.

To the extent of the first three propositions, as I understand them, the doctrine upon the subject is the same in Virginia as in England. The fourth proposition, however, restricting the search for the
550 testator's *intentions to the face of the will (whatever may be the state of the law upon that subject in England) has been so far modified in this state by our statute and the decisions of our courts as to allow the circumstances of the testator and the relative situation of the parties to be referred to as evidence, in all enquiries touching the true interpretation of the will. Ambler & wife v. Norton, 4 Hen. & Munf. 23; Herbert and others v. Wren, 7 Cranch's R. 370.

The rule with us in respect to the admissibility of extrinsic evidence to explain a will generally, as stated by Judge Lee, in the case of Wootton v. Redd's ex'or, 12 Gratt. 205, is, that in expounding wills, "extrinsic evidence may be resorted to for the purpose of showing the situation of the testator and the state of his family and of his property at the time of making his will." And he adds, that "generally, evidence may be received, as to any facts known to the testator which may reasonably be supposed to have influenced him in the disposition of his property, and as to all the surrounding circumstances at the time of making the will."

There are dicta of English chancellors to the effect that, in order to put the wife to her election, it must appear from the will that her right to dower was present to the mind of the testator, and that his dispositions were made in reference to it, and with a purpose to exclude it. And there are expressions in the latter part of V. C. Kindersley's statement of his third proposition, which, if taken alone, would seem to countenance such an idea. But when we look to his whole statement, I think it quite clear that he meant to affirm nothing further on that head than what was said by Lord Alvanley in French v. Davies, 2 Ves. jr. R. 572, viz: that the testator must appear to have the wife's rights in mind, and mean to bar her, or that what she demands is repugnant to the disposi-
551 tion. This *idea of the necessity of a presence of a wife's rights to the mind of the testator, was urged by counsel in the case of Parker v. Sowerby, 27 Eng. L. & E. R. 154, but was rejected: the chancellor observing that to raise a case of election against a wife provided for by the will, nothing more was required than that it should be apparent upon the will that the intention of the testator was to dispose of his property in a manner which was inconsistent with the right to dower.

It has been frequently said by learned judges and law writers that the implication which puts the widow to her election, must be a clear and necessary one.

Dangan, Ch., in the case of Bailey v. Boyce, 4 Strobh. Eq. R. 84, whilst stating the law very strongly in favor of the rights of widows, still thought it proper to explain what he understood and intended by a necessary implication. "There is (he s

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of course some latitude here as to what is a necessary implication or inference. A necessary implication or inference arising on the face of a will or deed, I apprehend, unless words have lost all certainty, means a construction the converse of which would be unreasonable, far-fetched and forced." And it is, I take it, in the sense of this definition that expressions of the kind have been usually employed.

In saying in the case of Higginbotham v. Cornwell, 8 Gratt. 83, that "the conclusion against the claim of the widow ought to be as satisfactory as if it were expressed," Judge Baldwin has, as I humbly conceive, stated the doctrine somewhat too strongly. A rule thus rigid, whilst it formed no necessary foundation for the judgment of the court in that case, would, in my opinion, come in conflict with decisions in numerous cases which have been too long and too generally recognized as precedents, to allow of dissent or doubt in respect to their authority now. There are comparatively very few of the reported
552 cases, wherein implications *of the testator's intentions have prevailed in putting the widow to her election, in which it would be truly said that the conclusion against the claim of the widow was as satisfactory as if the testator, in the very terms of the devise, had expressed an intention to exclude it. And I think it fairly results from the authorities, that whenever the inference against the widow's right is clear beyond reasonable doubt; whenever the implications against her are so strong, that, to defeat them, resort must be had to a forced, far-fetched or unreasonable construction of the will, a case is made which puts her to her election.

The case of Wiseley v. Findlay, 3 Rand. 361, is cited in the petition for the appeal as authority for the propositions, that a devise by a husband to his wife of his whole lands for years, even if expressly declared in the will to be in lieu of dower, would not, though she took the lands under the will, be such a jointure as could bar her right of dower. And that no provision made for her in her husband's will, in personal estate, though accepted, can bar a widow of her dower in his real estate. On a reference to the case it will be seen that no such propositions were decided by the court; though it is true that dicta to that effect were made by Judge Green in the course of his opinion. Judge Tucker, in vol. 1 of his Commentaries, at p. 74-5, remarks at some length on the case of Wiseley v. Findlay; and at p. 75, he says, "It is very certain that in that case, the provision being by will, it was no absolute bar, if the wife chose to renounce it; which she might have done, notwithstanding more than a year had elapsed from her husband's death; as the act requiring such prompt renunciation did not apply to her dower right. Still we are not precluded, I presume, by the opinion of the court in that case, from giving to the act a construction which would make even personalty a bar to dower, when properly settled by way
553 *of jointure. Thus, if before marriage a woman of full age enters into articles with her intended husband, by which ten thousand dollars in stock are settled upon her in lieu of dower, I should have no doubt it would operate an absolute bar under the broad terms of our act, unless indeed they shall be narrowed down by judicial legislation. See Ambler v. Norton, 4 Hen. & Munf. 23. And so, though a devise of ten thousand dollars either expressly or by averment in lieu of dower, is no absolute bar (since the wife is not bound by the will of her husband), yet it will so far operate as a jointure under the act, that she will be compelled to make her election and relinquish either the dower or the bequest." At p. 75-6, he observes further, "To constitute the jointure an absolute bar, the act also requires that it must take effect immediately on the husband's death, continue during her own life, and be determinable only by such acts as will forfeit her dower at common law. Yet observe, if it wants these requisites, the widow cannot take both. If she demands her dower, the estate conveyed in lieu of it shall cease." The first of the propositions thus stated by Judge Tucker, has in effect been recently decided by this court in the case of Findley's ex'ors v. Findley, 11 Gratt. 434; on which a wife was held to be barred by an agreement in contemplation of marriage, wherein the husband covenanted and bound himself, his heirs, &c. to pay her, if she survived him, certain sums of money, to be received by her in bar of, and in full compensation for her dower. The other propositions stated by him are, I think, equally just and correct. The question in such cases, whether the wife shall be put to her election, does not turn on the character of the estate, as whether real or personal, in which the provision is made for her. The true enquiries are, Is it manifest that the provision was intended to be in lieu of dower? Or, Is it clear that the claim of dower conflicts with
554 *the devise to another, of the subject in which the dower is claimed? As has been already intimated, however, whilst the general principles underlying questions of the kind, can no longer be regarded as subjects of serious controversy, yet, in the application of the principles to the cases, much conflict in the decisions will be found to exist. Not unfrequently, cases in which the implications of the testator's intention to exclude the claim of dower have been adjudged sufficiently strong to put the widow to her election, are found to be distinguished from others where the opposite result has been arrived at, by features of little mark or prominence. And in some classes of cases, the conflict of decisions is direct, the opposing judgments growing out of the different degrees of weight allowed by different judges to facts of the same or a like character. Thus, in numerous cases it has been decided, and may be regarded as clearly settled by the

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English decisions, that when a testator merely devises all of his lands to be sold and a part of the proceeds to be paid to his wife; or where, after making bequests or devises to his wife, he devises the residue of his estate or the balance of his lands to others; no such implication arises of an intention on the part of the testator to exclude the widow's claim to dower in such residue or balance of the real estate, as will put her to her election. It is said that the claim to dower does not, in either of such cases, come plainly in conflict with the intentions of the testator in respect to other objects of his bounty; that except where he has plainly indicated a purpose to do so, it is not to be presumed that he has designed to give away rights that do not belong to him; that such devises do not in terms import any thing more than all of the testator's interest in the subjects given.

In the case of Foster v. Cook, 3
555 Brown. C. C. 347, *Lord Thurlow met the argument, that by the devise of "all my estates," the testator meant to exclude the claim of the widow, with something of irony in the remark—"Because the testator gives all his property to the trustees, I am to gather from his having given all he has, that he has given that which he had not."

In the case of Gibson v. Gibson, already cited, V. C. Kindersley, after citing the foregoing observation, pursues the answer to arguments of a like character, with a few additional pointed remarks. "When it is recollected (he says) that it is only because the lands are his that the wife is entitled to dower out of them at all, it would be strange if his describing them as his should have the effect of excluding her from her right to dower. She is entitled to dower only because the lands are his; and the argument is, that because he describes them as his he meant to deprive her of dower." Still, upon the question whether the widow is put to her election by an annuity payable out of all the testator's estates or lands, the decisions have not been uniform. There is probably a preponderance against putting her to an election in such cases; but there are many well considered decisions the other way. And yet it is not easy to perceive any material difference, in the reasoning applicable to such cases, from that which was received as so satisfactory in the class of cases first mentioned.

And yet again, in cases where the testator has devised all his estates, or all his lands, or the residue of his estates or lands, to trustees, with power to lease, the English chancery court, after much discussion and some conflict of decisions, seems now to have come to the settled conclusion that the wife, in such cases, if provided for to any extent by the will, must make her election. Kindersley, V. C., in the case of Parker v. Sowerby, 21 Eng. L. & E. R. 39, said, that there was a series of cases which decide that although a devise of
556 *all a testator's estates is no proof that the testator did not mean his wife to enjoy dower also, inasmuch as all his estates meant only what was his own to devise, yet a devise upon trust to manage a farm, or the giving a power to lease lands, had been considered indicative of an intention to deprive the widow of her rights, which, in the absence of such a power or trust, she would be entitled to claim. The cases on this subject (he said) were too numerous and uniform, and their authority too high to allow him to hold, at the present day, that the principles to be deduced from them were not the established law. The case before him, he further observed, came within the authority which had been cited, subject, however, to the observation, that the right to dower arose out of a particular freehold estate, while the benefit the widow received was out of the personal estate, and from an annuity charged on an estate different from that out of which dower was claimed. Now, the rule (he said) was this: "If a testator devises any portion of his real estate in such a manner that the claim of dower would defeat that intention, then the widow is put to her election, if there were even the slightest benefit—a gold watch for instance—conferred upon her by the same instrument." And his decree was in accordance with the foregoing views.

In the case, however, of Warbutton v. Warbutton, 23 Eng. L. & E. R. 415, coming on the year after (1854), before Stuart, V. C., he made a directly opposite decree. In the course of his opinion he said, that the power of leasing might be a strong circumstance, but that it was not enough to put the widow to an election: and he endeavored to show, that in Parker v. Sowerby, the opinion and decree had proceeded from a misapprehension of the decisions on which they were founded. This decree in Warbutton v. Warbutton induced the defeated party in the case of Parker v.
557 Sowerby *to take an appeal in that case. In the Court of appeals, consisting of the Lord Chancellor Cranworth and Vice Chancellors Turner and Knight Bruce, the subject was fully discussed, and the entire line of authorities examined and reviewed. The views of V. C. Kindersley were fully sustained, and his decree affirmed by a unanimous court.

There is still, however, a further class of cases, which, as I conceive, bears more directly on the one before us than any to which reference has yet been made. In the case of Miall v. Brain, 4 Madd. R. 68, where the testator devised his estate to trustees, with directions to permit his daughter to use, occupy and enjoy a certain freehold house for her life. The vice chancellor held, that the testator contemplated for his daughter the personal use, occupation and enjoyment of the house, which was inconsistent with the widow's right to dower therein. And the widow was put to her election.

A like decree was made in the case of Butcher & wife v. Kemp, 5 Madd. R. 61.

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The facts of the case are stated with sufficient detail, in the opinion of the vice chancellor, to show its application to this. "The testator (he said) directs that his trustees shall stand possessed of the farm, which he describes as containing about one hundred and thirty-six acres, during the minority of his daughter, upon trust to carry on the business thereof, or to let the same upon lease for her benefit, as they should think best; and for that purpose, gives them all his stocks, cattle and implements on the farm. The question is, whether the testator can be considered as speaking of his interest in the farm subject to his widow's claim of dower. His plain intention is, that his trustees should, for the benefit of his daughter, have authority to continue his business in the entire farm which he himself occupied, consisting of about one hundred and thirty-six
558 acres; and *this intention must be disappointed, if the widow could have assigned to her a third part of this land." Like views prevailed in the case of Roadley v. Dixon, 3 Cond. Eng. Ch. R. 356. The analogy between that case and the one under consideration, will be seen in the following brief extract from the opinion of the lord chancellor: "After devising his real estate generally, the testator adds, 'And upon further trust, that they my said trustees do and shall, during the minority of my said son, occupy and manage the farm now in my own possession, employing a proper person as bailiff to superintend the same.' The farm in the testator's own possession was the farm at Searby; and it formed a very considerable portion of the whole of the property which he held in Searby. It was the intention of the testator, therefore, that that farm at Searby should be occupied and managed by his trustees, and that they should take possession and hold possession of it. To assign that part of the property for dower, setting it out by metes and bounds, would be inconsistent with such an intention."

The case of Birmingham v. Kirwan, 2 Sch. & Lef. 444, to the extent of the opinion and decision respecting the house and "demesne of 170 acres," in which dower was claimed, may be ranged in the same class of cases. See also Taylor v. Taylor, 20 Eng. Ch. R. 727; and Lowes v. Lowes, 26 Eng. Ch. R. 501.

Testing this case by the foregoing precedents, I do not think that the claim of the widow, to its whole extent, can be justly sustained. The directions in the second and third clauses of the will, that the widow shall retain possession of the farm for the space of five years after the testator's death, and manage it in the best possible manner: that the family, including the testator's mother, shall be all kept together and maintained and supported from the proceeds of the farm: that the education of the children shall be
559 *attended to and paid for out of said proceeds: and that, in order that the widow shall have the means of thus conducting the farm, she shall receive and retain out of the personal estate the negro Dick and other personal property, to the amount of five hundred dollars in value, all tend to show that the testator intended that the farm in its entirety should be held by the widow, and enjoyed by her and the family as a home: that the farm as one entire undivided concern should be cultivated, controlled and managed by her; and that the proceeds of the whole of it should constitute a fund in her hands to be by her appropriated to the support of herself and the family, and the education of the children. When with these intrinsic evidences of intention we couple the facts that the children were ten in number, and several of them of tender years, and that the farm was a small one, the implication of the testator's intention to exclude dower in the farm during the five years and until the executor, in the exercise of his discretion, should proceed to a sale, becomes so strong as to admit of no reasonable doubt. We may I think safely conclude (as was said by the chancellor in Birmingham v. Kerwan), in respect to "the house and demesne" in that case, that the testator intended the widow to retain possession of the whole farm "under a right created by the will, and not part of it, under a right which she had previously had, and part under the will." She could not, during the space of time above mentioned, have taken a third of the farm to her own exclusive use, without breaking in upon a scheme in which others had, under the will, a beneficial interest. The children had an interest, an essential interest, in the proceeds of the farm. Their support, maintenance and education are not referred to, and treated, by the testator merely as motives or inducements
560 leading to the devise to the *widow, but are coupled with it as a trust and imposed upon it as a charge.

No doubt or cloud is thrown over the indications of the testator's intentions, to be collected from the second and third clauses of the will, by the language which he has employed, in the fourth clause, in directing the sale of the real estate. If this direction, and the further direction to pay the widow one thousand dollars out of the proceeds of the sale, constituted the only provisions in which the testator set forth the position which he intended her to occupy in respect to his real estate, the rights which he wished her to have therein after his death, there would be room to argue that the case came within the influence of the first class of decisions to which reference has been had. In such a state of things, it might be said that the expression, "my executor is vested with full power and authority to dispose of all my real estate in fee simple, in as full and large a manner in every respect as I could myself do if living," did not show a clear purpose to bar the widow of her dower, inasmuch as the testator, "if living," would have no "power or authority" to dispose of her right thereto; and that hence no conflict could

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arise from the widow's claiming both her dower and the thousand dollars. But, as we have seen, such is not the case. And there is no rule which requires us to cull out from the will the expressions most favorable to the pretensions of the widow, and, rejecting the explanations furnished by other portions of the will, to treat such expressions as the controlling indications of the testator's intentions. The provisions which the testator has made for his wife and children out of the products of his real estate for the five years after his death, and out of the proceeds of the sale thereof after the expiration of that period, are closely connected parts of one entire
561 scheme. And when we *read those provisions in the connection in which they were written, and in the light of the circumstances by which the testator was surrounded; when we see that the farm on which he lived constituted the whole of his real estate; that the provision which he makes for his widow out of it is liberal, having regard to its value; and that the shares which the children are to receive respectively out of the proceeds of the sale, after the payment of the one thousand dollars to the widow, constitute, at best, but very scanty provisions for their support and education and outfit; the ambiguity of expression in the clause in question is cleared away, and we are led to a conclusion, satisfactory beyond all reasonable doubt, that the testator intended his wife to have no other rights in the subject than those conferred upon her by the will.

I concur therefore in the opinion of the Circuit court, that the widow is not entitled to dower in the land, and at the same time to the legacy of one thousand dollars given her by her husband's will out of the proceeds of the sale of the land. But I do not think she has done any thing which deprives her of the right to make her election now. Her retaining possession of the farm after her husband's death, does not of itself furnish conclusive evidence of her having elected to accept the provisions made for her by the will. Her possession down to the period of the advertisement of the farm for sale by the executor was, unexplained, conduct of an equivocal character, susceptible of reference, either to her rights as the widow of the testator, or to rights conferred upon her by his will. No state of things has grown out of her action in the matter, to disturb which now, would work wrong or injury to others. It is true, that in her bill she discloses the fact that in retaining possession she had been acting under her husband's will, but under her husband's will, as she construed and under-
562 stood it. She states in the *bill, that had she not conceived herself entitled under the will to retain the farm to enable her to raise the children, she would have renounced the will, and claimed that share of her husband's estate to which she would have been entitled by law. It is true we have already expressed our concurrence with the judge of the Circuit court in the opinion that the construction of the will for which she contends is not the true one. But we have no reason for supposing that she did not in fact interpret the will as she says she did; or that she did not in good faith shape her conduct by such interpretation. I think we shall act in thorough accordance with the decisions on the subject, in holding that the widow has not yet made an irrevocable election. See Streatfield v. Streatfield, Leading Cases in Eq. 65 Law Lib., notes at p. 271, 289; Upshaw v. Upshaw, 2 Hen. & Munf. 381, and Taylor v. Browne, 2 Leigh 419.

Upon the whole, I am of the opinion to reverse the decree, and remand the cause for further proceedings in accordance with the principles herein declared, and with liberty to Mrs. Dixon to make her election beween her dower in the land and the legacy of one thousand dollars, which the executor is directed to pay her out of the proceeds of the real estate.

The other judges concurred in the opinion of Daniel, J.

Decree affirmed in part, and reversed in part.

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563 ***Baltimore & Ohio R. R. Co. v. Gallahue's Adm'rs.**

July Term, 1858, Lewisburg.

Attachment—Garnishment—Case at Bar.*—The estimates of work done by a contractor for a railroad company, are made up to the 20th of each month, when they are considered due, though not paid for some days afterwards. As the price of the work done by the contractor after the 20th may be forfeited to the company for several causes, before the 20th of the next month, no debt is due from the company to the contractor until the 20th arrives: and therefore an attachment being served on the company on the 14th of the month, there is nothing then in its hands due to the contractor which may be attached, though in fact no forfeiture occurs, and on the following 20th of the month the amount of the estimate may be due.†

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*See principal case cited and approved in Strauss v. R. R. Co., 7 W. Va. 375; Wagon Co. v. Peterson, 27 W. Va. 336.

The principal case was cited in Joseph v. Pyle, 2 W. Va. 452, 453, as to the form of the judgment.

†Code, ch. 151, § 12, p. 603. "The plaintiff shall have a lien from the time of levying of such attachment, or serving a copy thereof, as aforesaid, upon the personal property, choses in action and other securities of the defendant against whom the claim is, in the hands of or due from any such garnishee on whom it is so served, and on any real estate mentioned in an endorsement on the attachment or subpœna, from the suing out of the same."

§ 17. "When any garnishee shall appear, he shall be examined on oath. If it appear, on such examination, or by his answer to a bill in equity, that at or after the service of the attachment he was indebted to the defendant against whom the claim is, or had in his possession or control any goods," &c., "the court may order him to pay the amount so due by him," "to such person as it may appoint as receiver," &c.

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This is the sequel of the case reported 12 Gratt. 655. When the cause went back the parties agreed the facts. From this it appears, that the course of business in respect to the contracts between the Baltimore and Ohio Rail Road Company and the defendants in the action, P. and F. C. Crowley, was for the company through its engineers to make the monthly estimates of work done on the 20th day of each month, and payments upon these estimates were
564 made *about the 10th of the next month. The estimates made on the 20th of December 1851 were paid by the company prior to the service of the attachment; which was served on the 14th of January 1852. The estimates made on the 20th of January 1852 were also paid by the company, but after the service of the attachment, and the amount of work done by P. and F. C. Crowley between the 20th of December 1851 and the 14th of January 1852, and which was embraced in the estimates of the 20th of January, after deducting one-fifth according to the terms of the contract, was two thousand one hundred and fifty dollars. The contracts under which the work was done, were set out at length; but the provisions of them which affect this case are stated by Judge Samuels in his opinion.

It was agreed that if the work done between the 20th of December 1851 and the 14th of January 1852, was liable to the attachment; or if the attachment was a lien upon the earnings of said Crowleys, under said contracts up to the end of two months subsequent to the 14th of January 1852, there should be a judgment for the whole amount of the plaintiffs' debt. But if the attachment did not operate as a lien upon the earnings of said Crowleys between the 20th of December and 14th of January, nor upon any earnings subsequent to the 14th of January, then the judgment in favor of the plaintiffs should be for three hundred and nine dollars and seventy-six cents, the amount admitted in the answer of the company, but with costs to the company.

Upon this agreed state of facts the court rendered a judgment against the Baltimore and Ohio Rail Road Company for one thousand and sixty-six dollars and seventy-nine cents, and interest, the whole amount of the plaintiffs' claim. Whereupon the company applied to this court for a supersedeas; which was allowed.

565 *Russell, for the appellant.
Haymond, for the appellees.

SAMUELS, J. When this case was formerly before the court, it was decided, 12 Gratt. 655, that the plaintiff in error was such a party as might be a garnishee under process of attachment.

It is alleged by the plaintiff's counsel in this court, that the Circuit court erred at its June term 1857, and also at a previous term, in refusing leave to the garnishee to file an amended answer to the attachment. The decisions of this court have settled the practice that a party alleging error in the ruling of a Circuit court, must show the error on the face of the record; that the court here will intend that the Circuit court decided correctly, unless the contrary appears. In our case the record shows the fact that at some term prior to that of June 1857 the leave had been refused; but why the leave was asked, or what support was offered to sustain the application, is not shown. At June term 1857, when leave was again asked and refused, the cause was ready for trial; and if an amended answer had been received, it would have presented a new issue, and might have caused a delay of the trial. In this state of the case, it was incumbent on the plaintiff to have shown an excuse for its delay in asking leave; and this was not done nor attempted to be done. It is unnecessary, however, for any purpose in this case, to decide whether the amended answers should have been filed, inasmuch as the parties have themselves agreed the facts of the whole case, thereby dispensing with the necessity for an answer, issue, or trial by jury. The case, as it now stands, presents only a question of law as to the time and state of facts at and under which the garnishee became liable, if liable at all, to the attaching creditor, and the amount of that liability.

566 *The parties, in their agreement of facts, set out at length the contract between Crowley (the defendant in the attachment) and the garnishee (the plaintiff here). This contract, amongst other things, provides in substance that if Crowley should not well and truly from time to time comply with and perform all the terms therein before stated and stipulated, on his part, in manner and form and within the time thereinbefore mentioned; or in case it should appear to the chief engineer that the work did not progress with sufficient speed; or in case of interference with said work by legal proceedings, the chief engineer should have power to annul the contract, if he saw fit to do so; of which three days' notice in writing should be given to Crowley, when the agreements on the part of the company, and every clause thereof, should become null and void; and the unpaid part of the value of the work done should be forfeited by the said Crowley to the use of the company. The parties further agree, that if the value of work between December 20th, 1851, and January 20th, 1852, under the contracts, is liable to the attachment, then the attaching creditor should recover of the garnishee the full amount of their debt, interest and costs: so in regard to work done to the end of two months subsequent to 14th January 1852. But if the attachment did not operate as a lien upon the earnings between 20th December 1851 and January 14, 1852, or upon earnings after January 14, 1852, then the judgment in favor of the attaching creditor should be rendered for three hundred and nine dollars and seventy-six cents, but with costs in favor of the garnishee.

In the case of the Baltimore and Ohio R. R. Co. v. McCullough & Co., 12 Gratt. 595,

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this court affirmed the general principle that the terms of a contract, such as that in our case, must be complied with before a debt can arise out of it. In that case, the terms that a release should be ex-
567 ecuted cotemporaneously with *the receipt of money estimated as having been earned, not having been complied with, the court held that the contractor himself, or his creditors standing in his place, could not enforce payment of the money. In our case, the performance of labor by Crowley for the garnishee, after 20th December 1851, and before 14th January 1852, did not of itself put the garnishee in the condition of debtor to Crowley; for by the terms of the contract, if Crowley should not well and truly, from time to time, comply with and perform all the terms thereinbefore stated and stipulated, on his part, in manner and form, and within the time therein mentioned; or in case it should appear to the chief engineer that the work did not progress with sufficient speed; or in case of interference with said work by legal proceedings, the chief engineer should have power to annul the contract, if he saw fit to do so, of which three days' notice in writing should be given to Crowley, when the agreements on the part of the company, and every clause thereof, should become null and void, and the unpaid part of the value of the work done should be forfeited by Crowley to the use of the company. Thus, at the time of service of the attachment, 14th January 1852, it was uncertain and dependent upon future events, whether any amount whatever would be due for labor performed between 20th December and 14th January; nor is the case changed by the fact that the contract continued in force and was complied with by Crowley, and that on the 20th January the garnishee became indebted in the amount estimated as due for labor from 20th December to 20th January. This debt was of the latter date only; it cannot be divided into parcels, and one parcel held to be due as of the 14th, and the other of the 20th January; the debt was entire, and was wholly dependent upon events which could not be known before 20th January. The same reasons show
568 that Crowley's *earnings, at any time after 20th January, could not create a debt as of the 14th January, the time of serving process.

The statute, Code of 1849, ch. 151, § 1, p. 600, makes "debts due" the subject of attachment; § 7 makes service by copy on a party "indebted to the defendant," a sufficient service; § 9 directs the officer to return with the attachment the names of persons "owing debts to the defendant;" § 11 prescribes the mode of proceeding under attachments in equity, whereby "debts due or to become due" to the defendant, are made the subject of attachment, to be executed in the same manner and to have the same effect as at law; § 12 creates a lien on attached effects, which lien under the obvious construction of the statute is the same, whether created under process of law or equity. This lien can affect only such subjects as exist when the attachment is levied or served; it is impossible to conceive the existence of a lien without a subject. The judgment or decree of the court satisfies the lien by applying the subject in the hands of the garnishee to the debt due the attaching creditor. The sections of the statute above referred to subject a "debt" to process of attachment; such debt may be due and payable at once, or it may be due and payable at a future time; but to constitute a debt, there must be a time of payment. It has been said, however, that § 17 extends the operation of the attachment to a subsequent time, and to debts not in existence at the time of levying or serving the attachments, but subsequently coming into being. This construction seems to be at war with the general principles of law regulating the liability of property to pay debts; if this be a case of the kind, it is perhaps the only case in which a subject is bound by process not levied or leviable on it, and this after the return day of the process. Drake on Attachment, ch. 26, § 555 to 559, inclusive.

569 *In this, a common law case, we can decide only according to the law governing common law courts: if a different rule shall prevail in chancery courts, it must be so decided in a case before such court.

I am of opinion to reverse the judgment of the Circuit court with costs, and to enter judgment against the plaintiff, the garnishee, for three hundred and nine dollars and seventy-six cents, the amount confessed to be due to Crowley, but with costs of the Circuit court to the plaintiff.

The other judges concurred in the opinion of Samuels, J.

Judgment reversed.

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570 *McCann v. The Commonwealth.

July Term, 1857, Lewisburg.

(Absent LEE, J.)

Criminal Law—Discharge by Examining Court—Effect on Subsequent Prosecution for Same Offence.*—A discharge by an examining court, of a prisoner committed on a charge of felony, is not a bar to another prosecution for the same offence, except when the record shows that the discharge was upon an examination of the facts charged.†

This was an indictment in the Circuit court of Harrison county, against William M. McCann for a felonious and malicious assault upon Cyrus Ross with stones, with intent to maim, disfigure, disable and kill. There were three counts in the indictment, but they were substantially the same.

*See principal case cited in Ward v. Reasor, 98 Va. 404, 36 S. E. Rep. 470.

†Code, ch. 205, § 11, p. 765. "If the court in which a person is examined as aforesaid, discharge him, he shall not thereafter be questioned or tried for the same offence."

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When the prisoner was set to the bar, he moved the court to quash the indictment, on the ground that he had not been examined for the offence charged therein. This motion the court overruled; and upon comparing the record of the trial before the examining court with the indictment, there does not seem to have been any ground for the motion.

The prisoner then pleaded a discharge by the examining court; to which the attorney for the commonwealth replied, "nul tiel record:" and so the court held. The record produced showed that the prisoner had been brought before the County court for examination upon the same charge, in August 1855, and the case was regularly continued from term to term, until the October term; when the entry on the record is,
571 *"Ordered that this case be dismissed." This entry bears date the 8th of October; and on the 11th of the same month he was again arrested and committed by a justice for examination; and at the November term of the County court, he was examined and sent on for trial to the Circuit court; he having set up the former dismissal of his case, which was overruled.

On the trial the jury found the prisoner not guilty of the felony charged in the indictment; but guilty of an assault and battery on said Cyrus Ross; and they assessed his fine at one hundred dollars. And thereupon the court rendered a judgment against him for the fine and the costs of prosecution; and for twelve days' imprisonment in the county jail; and required him to find security in the penalty of one thousand dollars to keep the peace and be of good behavior for one year. From this judgment McCann applied to this court for a writ of error; which was allowed.

Robert Johnston, for the appellant.
The Attorney General, for the commonwealth.

DANIEL, J. The first bill of exceptions founded on the refusal of the Circuit court to quash the indictment, because there had been no sufficient examination of the accused by an examining court, is not mentioned either in his petition or in the written argument of his counsel. I have, however, carefully looked to the evidence adduced upon the hearing of the motion, and I have been wholly unable to discover any ground for the allegation of such insufficiency. The examination seems to have been duly heard at a regular term of the County court, the term at which the accused was by his recognizance required to appear. There seems to be an exact correspondence between the certificate of the justice who admitted the accused to bail and the record of
572 the examination by the County *court in respect to the nature of the offence; which is set out in each of them in plain, sufficient and unambiguous terms. And whilst the indictment contains three counts, yet they each charge the same felony; a felony identical with that for which the accused was examined, and remanded to the Circuit court for trial.

The true ground on which the accused rested his defence in the Circuit court, and on which he seeks here to reverse the action of that court, is, doubtless, that presented in his two special pleas. In each of these pleas he seeks to set up the order made by the examining court in October 1855, as a discharge—a discharge exempting him from all liability to be thereafter questioned or tried for the same offence. The order in question is briefly as follows: "Ordered, that this case be dismissed."

It is conceded that the effect of the order turns upon the true construction of the 11th section of chapter 205 of the Code of 1849, which declares, that "if the court in which a person is examined as aforesaid, discharge him, he shall not thereafter be questioned or tried for the same offence."

Reading this section by itself, the construction would seem to be a natural, if not a necessary one, that the discharge therein mentioned is a discharge consequent upon an examination of the prisoner by the court. And when we connect it with the preceding provisions of the chapter, the construction appears still more obvious. The sections previous to the 6th having declared in what cases examinations are to be had, how the courts which are to make such examinations are to be composed, &c., that section provides, that "upon such examination, if it appear to the court that there is not probable cause for charging the accused with the offence, he shall be discharged." Adopting the course pursued by the attorney general, in his printed argument, of combining the two sections (the
573 *6th and 11th) and reading them as one, and throwing out of view all previous legislation on the subject, it would seem impossible to escape his conclusion, that the discharge mentioned in the one is identical with that mentioned in the other of these sections; and that no discharge can, under the provisions of the 11th section, be relied on as a bar to subsequent question or trial, except such a discharge as is adjuged, by the court, upon an examination, in which it has been made to appear that there is not probable cause for charging the accused with the offence.

The counsel for the accused, however, refers to the 3d section of the act of 1804, in which the legislature for the first time declared the effect of a discharge by the examining court, on a subsequent prosecution for the same offence. And he calls our attention more particularly to that portion of the section in which the court is mentioned as "the court of the county or corporation in which the offence *is or may be examinable.*" Upon the words which I have italicised he founds the argument that, under the acts of 1804 and 1819 (in both of which the same language is used), the force of a discharge, as a bar to further prosecution, was in no wise dependent on the fact of its being the result of an examination: that the fact of its being pro-

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nounced by a court of competent authority, a court having the right to examine the accused, constituted all that was essential to the validity of the discharge as a bar. And he contends that the revisors, in employing the words, "is examined," in place of the words, "is or may be examinable," did not mean to effect any change in the law in this particular; and that the words, "the court in which a person is examined as aforesaid," are merely intended to designate the court whose discharge is a bar; and do not qualify the discharge further than to show what court may make it, viz: the County court, at its regular or
574 *special session, organized as an examining court, with five justices on the bench, &c.

It cannot be denied that the particular words referred to in the act of 1804, do countenance the construction of that act, contended for by the counsel for the accused. But on looking to the whole of the 3d section of the act and the other parts of the act to which it refers, it becomes, I think, quite obvious that such is not the true construction. The language of the section is, "If any person charged with any crime or offence against the commonwealth, shall be acquitted or discharged from further prosecution by the court of the county or corporation in which the offence is or may be examinable, he or she shall not thereafter be examined, questioned or tried for the same crime or offence, but may plead such acquittal or discharge in bar of any other or further examination or trial for the same crime or offence; any law, custom, usage or opinion to the contrary in any wise notwithstanding." 2 Rev. Code (1808), p. 38.

The office of this section is not to declare in what cases the party is to be discharged; but to declare the effect of the discharge on a subsequent prosecution for the same offence. The power to discharge is conferred by the first section; and when we look to that we see that a court is to be held "for the examination of the fact, which court, consisting of five members at the least, shall consider whether, as the case may appear to them, the prisoner may be discharged from further prosecution, or may be tried in the county or corporation or in the district court, &c." The power to discharge is no where else mentioned in the act. Is it not then a necessary inference that when in the third section the legislature attached to an acquittal or discharge the effect of a bar, they had in contemplation no other discharge than a discharge from further prosecution, pronounced by the court upon an examination of the
575 *fact and a consideration of the case? Why declare that a discharge may be pleaded in bar of any other or further examination or trial, if such discharge had not resulted from a previous examination or trial?

The counsel for the accused, however, in further support of his view, refers us to the fifth section of chapter 205 of the Code, regulating the power of the examining court over the subject of adjournment; in which the court is prohibited from adjourning the examination, except on the motion of the accused, &c., "beyond the third regular term after the examination was ordered." And assuming that the discharge of a prisoner from further prosecution would be the result of a continuance of the case (except under the circumstances provided for), "beyond the third term," he says that here is an instance of final discharge without examination, and consequently that the construction which would limit the bar sanctioned by the eleventh section to the single case of a discharge upon an examination, must be unsound, inasmuch as no good reason can be assigned why the legislature should prohibit further prosecution in the one instance of final discharge, and not in the other. And hence he concludes that the term "discharge" cannot be restricted in its meaning, by referring it to the 6th section, but must be taken in its largest sense, embracing any discharge whatever by the examining court.

In the reply by the attorney general to this assumption, there seems to me to be much force. He refers us to section 36 of chapter 208, in which it is provided, "that every person charged with felony, and remanded to a superior court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of such court after his examination, without a trial, unless the failure to try him" results from some of the causes there mentioned. And he argues, that as the legislature have thought it necessary to
576 attach, *in express terms, to the delays in the superior court the consequences of a discharge from further prosecution, the fair conclusion from their silence in respect to such consequences as flowing from the prohibited delays in the examining court, is, that they did not mean to attach to the latter the same or like consequences.

This view derives support from the fact, that in the act of 1804 the examining court was restricted in its power to adjourn to a period not longer than three days, except on the application of the prisoner, and then for not more than ten days from the day of adjournment.

It is difficult to suppose that in 1804 the legislature intended that an irregular adjournment by the justices occasioning a delay longer, by a day or two, than that allowed by the act, should operate the grave result of a final discharge of the accused. And though the legislature in all the subsequent acts have extended the period to which the court may adjourn, yet, as they have still remained silent as to what shall be the effect of an adjournment to a period more distant than that allowed by the law, there arises a strong inference that these provisions, with respect to adjournments by the examining courts, are simply directory; and that a departure from them does not

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result in the final discharge of persons accused.

As to this question, however, I do not deem it necessary to express a definitive opinion. Its decision is not, I think, material in its bearing on the argument under consideration. For if it be conceded (as contended for by the counsel for the accused) that a continuance for more than three terms of the County court would result in a final discharge of the party accused, such a discharge would be an act of the law, and not the result of a judgment pronounced by the examining court, and would
577 plainly stand outside of *the provisions of the 11th section of chapter 205, construed even as the counsel contends it ought to be. For according to his construction, a discharge, to avail the accused as a bar, must yet be a discharge by a court in which the offence is examinable, a court lawfully held, &c.; whereas the discharge in the case supposed would be the result flowing from the fact that there was no longer any court in which the offence could be legally examined. Upon the supposition that the law intends a discharge to flow from a continuance beyond the third term, a prisoner, if still held in custody after the expiration of such term, would be illegally detained, and would be discharged upon a habeas corpus. Green's Case, 1 Rob. R. 731. And if the prisoner should not avail himself of the writ, he might doubtless, if sent on by a County court subsequently held, have the indictment quashed, on the ground that he had not been examined by a competent court. Or if a court held subsequent to the third term, by adjournment should discharge a prisoner on the ground that it had no jurisdiction of the case, and the prisoner being subsequently prosecuted, should, instead of resorting to other modes of relief, wait until he was indicted, and then seek to rely on a plea of such discharge, it is obvious, for the reasons already stated, that the plea, if received, would be allowed, not under the 11th section, but by virtue of some other law: such discharge having been pronounced not by a court in which the offence was examined or was examinable, but by a court having no legal capacity or power to proceed with the examination.

The history of the circumstances and reasons which led to the adoption of the provisions of the 3d section of the act of 1804, furnishes strong support in aid of these views. In Myers' Case, 1 Va. Cas. 188, it is stated by Judge White, as also by two of the distinguished counsel of the prisoner (Messrs. Tazewell and
578 *Taylor), that the passage of this section was probably caused by the expression of an opinion by Judge Tucker, in his notes on Blackstone's Commentaries, to the effect that an acquittal by an examining court did not in any case constitute a bar to further prosecution. And on a reference to the 5th volume of his work, p. 335 (in notes), it will be seen that the judge there uses the following language: "There have been decisions to the effect that if a person brought before an examining court, and upon such examination be discharged by that court, such discharge may be pleaded as an acquittal;" and he then proceeds to express the opinion that such was not the case, and founds his opinion mainly on the idea that acquittal was the legal converse of conviction; and as the examining court had no power to convict, so neither had they, in the absence of an express provision conferring it, the power to render such a discharge as could be pleaded as a bar to a subsequent prosecution.

It is thus apparent that the evil was, that doubts existed whether a regular discharge upon an examination by the examining courts had the force of an acquittal, and it was to remedy this evil and to remove these doubts, that the 3d section of the act of 1804 was passed.

And on looking into the course of legislation in the interval between 1804 and 1849, I can see nothing calculated to reflect doubt on the construction of the law on this subject, as it now stands.

In 1819, as has been already stated, the 3d section of the act of 1804 was re-enacted without alteration; and no change was made in the law in this regard till the revision of the criminal laws in 1847-8. In the 3d section of the chapter on examining courts (Sess. Acts 1847-8, p. 139), the power to discharge is conferred in the following terms: "If it shall appear to the court, on the whole examination, that no offence
579 *has been committed, or that there is not probable cause for charging the person with the offence, he shall be discharged." And the effect of a discharge is declared in the 8th section as follows: "If any person shall be discharged by the County or Corporation court in which his offence is examinable, he shall not thereafter be questioned or tried for the same offence, except on indictment found within twelve months thereafter; in which case, no other examination shall be necessary." It is evident that in the 3d section of this chapter the word "discharged" is used as the equivalent of the words "discharged from further prosecution," employed in the corresponding part of the act of 1804; and it is, I think, equally evident that it is used in the 8th section in the like sense, and is substituted for the words "acquitted or discharged from further prosecution," employed in the 3d section of the act of 1804. And the only material difference between the 8th section of the law of 1847-8 and the 3d section of the act of 1804, contemplated by the legislature, is, I think, that the former allows of a prosecution by indictment after a discharge by the examining court. Such evidently was the view of the matter taken by the revisors, in the notes accompanying their report to the legislature.

The 11th section of the chapter on "examining courts," as reported by them, was as follows: "If the court in which a prisoner is examined as aforesaid, discharge

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him, he shall not thereafter be examined, questioned or tried for the same offence, unless new evidence which is material, be discovered; in which case, he may again be prosecuted within one year from the time of such discharge, but not after." And in assigning their reasons for recommending the adoption of this section in place of the 8th section of the law of 1847-8, they say, "When, after full examination by a *court, the prisoner is discharged for want of proof of even probable cause for a trial, it is thought hard that he should be yet liable to be taken up and indicted on the same evidence, without examination." They therefore proposed to modify the law of 1847-8, so as to make the liability of a party discharged by the examining court, to be again prosecuted for the same offence, dependent on the discovery of new and material evidence. The legislature, however, refused to allow of a subsequent prosecution, either as provided for in the law of 1847-8, or as recommended by the revisors, but adopted the first part of the section reported by them, after striking out the provision in respect to a subsequent prosecution, on the discovery of new evidence. They thus, I think, restored the law substantially to the footing on which it stood by the act of 1804; and I feel satisfied that the effect of the section in question is to attribute the qualities of a legal bar to such a discharge by an examining court, only, as may be made by the court upon examination.

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It is incumbent on the accused, therefore, to show that the order on which he relies in support of his pleas of former acquittal, is substantially a discharge upon examination. It may be conceded, that in view of the loose and hurried manner in which the proceedings in the County courts are often recorded, it would be harsh in the court to require that the record exhibited by the accused should set out the fact of his acquittal, with the clearness and precision of language that would be looked for in the orders of a court whose proceedings are recorded in extenso. Still, the record which he vouches, must be of such a character as to prove, with reasonable certainty at least, the fact which it is offered to establish. The words of the order must be at least such as (of their own sense, or by means of reference to the context) to be capable *without the aid of strained and unnatural inferences, of certifying the fact that the discharge relied on was the result of an examination.

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Applying this test to the order in question, it fails, I think, to show the fact for which it is vouched. The words of the order, so far from being appropriate to convey the idea of trial and acquittal, have had a definition affixed to them, by judicial decisions and analogous cases, importing a cessation of the proceedings without any examination whatever of the cause upon its merits. Lindsay v. The Commonwealth, 2 Va. Cas. 345; Wortham v. The Commonwealth, 5 Rand. 669. And there is nothing on the face of the proceedings with which the words of the order can be connected, so as to be made capable of showing that they were used for the purpose of indicating a discharge of the accused upon examination.

As this view, if concurred in (as I understand it is, by a majority of the court), results in an affirmance of the judgment, I deem it unnecessary to express any opinion as to the other question discussed by the attorney general.

MONCURE and SAMUELS, Js., concurred in the opinion of Daniel, J.

ALLEN, P., concurred in the result.

Judgment affirmed.

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582 *Gibboney v. The Commonwealth.

July Term, 1857, Lewisburg.

(Absent LEE, J.)

Gaming—Indictment—Proof.*—An indictment for playing at cards at a public place, may be sustained by proof that the party bet at faro at the time and place stated in the indictment.†

This was an indictment in the Circuit court of Wythe county against Robert Gibboney for unlawfully playing at cards at the hotel of Charles Yancey, said hotel being then and there a public place. The case is stated by Judge Samuels. The only question in the cause was, whether proof of betting at faro at the place and time stated, would sustain the indictment. The court below held that it would, and there being a verdict and judgment for the commonwealth, Gibboney applied to this court for a supersedeas; which was allowed.

Cook, for the appellant:

Two bills of exceptions were filed by petitioner upon the trial; but both present the same question, with so little variation, as not to require separate consideration. That question is, whether under an ordinary *indictment for "unlawfully playing at cards," the defendant can be found guilty, by proof, of betting at faro.

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By law, the game of faro is recognized as a different sort of gambling from ordi-

*See monographic *note* on "Gaming" appended to Neal v. Com., 22 Gratt. 917; monographic *note* on "Indictments, Informations, and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

†Code, ch. 198, § 4, p. 743. "If a free person bet or play at any such table or bank as is mentioned in the first section (A B C. E O table, or faro bank, or table of the like kind), or if at any ordinary, racefield, or other public place, he play at any game except bowls, chess, backgammon, draughts, or a licensed game, or bet on the sides of those who play, he shall be fined thirty dollars, and shall, if required by the court, give security for his good behavior for one year, or in default thereof, may be imprisoned not more than three months."

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nary card playing. It is set apart as one of a class, to be punished with greater severity than common games. Specific provisions, inapplicable to other games, have been adopted for its suppression. That the legislature intended to make it a more serious violation of law than the more common games, is apparent, not only from the peculiar provisions found in the first three sections of chapter 198, page 742 of the Code, but also from the language of the 4th section, which announces the punishment of such as bet or play at this game. It is a misdemeanor to bet at faro at any place, while other gaming is unlawful at only some particular places.

Nor is it a game necessary to be played with cards. Most usually it is so, but not of necessity. It may be played with any kind of markers or counters. Plates of tin, or pieces of leather, or paper, with suitable numbers marked upon them, would answer as well as cards; and the game thus played would be equally as unlawful as if played with cards. The second bill of exceptions shows that cards are not the only instruments with which this game might be carried on.

Windsor's Case, 4 Leigh 680, shows that when the commonwealth alleges the playing to have been at a particular game, she must so prove it. Here she alleges that the defendant "played at cards." The game proven, is a different one. The defendant could not have pleaded his conviction under this indictment, in bar of another charging him with "betting at faro." The language of the 4th section is in the disjunctive; making either of the two offences a misdemeanor, and the commonwealth chose her ground.

Wyatt's Case, 6 Rand. 694, contains
584 a judicial recognition *of the distinction between faro and other games of the like kind, and the ordinary forms of card playing. It is one of the games in which the chances are unequal, and is therefore placed in the list of those which are especially condemned by law.

Had this indictment only charged the defendant with unlawful gaming at the place named in the indictment, possibly he might have been found guilty upon the evidence. This may be inferred from the case of Linkous, 9 Leigh 608, coupled with the remarks of Judge Semple in Windsor's Case, 4 Leigh 680. But when we come to speak of faro, we find it unnecessary to charge that it was at any public place.

The Attorney General, for the commonwealth.

The exceptions taken in this case are both based upon the ground, that proof of playing at faro is not sufficient to sustain an indictment for "unlawfully playing at cards."

This may either be, because:

1st. Faro cannot be prosecuted, except under the first clause of § 4, ch. 198 of the Code; or,

2d. Faro is not described by the terms of the indictment, "unlawfully playing at cards."

The first ground is erroneous, as will appear from the following considerations:

These laws in ch. 198 are construed remedially—section 20. The 4th section of that chapter groups offences punishable alike. It punishes faro and the like, wherever played, and any unlawful game, when played at an ordinary, in the same way. The first clause refers to faro, &c., alone; the second to any game, except bowls," &c.

Under the second clause, then, can faro be prosecuted? The answer is found in the answers to two other questions. Is faro "any game?" The affirmative answer includes it under the terms of the sec-
585 ond *clause. Is it among the excepted games? The negative answer leaves it under the including terms, unrelieved by the exceptions.

The petitioner's counsel so argues, that if his view be right, a prosecution for playing faro cannot be instituted under a statute, whose terms expressly include it, and do not except it; and this, merely because it might be prosecuted under another clause, without a specification of an ordinary as the place. Such a construction would, so far from being remedial, be more rigid than a penal construction. See 1 Arch. Cr. Pl. & Ev. 111-5, and notes, for cases of acts having a double criminal aspect.

The second ground is equally untenable. The charge is for unlawfully playing at cards at the hotel of Yancey. Is the faro proved, within the terms of this description? Was it played at the hotel? Unquestionably. Was it a playing with cards? That it is a game played with cards appears from ch. 198, § 1; "whether the game or table be played with cards, dice or otherwise."

If it might be played with cards, it was relevant to ask the question excepted to in the first bill; to be followed, if necessary, by a question as to how it was played.

The other bill of exceptions shows it was played with cards; and does not show it could be played without them.

It may be said that on the authority of the case in 3 Rand. 108, the second bill cannot be referred to in aid of the first. The cases are different. In that, the two exceptions were to points of evidence; and as neither purported to give all the evidence, the court, to avoid injustice, refused, in considering the one, to look into the other. In this, the second bill gives all the evidence in the case. The reason for that decision is inapplicable to this case.

In addition, the question was rele-
586 vant, because it is *a matter of which even the court may judicially know. See 12 Gill & John. 260. Faro is usually, if not always, a game of cards. In order to the interpretation of a statute containing the word faro, as in the case of any other word, the court may judicially know its meaning without evidence.

Upon the second bill of exceptions, it is clear the verdict was right, and the in-

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structions proper. The probata sustained the allegata completely.

In fact, the whole question rests on this distinction. Playing at cards is the generic term, which includes faro, and all other games of cards. Under this descriptive term, faro may be proved. On the other hand, as faro is a specific term, upon a charge of playing at that, no other specific game of cards would be provable.

The great objection in this case seems to rest upon the idea, that notwithstanding this conviction, the party may be again indicted for this playing at faro, under the first clause of the 4th section, and he cannot plead autre fois convict.

This assumes the point in dispute. For if for the act proved he may be prosecuted under either clause, as I insist, a conviction under either is a discharge from prosecution under the other. He cannot be again indicted; or if he be, he may plead autre fois convict, and prove that the offence charged in the second indictment is the same for which he was convicted.

It is true, it is difficult in such cases to sustain this plea. This arises from the frequent repetition of, and the likeness between, the several offensive acts, and the natural obliviousness and want of discrimination between them by the offender and the witnesses. Owing to this difficulty, the statute requires prosecutions within a year—a short limitation.

But the same difficulty occurs in like cases, where there is no question of the
587 validity of the conviction. *Thus, in liquor cases, 1 Gratt. 553, "selling to persons to the jurors unknown;" which lets in evidence of any selling within a year. See also how difficult to make the plea available against conviction for a particular game of cards; as in Windsor's Case, 4 Leigh 680.

A place must be laid, which is done here. Head's Case, 11 Gratt. 819.

All necessary to define the offence must be stated. Here it is done. 3 Gratt. 590.

It is only where as in Coe's Case, 9 Leigh 620, a different species of offence is sought to be proved from the one charged, that the evidence has been held insufficient. Here one is proved, of a number included under generic terms.

In Windsor's Case, 4 Leigh 680, a particular kind of game at cards was charged—another kind could not be proved. One species is alleged—another could not be proved. It is very different to allege under a general term and to prove any one included under it. See Semple's opinion in that case.

This last case was decided on two grounds:

1. To allege one, is to exclude all others, and thus surprise the defendant, if another could be proved.

To allege one, when another is proved, would bar the plea of autre fois convict for the record vouched, would falsify it.

Defendant's counsel, referring to Windsor's Case, in his petition concedes, that possibly a conviction upon proof of faro might have been had, under a charge for unlawful gaming. Now it would seem that, if under a charge of unlawful gaming, proof of any game, faro inclusive, would suffice. the same proof would suffice, under a general charge of unlawful gaming at cards. The latter is more specific in alleging the special character of the gaming, but
588 each charge is inclusive of *the offence proved. If the concession be right, the argument of the counsel is at an end.

6 Rand. 694 is cited to show that faro is different from other games of cards. True—but the case does not show that faro is not a game of cards. Nor is the difference spoken of material, except as to the dealer, who has the advantage of the inequality, and it is not applicable to the player.

In concluding, I would refer the court to 1 Arch. Cr. Pl. & Ev. 111-5, and the notes, for cases where the same act has a double criminal aspect; in which prosecutions for both will be good, except where under the first, there might have been a conviction for the second offence; or where the one is inclusive of the other.

Here, had there been a prosecution under the first clause of § 4, it would have barred a conviction under the second clause, because the former is inclusive of the latter. But an acquital in this case, where the place is specified, and must be proved, would not bar a conviction for faro at another place.

As to the evidence to sustain these pleas, see 1 Arch. 113, note (1); 113-1, note 2.

SAMUELS, J. The plaintiff was indicted in the Circuit court of Wythe county, for that, on the 1st of August 1854, at the county aforesaid, and within the jurisdiction of said court, he did unlawfully play at cards, at the hotel of Charles Yancey, in the town of Wytheville; said hotel being then and there a public place, &c. The plaintiff pleaded not guilty. On the trial before the jury, a witness on behalf of the commonwealth was asked the question whether he had seen the plaintiff bet or play at faro at the place alleged in the indictment. This question was objected to by the plaintiff; but the court overruling the objection,
589 *allowed the question to be asked and answered; and thereupon the plaintiff filed his first bill of exceptions. This exception, however, does not show what answer was given to the question; nor can we look to the second bill of exceptions in aid of the first, as the first does not refer to the second; nor does the second show what answer was given to the particular question excepted to. If the court should be of opinion that the question was improper, still the judgment could not be reversed for that reason, as it does not appear that the answer was, or might have been prejudicial to the plaintiff.

In the progress of the trial it was proved that the plaintiff did bet at the game of faro at the time and place mentioned in the indictment; that the game of faro is played with cards; and that the plaintiff did not

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play at any other game at that time and place. Thereupon the plaintiff moved the court to instruct the jury, in effect, that proof of betting at faro did not sustain the charge of playing cards, alleged in the indictment. This instruction the court refused to give, and instructed the jury that if they believed from the evidence that the plaintiff, within twelve months before the finding of the indictment, did bet at the game of faro exhibited at the place named in the indictment, they ought to find him guilty. To these several rulings of the court, the plaintiff filed his second bill of exceptions.

It must be conceded that the law prior to the 1st July 1850 would have justified a conviction of the offence alleged in this case, upon the proof heard therein. Faro is a game, and it is played with cards; and it is not one of the class of games excepted, "bowls," &c., &c. See 1 Rev. Code, p. 563, § 5; Sess. Acts 1848, p. 114, § 5. The present Code of Virginia became the law upon and after the day above named, and gives the rule for our case. Chap. 198, §
590 4, p. 743, *embraces this subject. The second clause of the section last cited, if it stood alone, would extend to the case, as would the previous statutes above cited, if they had remained in force. A penalty is denounced against playing "at any game at an ordinary," &c. except, "bowls," &c., &c.: faro is included by the terms "any game;" it is not included within the exceptions "bowls," &c., &c.; it is played with cards, as the evidence in the record shows; it is therefore properly described as unlawful playing at cards.

It only remains to enquire whether the first clause of § 4 of the statute has the effect of withdrawing the offence of playing at faro from the general provisions of the law; of making it a different offence to be prosecuted as such, upon allegations and proof specifically appropriate to it.

The legislature obviously intended by the first clause of § 4, to extend the previous laws against gaming at public places, to certain games, faro and others, when played at private places; to this extent new offences were created, to be prosecuted upon proper allegations and proofs. This construction is perfectly consistent with the purpose of leaving gaming at public places to the operation of the general law. And such, in my judgment, is the meaning of the law upon the most strict construction of its terms. Construing it, however, as a remedial law according to § 20, p. 745 of the Code, we must hold that as to certain games, faro, &c., when played at public places, the commonwealth has cumulative remedies: one under the general law against all forbidden games at such places—the other under the law against faro and the games classed with it, when played at any place.

The revisors of the statute say, in their report to the general assembly, p. 977, § 4, that they inserted the first clause for the sole purpose of preventing any question as to whether the place at which faro, &c.,
591 *was played was public or private; they indicate no purpose of withdrawing any case from the operation of the second clause, which would be embraced by its terms.

The argument on behalf of plaintiff, that the judgment in this case will be no bar to another prosecution for the alleged playing at faro, is not well founded. The judgment will bar a future prosecution for the criminal fact of which the plaintiff may have been convicted upon the indictment in this case; and this, although the fact may be described by a different name. Having shown that in this case the plaintiff may be convicted of unlawful playing at cards, by proof of playing at faro, it follows that this judgment will bar a further prosecution for the same offence, although it shall be described as playing at faro.

I am of opinion to affirm the judgment.

The other judges concurred.

Judgment affirmed.

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592 *Livingston v. The Commonwealth.

October Term, 1857, Richmond.

(Absent ALLEN, P., and LEE, J.)

1. **Indictment for Murder—Conviction.***—Under a common law indictment for murder, the prisoner may be found guilty of murder in the first or second degree, or manslaughter.

2. **Same—Same—New Trial—Higher Offence.†**—QUÆRE: If a prisoner has been convicted of murder in the second degree, or manslaughter, and obtains new trial, whether he can be put upon his trial again for a higher offence, than that of which he was convicted.

***Indictment for Murder—Conviction.**—It seems settled that an indictment in the common-law form for murder is good and will support a conviction for murder in the first or second degree, or manslaughter. The principal case is cited as authority for the proposition in Bull v. Com., 14 Gratt. 620; Cluverius' Case, 81 Va. 848; Kibler v. Com., 94 Va. 809, 26 S. E. Rep. 858; State v. Abbott, 8 W. Va. 747. See, in accord, Wicks v. Com., 2 Va. Cas. 387; Commonwealth v. Miller, 1 Va. Cas. 310; Thompson v. Com., 20 Gratt. 730, and *foot-note*. See a collection of the Virginia and West Virginia cases in monographic *note* on "Indictments, Informations and Presentments," appended to Boyle v. Com., 14 Gratt. 674.

†**Criminal Law—New Trial—Higher Offence.**—The question, as to whether, if a prisoner, on an indictment for murder, has been convicted of murder in the second degree or manslaughter, and obtains a new trial, he can be put upon his trial again for a higher offence, than that of which he was convicted, seems to have been brought directly to the notice of the court of appeals for the first time in the principal case. But, as seen from the second headnote, the court left the query unanswered: though DANIEL, J., expressed the opinion that the conviction barred a subsequent trial for a higher offence. But, in Stuart v. Com., 28 Gratt. 958, there is a partial answer to the question. In this case, the rule was laid down that, where there is but one

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3. **Evidence — Murder — Spontaneous Declarations.**‡ — Upon a trial for murder, it having been proved that the prisoner had beat the deceased, the complaint of the deceased of pain suffered by her within two hours of the beating, is competent evidence.

4. **Same — Opinion§ — Medical Experts.**** — It being proved that a witness is a practicing physician, he is a competent witness to express an opinion as an expert upon a medical question.

5. **Same—Same—Same¶—Cause of Death.**** — Upon a trial for homicide, it is competent for the commonwealth to introduce physicians or surgeons to give their opinion on a state of facts testified to by themselves or other witnesses, in respect to a wound or beating proved to have been inflicted on the deceased, as to whether such wound or beating would be a cause adequate to produce the death, or was the actual cause of the death.

6. **Same—Same—Same—Same¶—How Questions Should Be Put.**** — In such case, the questions put and the answers given should be so put and given as not to elicit or express an opinion by the physician or surgeon on the credit of the witnesses or the truth of the facts testified to by others.

7. **Homicide—Death from Independent Cause—Responsibility of Accused.**†† — Where in a cause of homicide it appears that a wound or beating was inflicted on the deceased, which was not mortal, and the deceased whilst laboring under the effect of the violence, becomes sick of a disease not caused by such violence, from which disease death ensues within a year and a day, the party charged with

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count in an indictment on which the accused may be convicted of one of several offences which are covered by the indictment, the verdict of the jury finding the accused guilty of one of the said offences is a verdict of acquittal of all the others of a higher grade of offence; and thus, on an indictment for murder, a verdict finding the accused guilty of manslaughter is a verdict of acquittal as to the murder, and a bar to a conviction thereof on a second trial. But the court left it a query as to whether the same rule applies where, on an indictment for murder, the jury find the prisoner guilty of murder in the second degree. The principal case was reviewed in this case (pp. 956-958).

In State v. Cross, 44 W. Va. 315, 29 S. E. Rep. 527, the court, after reviewing the Virginia cases (among others the principal case and Stuart v. Com., 28 Gratt. 950) and statutes, decides (in keeping with Stuart v. Com.) that where a party is tried upon an indictment for murder and found guilty of voluntary manslaughter, and obtains a new trial, though the verdict is silent as to murder, he cannot be tried again for murder. But this court also left it a question as to whether one found guilty of murder in the second degree can be tried again for murder in the first degree.

In 1878, it was enacted by the Virginia Legislature (Acts of 1877-'78, p. 344, § 25) that "if a verdict be set aside on the motion of the accused, and a new trial awarded, on such new trial the accused shall be tried, and such verdict may be found and sentence pronounced as if the former verdict had not been found." In Briggs' Case, 82 Va. 560, this act was pronounced constitutional. See the principal case cited in this case at p. 562. In this case (Briggs v. Com.), on the indictment for murder, the accused was convicted of murder in the second degree. Upon appeal, the conviction was set aside and a new trial awarded. At the second trial, the prisoner pleaded an acquittal of murder in the first degree by virtue of the former conviction of murder in the second degree, and moved the court to so charge the jury as to exclude a finding of murder in the first degree. It was held that the lower court did not err in rejecting the plea, and in refusing, in effect, to charge the jury that they could not convict the accused of murder in the first degree, upon the ground of the former conviction of murder in the second degree. But, by Va. Code 1887, § 4040, it is provided: "If the verdict be set aside, and a new trial granted the accused, he shall not be tried for any higher offence than that of which he was convicted on the last trial." This statute was construed in Forbes v. Com., 90 Va. 550, 19 S. E. Rep. 164; Benton's Case, 91 Va. 782, 21 S. E. Rep. 495. See 2 Va. Law Reg. 697, 787, 870.

See also, monographic *note* on "Autrefois, Acquit and Convict" appended to Page v. Com., 26 Gratt. 943.

‡**Evidence—Murder—Spontaneous Declarations.**—See monographic *note* on "Res Gestæ" appended to Jordan v. Com., 25 Gratt. 943.

§**Same—Opinion—Medical Experts.**—In Ellis v. Harris, 32 Gratt. 690, the principal case was cited as correctly expounding the law as to the admissibility of the testimony of an expert. On the subject of admissibility of the opinion of a nonexpert, see *foot-note* to McCormick v. Hamilton, 23 Gratt. 561.

¶**Same—Same—Same—Cause of Death.**—See the principal case cited in Bowen v. The City of Huntington, 35 W. Va. 694, 14 S. E. Rep. 221; State v. Musgrave, 43 W. Va. 702, 708, 28 S. E. Rep. 825, 828 (dissenting opinion of BRANNON, J.).

¶**Same—Same—Same—Same—How Questions Should Be Put.**—In McMechen v. McMechen, 17 W. Va. 694, it was said: "There seems to be no conflict of authorities on the law applicable to the testimony of medical experts. The law bearing upon the precise question we are now considering may be thus correctly stated: When a medical expert is asked to give his professional opinion to a jury not upon matters within his own knowledge but upon a hypothetical case founded upon the testimony of witnesses previously examined in the case, the questions to him must be so shaped, as to give him no occasion to mentally draw his own conclusions from the whole evidence or a part thereof, and from the conclusion so drawn express his opinion, or to decide as to the weight of evidence or the credibility of witnesses; and his answers must be such, as not to involve any such conclusions so drawn, or any opinion of the expert, as to the weight of the evidence or credibility of the witnesses. Butler v. St. Louis Life Insurance Co., 45 Iowa 93; State v. Bowman, 78 N. C. 509; *Livingston's Case, 14 Gratt. 592;* Cincinnati Insurance Co. v. May, 20 Ohio 223; Commonwealth v. Rogers, 7 Met. 505; Woodbury v. Obear, 7 Gray 471; The People v. Lake, 12 N. Y. 362; Reynolds v. Robinson, 64 N. Y. 395; Carpenter v. Blake, 2 Lans. 206; Fairchild v. Bascomb, 35 Vt. 398; Spear v. Richardson, 37 N. H. 23."

See also, the principal case cited in State v. Musgrave, 43 W. Va. 683, 28 S. E. Rep. 818.

**As to the propositions of law laid down in the 4th, 5th and 6th headnotes, see monographic *note* on "Expert and Opinion Evidence."

††**Homicide—Death from Independent Cause—Responsibility of Accused.**—See generally, monographic *note* on "Homicide."

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the homicide is not criminally responsible for the death, although it should also appear that the symptoms of the disease were aggravated, and the fatal progress quickened, by the enfeebled or irritated condition of the deceased, caused by the violence.

593 *At the October term 1856 of the Circuit court of the city of Richmond, George Livingston was indicted for the murder of Elizabeth Duesberry. The indictment was in the usual form of a common law indictment for murder, and contained but one count. To this indictment the prisoner demurred; but his demurrer was overruled. He was tried at the same term, and found guilty of murder in the second degree; but on the motion of the prisoner, the court set aside the verdict and granted him a new trial. In April 1857 the prisoner was again tried and found guilty of voluntary manslaughter; and the term of his imprisonment was fixed at one year. Upon this trial the clerk charged the jury in the same terms as on the first trial. Upon the verdict the court rendered judgment against the prisoner; and he applied to this court for a writ of error; which was allowed.

On the trial a number of questions were saved; but it is only necessary to state those which were acted on by this court. It appears that the deceased was the mistress of the prisoner, and that he frequently beat her. On the Saturday previous to her death he gave her a beating, which was testified to by two of the inmates of the house where she lived. These witnesses testified, that on the same evening, and about two hours after the beating, she complained of a violent pain in her side. This testimony the prisoner moved the court to exclude; but the court overruled the motion; and the prisoner excepted. This is his first exception.

Dr. Waring, a practicing physician in Richmond, was sent for to see the deceased, and attended her until her death on the next Thursday. He stated, in giving in his evidence, that he heard nothing, either from the deceased or the witnesses, of bruises or pain any where except in the lower part of the abdomen, in the region of the bladder. That he treated the de-
594 ceased *to allay inflammation and promote action on the bowels. He made a post-mortem examination; and after detailing the appearances, said he saw sufficient cause of death, without referring it to the beating. The witness having said in answer to a question by the attorney for the commonwealth, that he heard the testimony of all the witnesses who had been examined; the attorney put to him the following question: Do you not think that the violence which she received by the beating which you have heard described, accelerated the death of the deceased? This question was objected to by the counsel for the prisoner; but the objection was overruled; and he excepted. This is his second exception.

After taking the foregoing exception, the prisoner by his counsel moved the court to exclude from the jury all the medical evidence which they had heard from the witness Waring, and all evidence given by him derived from his knowledge or skill as a practicing physician, unless it was proved or admitted by the commonwealth that he was an expert in his profession; the prisoner being willing to admit the fact. But the court overruled the motion; and the prisoner excepted.

After the attorney for the commonwealth had asked several other questions of the witness as to the effect of a beating upon a person in a diseased condition; all of which were excepted to by the prisoner's counsel; his ninth question was as follows: Your last answer seems to be based upon the opinion that the inflammation of the bladder and the constipation of the bowels could not have been caused by the infliction of the violence which you have heard related by the witness. Suppose the diseases of which you speak had developed themselves in this case after the violence (but not in consequence thereof), yet when she was suffering from said violence, do you think that said violence did or did not ac-
595 celerate her death? To *this question the prisoner by his counsel objected; but the court overruled the objection; and he again excepted.

On the trial a number of physicians had been summoned, who were present and heard the evidence, and were examined as to their opinion of the cause of the death of the deceased. Among these physicians was Dr. Charles Bell Gibson, who having stated that he had heard all the testimony in the cause, the attorney for the commonwealth put to him the following question: Please state what in your opinion, from all the evidence which has been given in this cause, was the cause of the death of Elizabeth Duesberry? This question was objected to by the prisoner by his counsel; but the objection was overruled by the court: and the prisoner again excepted. The witness answered: I think she died of peritonitis, which is an inflammation of the peritoneum, a cerous membrane which covers most of the viscera of the abdomen. This peritonitis was caused, I think, by the beating testified to.

After all the evidence had been introduced, and the argument of the cause had been concluded, when the jury were about to retire to consider of their verdict, one of them asked the court to instruct them, whether it was necessary to prove that the beating and the death occurred on the respective days laid in the indictment. And thereupon the court instructed the jury as follows: It is averred in the indictment that the beating and injury was inflicted on the 14th of March 1856, and that the deceased died on the 19th of that month. It is competent for the commonwealth to prove that the beating and injury was inflicted on the 8th, and that the deceased died on the 13th of that month; and if the ingredients necessary to prove the crime are proved to the satisfaction of the jury, they

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may find the prisoner guilty under this indictment. To which opinion of the court the prisoner excepted.

596 *Crenshaw and Crump, for the prisoner.

The Attorney General, for the commonwealth.

DANIEL, J. The indictment is in the common law form of an indictment for murder. In the demurrer to it, which was overruled by the Circuit court, the causes of demurrer are not stated. And as to those causes which have been assigned by the counsel for the prisoner, in the argument here, they seem to be fully answered by the cases of Miller v. The Commonwealth, 1 Va. Cas. 310; Vance v. The Commonwealth, 2 Va. Cas. 162; and Wicks v. The Commonwealth, 2 Va. Cas. 387.

In the last mentioned case, the General court held, unanimously, that the true object and effect of our act of 1802-3 was not to create two offences out of the crime of murder, but to arrange the various kinds of murder at the common law, under the two denominations of murder in the first degree, and murder in the second degree; and to annex to the cases in each denomination a punishment corresponding in severity to the degree of atrocity with which they might be perpetrated, and by which they would be marked as belonging to the one or the other of said denominations of murder. And that the legislature contemplated no change in the frame of the indictment, they further held, was plainly to be inferred, from the clause requiring the juries, in all cases of indictments for murder, when they find the party accused guilty of murder, to ascertain in their verdict whether it be murder in the first degree or second degree; and also from the clause requiring the court, in case of conviction by confession, to proceed by examination of witnesses to determine the degree of crime, and to give sentence accordingly. These clauses, they held, would have been wholly unnecessary, if it had been in the contemplation of the framers of the
597 act that the indictment *should in each case set out specially the features by which the offence should be marked as belonging to murder in the first or murder in the second degree: inasmuch as a general verdict of guilty on the one hand, or a confession of guilt on the other, under such an indictment would necessarily, without any further resort to the jury or the examination of witnesses, ascertain the degree of the offence beyond all doubt.

In conformity with these views, the practice has hitherto generally, if not uniformly prevailed in our courts, of prosecuting and punishing all acts of felonious homicide whatsoever, under indictments for murder, framed as at common law.

The same practice has prevailed in Pennsylvania from an early period, under the act of the legislature of that state, of the 22d April 1794, from which the first section of our act of 1802-3 is taken. White v. Commonwealth, 6 Binn. R. 179; Wharton's Am. Cr. Law 410.

No injustice or inconvenience is shown to have resulted from the practice; and I do not know of any act of our legislature which can be construed as indicating a purpose to change it. I see no reason for disturbing it.

I can see no objection to the admissibility of the testimony, the refusal to exclude which, forms the ground of the prisoner's first exception. It seems now to be well settled, that whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, may be given in evidence. If they were the natural language of the affection, whether of body or mind, they furnish (it is said) satisfactory evidence and often the only proof of its existence: And whether they were real or feigned is for the jury to determine. So also the representations, by a sick person, of the nature, symptoms
598 and effects of the *malady under which he is laboring at the time, are received as original evidence. 1 Greenl. Evi. 179; Aveson v. Lord Kinnaird, 6 East's R. 188. Such representations (it is said) are admitted from necessity, and as being in the nature of pars res gestæ. Roulkac v. White, 9 Ired. R. 63. And hence it is the practice to receive them, though made by persons who, if produced in court to testify, would be properly rejected as incompetent witnesses. Frequent instances of this will be found in the reports of cases in the courts of the southern states, growing out of actions on warranties of the soundness of slaves. In such actions, where the question is as to the diseased state of the slave at a particular time, the appearance and actions of the slave, his exclamations or declarations, at the time, as to his pains and other symptoms, are all regarded as part of the res gestæ, and admitted on that ground. Such declarations, it was said by the court in Jones v. White, 11 Humph. R. 268, drawn from the slave by those investigating the character and symptoms of the disease, become part of that investigation, and as such may properly go to the jury. The admissibility of such evidence is further sustained by the cases of Marr v. Hill, 10 Missouri R. 321; Grey v. Young, Harper's S. C. R. 38; Biles v. Holmes, 11 Ired. R. 16; Allen v. Vancleave & Kelso, 15 B. Monr. R. 236; Clancey v. Overman, 1 Dev. & Batt. 402.

In one of these cases, however (Marr v. Hill, &c.), it was said by the court that the mere declarations of a slave that he was diseased, without proof of any symptoms or appearance of disease, would be mere hearsay, which ought not to affect the rights of any person, and would be clearly inadmissible. Without stopping to enquire whether this dictum correctly states a qualification to the rule, it is obvious to remark that such a qualification can have no application, where, as here, the enquiry is
599 as to the condition *of a person who

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had been assaulted and beaten only two hours before the period at which the declarations as to her sufferings were made. On the contrary, the circumstances under which the question, as to the admissibility of the evidence, arises here, seem to me to bring this case directly within the influence of the decision in Biles v. Holmes. There the object was to show that a slave had been permanently injured by a severe blow on the head; and the plaintiff was allowed to prove that "he complained much of headache when exposed to the sun, and stated his inability to work in the sun." And it does not appear from the report of the case that the offer on the part of the plaintiff to prove such complaints and statements, had been preceded by proof of any other evidence of the supposed malady. And in the case of Aveson v. Lord Kinnaird, it was said by Lawrence, J., that it was in every day's experience in actions of assault, that what a man has said of himself to his surgeon, is evidence to show what he suffered by reason of the assault. Aveson v. Lord Kinnaird, 6 East's R. 188, already cited.

Doubts have been expressed in some cases whether the admissibility of such evidence should not be restricted to the proof of complaints and statements made by the sick or suffering persons to their physicians. On a reference, however, to the cases which I have cited, it will be seen that the courts recognize no distinction, in respect of competency, between such declarations, when made to physicians, and when made to unprofessional persons. I think the evidence was properly received.

The objections to the testimony of Dr. Waring, so far as founded on the supposed absence of proof of his being an expert, must have proceeded from a mistake—inasmuch as it appears from the second bill of exceptions, to which express reference
600 is made in the *third and fourth, that he was proved to be a practicing physician in the city of Richmond. This evidence, in the absence of any conflicting proof, was sufficient to justify the court in overruling the objection.

In the instructions which the court gave to the jury at their instance, I can perceive no error. The variance between the dates of the beating and injury inflicted on the deceased, and of her death, as averred in the indictment, and the true dates of those events, as shown by the proofs, was wholly immaterial. Commonwealth v. Ailstock, 3 Gratt. 650; Wharton Am. Cr. Law 220. And it is obvious that in saying to the jury, "that if the ingredients necessary to constitute the crime were proved to the satisfaction of the jury, they might find the prisoner guilty under the indictment," the judge could not have been understood by the jury as intending to deny the truth of the proposition that they ought to be satisfied beyond a reasonable doubt of the guilt of the prisoner before they could convict him. The question propounded by the jury, and the answer given by the judge, both plainly pointed to the variance between the dates alleged and proved, and not to the degree of belief or satisfaction, in the minds of the jury, respecting the guilt of the prisoner, essential to his conviction. The instruction given by the judge amounted in effect to nothing more than saying to the jury, that if all the other elements of the crime were established in accordance with the requirements of the law, the variance just mentioned presented no valid objection to their finding the prisoner guilty under the indictment.

It seems to me, however, that the court below erred in receiving a portion of the testimony set out in the fifth bill of exceptions; and more particularly that portion sought and elicited by the ninth question propounded by the prosecution to the witness Waring. I know of no authority
601 which would hold a party *criminally responsible in a case such as that which it was the aim and tendency of this testimony to establish.

It is true that if a man be sick of a mortal disease, and receives a wound which, by irritating or provoking the disease to operate more violently, hastens his death, the party inflicting the wound may be held accountable for the death. In such a case it is said, the deceased has not died ex visitatione dei, for the wound has hastened the death, and the offender cannot apportion his wrong. 1 Hale 428.

So again, it is said by the same authority, if a man receives a wound not mortal, and through neglect or failure to use the proper application, it turns to a gangrene or fever which causes the death, then the wound, being the cause of the gangrene or fever, is regarded as the causa causati, and the party inflicting the wound may be held responsible for the death.

On the other hand, however, if the wound be not mortal, but with ill applications the party dies, and it clearly appears that the medicine and not the wound was the cause of the death, this is not homicide.

It will be seen that there is a marked difference between the first two cases thus instanced by Lord Hale, and the case pointed to by the testimony in question. In neither of the former is any independent cause interposed between the wound and the death. In the first of the two the death would not have occurred at the time it did but for the wound. Though the sick man was laboring under a disease, which if left to take its natural course, would result in death at no distant period; yet the death in respect of time is plainly referable to the wound. So, in the second, though the gangrene is the proximate cause of the death, yet the gangrene is a consequence of the wound; and so the death is, by a regular course and natural order, in the sequence of events, traced up to
602 the wound as its *originating cause.

But in the case sought to be made out by the testimony objected to, a disease is supposed to have supervened between a blow not mortal and the death: a disease

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not caused by the blow, but coming by the visitation of Providence.

In such a case, the exemption of the party inflicting the blow from criminal accountability, is, it seems to me, even more obvious than in the third of the instances cited from Hale. For then it might be said, the "ill application" of which the party died would not have been resorted to but for the wound inflicted by the wrongdoer; and if the connection, there, between the wound and the death, is too remote to be made the foundation of criminal responsibility, a fortiori, must such be the rule when the disease, but for the supervention of which the death would not have occurred, is, in its origin, independent of the wound or blow, and wholly out of the course of its consequences. In such a state of things, the blow and the death have no necessary or natural connection with each other as cause and effect. The blow is neither the proximate cause of the death, nor is it, though made by extraneous circumstances to accelerate it, linked with it in the regular chain of causes and consequences. A new and wholly independent instrumentality is interposed in the shape of the disease; and in contemplation of law, the death stroke is inflicted by the hand of Providence, and not by the hand of violence.

I am also of the opinion that the Circuit court, instead of overruling, ought to have sustained the motion of the prisoner to exclude from the jury the second question propounded to Dr. Gibson, and his answer thereto, set out in the sixth bill of exceptions. I do not doubt that in criminal as well as in civil trials, when questions of art or science are involved, persons who have peculiar skill or experience
603 therein, may be *introduced to give to the jury their opinions on such questions. In 1 Philips Evidence, p. 190, it is said that the opinion of a witness in general is not evidence: the witness must speak to facts. But on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but are allowed also to give their opinions in evidence. The opinion of medical men is evidence as to the state of a patient whom they have seen. Even in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state detailed by other witnesses at the trial, their opinion on the nature of such symptoms, has been properly admitted. Thus on a question of sanity, medical men have been permitted to form and express their judgment upon the representation which witnesses at the trial have given of the conduct, manner and general appearance exhibited by the patient. So in prosecutions for murder, they have been allowed to state their opinion whether the wounds described by witnesses were likely to be the causes of death.

In England it would seem that the practice in respect to the character and scope of the questions which ought to be propounded to a professional person or expert in such cases, is not as yet very well settled. 2 Leading Criminal Cases 105, notes. I think, however, that it is a well established practice in this country, in cases of homicide, to allow physicians and surgeons to say, upon a state of facts testified to either by themselves or by other witnesses, whether in their opinion a particular wound or blow described would be an adequate cause, or even, whether such wound was, in their opinion, the actual cause of the death in the particular case. Commonwealth v. Rogers, 7 Metc. R. 500. But it would seem to be generally agreed that in such case the opinion of the witness is to be restricted to matters of science,
604 and that he is not to *be allowed to give an opinion on things with which a jury may be supposed to be equally well acquainted. 3 Philips 761, notes. And especially, that the questions should be so shaped and the answers so given as to exclude any opinion of the medical witness as to the credit of the witnesses on the truth of the facts testified to by others. Commonwealth v. Rogers, just cited.

The question and answer under consideration are in violation of these guards and restrictions, and invade the province of the jury. The question calls for, and the answer gives not simply the opinion of the witness as a man of science on a given or supposed state of facts, but an opinion necessarily involving his judgment as to the truth of evidence, not free from conflict.

The like objection exists in respect to the course pursued in the examination of Dr. Waring; which is made the ground of the second bill of exceptions.

I do not think that the Circuit court committed any error in overruling the motion of the prisoner to set aside the verdict on the ground that the jury was improperly charged by the clerk. For if we should concede, for the sake of the argument, that the verdict of guilty of murder in the second degree only, amounted also in effect to a verdict of not guilty of murder in the first degree, and that upon the second trial the prisoner ought not to have been again placed in jeopardy for murder in the first degree, we would still be of the opinion that the motion was properly overruled. The first error, if any, was committed when the second trial was granted. The prisoner ought then to have asked the court to make an order, that upon the second trial so much of the charge to the jury should be excluded as related to murder in the first degree. Having failed to do so, he should have made such a motion to
605 the court on the new *trial before the charge to the jury was given; or at least have brought the subject to the notice of the court before the jury retired. He has been found guilty on the second trial, not of murder in the first degree, but of manslaughter, for which he could without question be legally tried and convicted under the indictment. The prisoner has not shown, and the court cannot see how

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he has been, or could have been injured by the course pursued.

As, however, on account of the errors in the ruling of the Circuit court, which we have already indicated, we have to reverse the judgment, and remand the cause for a new trial, the question does necessarily arise, whether upon such trial the prisoner may be yet legally tried and convicted of murder in either degree; or whether the Circuit court is to be directed so to modify the charge to the jury as to restrict their enquiry and finding to the offense of manslaughter.

In the case of Lithgow v. The Commonwealth, 2 Va. Cas. 297, it was decided by the General court, that when there are several counts in an indictment, and on one of them the prisoner was convicted, and acquitted of the rest; if, on a writ of error obtained by him, the judgment and verdict are set aside, and a new trial awarded to him, the prisoner can only be tried again on the count on which he was convicted, and not on the other counts of which he had been before acquitted. The court said there was no reason why a prisoner, who had been rightfully acquitted upon one of several offences which have been joined in the same indictment, should be again brought into jeopardy for these alleged offences; because, having been wrongfully convicted on another of these separate charges, he seeks and obtains redress against this latter error. And in Bennet v. The Commonwealth, 2 Va. Cas. 234, the same court decided that when there are several counts in an indictment, and the jury convict the prisoner
606 *on one of them, finding nothing as to the others, the verdict ought not therefore to be set aside; but the court ought to enter a judgment of acquittal on the counts as to which the jury were silent, though a judgment of conviction may be entered on the one on which the jury had found the prisoner guilty. Thus necessarily deciding that a verdict of guilty on one count, saying nothing as to the others, operated in law a verdict of not guilty on those others. A like decision was made in the cases of Kirk v. The Commonwealth, 9 Leigh 627; and Page v. The Commonwealth, Id. 683.

If there had been in this case, therefore, one count for murder, and another for manslaughter, and there had been a verdict of guilty on the latter count, taking no notice of the former, it would seem to me that under the authority of these cases we would have had to send the case back for a new trial for manslaughter alone. Does it make any difference that the verdict in this case has been rendered under a single count—a count for murder? The weight of authority would seem to be with the proposition that it does not. In 1 Bishop on Criminal Law, § 676, in speaking of the waiver, by a prisoner in asking for a new trial, of the protection afforded by the common law maxim, adopted into the constitution of the United States, and into the constitutions of most of the states, "that no man is to be brought into jeopardy of his life more than once for the same offence," the author proceeds to say that this waiving of constitutional right is not considered by the court as extending beyond the exact matter concerning which the relief is sought. If, therefore, the verdict which finds a prisoner guilty of part of the charge against him, finds him not guilty of another part; as for example guilty on one count of the indictment, and not guilty on another count; or where there is but one count,
607 guilty of manslaughter, and *not guilty of murder; and a new trial is granted him, he cannot be convicted on the second trial, of the matter of which he was acquitted on the first. The same principle is recognized by the Supreme court of Tennessee in Slaughter v. State, 6 Humph. R. 410; in which case it was held that where a party is found guilty of manslaughter on an indictment for murder, and not guilty of murder, and obtains a new trial, he is discharged from the murder, though he may be convicted on the same indictment for manslaughter. The case of Hurt v. The State, 25 Miss. R. 378, is to the like effect. In that case, under an indictment for murder, the verdict found the prisoner guilty of manslaughter, but was silent as to his guilt or innocence of the murder. The court said, that the verdict operated as an acquittal of every crime of a higher grade, of which the prisoner might have been convicted under the indictment upon which the issue was made; otherwise, after undergoing the sentence for manslaughter, he might be put upon his trial for the charge of murder, which would thus be only postponed and not decided by the verdict of manslaughter; that the jury in such case, in contemplation of law, render two verdicts; one acquitting the accused of the higher crime charged in the indictment; the other finding him guilty of an inferior crime; and that the verdict of manslaughter was as much an acquittal of murder as a verdict pronouncing his entire innocence could be. The court further held, that on such a verdict the court below ought to have entered a judgment of acquittal as to the charge of murder, and that whether that judgment was in fact rendered or attached by mere operation of law to the verdict, it was bound to be in the prisoner's favor; and in asking a new trial, he could not be regarded as asking to disturb the verdict and judgment in his favor.

This case was followed by Brennan
608 v. The People, *15 Illinois R. 572. There, too, it was held that a verdict of guilty of manslaughter, under an indictment for murder, saying nothing as to the murder, amounted to an acquittal of the charge of murder, and that the prisoner, upon obtaining a new trial, could only be tried again for the manslaughter. The same views prevailed in the case of The People v. Gilmore, 4 Calif. R. 376; and in Jones v. The State, 13 Texas R. 168. I

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have seen no case in which a contrary doctrine has been declared, except the case of the United States v. Harding, Wallace, jr. R. 127; decided in the Circuit court of the United States for the third circuit.

It is true that in the case of Gwatkin, who obtained in the General court the reversal of a judgment convicting him of murder in the second degree, the order remanding the cause for a new trial was in general terms. 9 Leigh 678. And on a second trial he was convicted of murder in the first degree; and the court below rendered a judgment accordingly. The case was again brought up to the General court by a writ of error; and a new trial again obtained, on the ground of an improper refusal of the Circuit court to grant the accused a continuance. No question seems to have been raised on the first reversal, as to the character of the order to be made on awarding the new trial. Nor does it appear from the report of the case, that any other error in the proceedings at the second trial was assigned, except the refusal of the court to grant the motion for a continuance.

I do not think we can properly allow to that case the weight of an adjudication expressly deciding that a party who obtains the reversal of a judgment erroneously convicting him of murder in the second degree, may, upon his second trial, be properly convicted of murder in the first degree; inasmuch as it does not appear from the report of the case that the question was brought distinctly to the notice of the court.

609 *The same remark applies to the case of Ball v. Commonwealth, 8 Leigh 726, in which the General court granted a new trial in case of a conviction of murder in the second degree. No question of the kind seems to have been raised, and the cause was simply remanded for a new trial.

If, however, these cases could be regarded as express adjudications of the question which they are supposed to have decided, I am not prepared to say that they would necessarily furnish the rule for the case under consideration. There are considerations of a technical character, which might have entered into such decisions, but which have no application to a judgment reversing a conviction of manslaughter. It might be said, in support of such decisions, that as the indictment, according to our practice, is but an indictment in form for murder at the common law, a party, when found guilty of murder in the second degree, and not guilty of murder in the first degree, is not acquitted of any express averment which the indictment contains. You cannot, by reason of said acquittal, regard any important word in the indictment as stricken out, or treat any express allegation as negatived. If you did, you would thereby vitiate the indictment, and reduce it to something short of a charge of murder in any degree. If, therefore, the party is to be sent back to be tried for murder in any degree, it is necessary that he should be tried under the indictment as it stands, and that he should be regarded as unacquitted (as the fact is) of any one of the material allegations which the indictment contains. If this view does not present a mere technical and unsubstantial difficulty which may be gotten over by modifying the charge to the jury, so as to restrict their enquiry and finding to the grades of offence below murder in the first degree, it is obvious that there may be reasons for the supposed decisions in the cases of Gwat-

610 kins and Ball, that *do not apply to this. For where a party is found guilty of manslaughter only, you may suppose him not guilty (as by legal consequence he in fact is) of some of the most important allegations of the indictment; and you may strike out, or suppose to be stricken out the most important words; as for instance, "murder," and "of malice aforethought," and still leave an indictment which would contain the charge of manslaughter.

Without going into any further speculation as to the reasons which may have possibly influenced the orders of the General court in the two cases just mentioned, I deem it sufficient to say that they do not amount to express authority requiring us, in a case like the one under consideration, to subject the party, on his new trial, to a trial for murder, and that elsewhere the weight of authority is, in my opinion, clearly the other way.

In this state of the law, I cannot undertake to say to a party who has been erroneously convicted of manslaughter, and who has appealed to this court, that we will not redress his wrong (which we admit to be manifest), except on the condition of his consenting to be again put in jeopardy for a higher offence, of which the jury have in effect once found him not guilty.

I think that for the errors of the Circuit court which have been pointed out, the judgment should be reversed, so much of the verdict set aside as finds the prisoner guilty of manslaughter, and the cause remanded for a new trial for manslaughter only. As, however, the other members of the court who concur in the other portions of this opinion, are of opinion that the order granting a new trial should be a general one, the order will be in accordance with their views.

MONCURE and SAMUELS, Js., concurred in the opinion of Daniel, J., except as to directing the new trial to be for manslaughter only.

611 *The judgment was as follows:

It seems to the court, that upon a trial for homicide, it is competent for the attorney for the commonwealth to introduce physicians or surgeons to give their opinion on a state of facts testified to by themselves or other witnesses, in respect to a wound or beating proved to have been in-

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flicted on the deceased, as to whether such wound or beating would be a cause adequate to produce the death, or was the actual cause of the death. That this right is, however, subject to the restriction that the interrogatories to such medical persons be so framed as not to elicit, and their answers so given as not to contain any expression of opinion by them, on the credit of the witnesses, or the truth of the facts testified to by others.

And it seems to the court, that the course pursued in the examination of the witness Dr. Gibson, set out in the sixth bill of exceptions, was in violation of this restriction, and consequently that the Circuit court erred in refusing to exclude from the jury, on the motion of the prisoner's counsel, the second question put to the said witness, and his answer thereto.

And it seems further to the court, that an error of the like character was committed in the examination of the witness Dr. Waring, as set out in the second bill of exceptions.

And it seems also further to the court, that where in case of homicide it appears that a wound or beating was inflicted on the deceased which was not mortal, and the deceased, whilst laboring under the effects of the violence, becomes sick of a disease, not caused by such violence, from which disease death ensues within a year and a day, the party charged with the homicide is not criminally responsible for the death, although it should also appear that the symptoms of the disease were aggravated and its fatal progress
612 quickened by *the enfeebled or irritated condition of the deceased, caused by the violence.

And it also seems further to the court, that the ninth question propounded by the attorney for the commonwealth to the witness Waring, and his answer thereto set out in the fifth bill of exceptions, are in conflict with this rule; and consequently, that the Circuit court erred in refusing to grant the prisoner's motion to exclude said question and answer from the jury.

For these reasons, the court is of the opinion to reverse the judgment, set aside the verdict, and remand the cause for a new trial on the indictment, to be made on the indictment as it stands, and without any change in the usual charge to the jury.

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613 *Bull v. The Commonwealth.

October Term, 1857, Richmond.

1. **Murder—Indictment—Omission of "Deliberately."***—In an indictment for murder, the omission of the word "deliberately," will not be fatal on general demurrer.

2. **Same—Evidence—Dying Declarations—Consciousness of Impending Death.**†—On a trial for murder, the commonwealth, to introduce the dying declarations of the deceased, proved that he was told that his physicians thought that unless he could be relieved of the shortness of breath under which he was then suffering, he would die very soon. He then made the statements which were proposed to be introduced as evidence; and he was asked if these were made as his dying declarations; to which he answered that they were. The deceased was then told that the doctors were of opinion he was certainly dying, and that he would die very soon; and what he had said was repeated to him, and he was asked if he made that statement again, and did he make it as a dying declaration; and he said he did. The statement is admissible evidence as dying declarations.

3. **Appellate Practice—Certification of Evidence—When Judgment Reversed.**‡—A bill of exceptions taken to the opinion of the court refusing to grant a new trial, sets out the evidence.—The appellate court will not reverse the judgment, unless, by rejecting all the parol evidence for the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court below still appears to be wrong.

***Murder—Indictment—Omission of "Deliberately."**—See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

†**Evidence—Dying Declarations—Consciousness of Impending Death.**—In Jackson v. Com., 19 Gratt. 667, the principal case is cited as laying down the well-settled rule of law that to render dying declarations admissible evidence, they must be shown to have been made when the declarant is under a sense of impending death, and without any expectation or hope of recovery.

Whether the dying declarations sought to be introduced were made under a sense of impending death, without any expectation or hope of recovery is always a question to be determined by the court, not only from the proofs, but from all the circumstances of the case. Swisher v. Com., 26 Gratt. 965, 974, citing the principal case. See also, *foot-note* to Swisher v. Com., 26 Gratt. 963; monographic *note* on "Dying Declarations," appended to Jackson v. Com., 19 Gratt. 656.

‡**Appellate Practice—Certification of Evidence—When Judgment Reversed.**—The rule stated in the third headnote as to when the appellate court will reverse a judgment where the evidence is certified in the bill of exceptions is known as the old rule in Virginia. The principal case was cited as authorizing this rule in Gimmi v. Cullen, 20 Gratt. 452; Read v. Com., 22 Gratt. 929, 942; Lamberts v. Cooper, 29 Gratt. 67, and *foot-note*; Danville Bank v. Waddill, 31 Gratt. 475. For other cases supporting this rule, see Gimmi v. Cullen, 20 Gratt. 441, and *foot-note*, and other *foot-notes* there referred to. See also, monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887. See Va. Code 1887, sec. 3484, for the abolition of this rule.

Practice at Common Law—Refusal to Certify Facts.—Powell v. Tarry, 77 Va. 260, says: "As has been said, the facts proved are not certified in this case, the court certifies that the evidence is conflicting, and when the evidence is conflicting, the court may refuse to certify the facts proved. Grayson's Case, 6 Gratt. 712; 7 Gratt. 613; cited and approved, 11 Gratt. 706; Vaiden's Case, 12 Gratt. 727; *Bull's Case, 14 Gratt. 613*; Caldwell v. Craig, 21 Gratt. 136; Blosser v. Harshbarger, 21 Gratt. 215, and numerous other cases there

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4. **Involuntary Manslaughter§—Case at Bar.**—On a trial for murder, where the evidence repelled the idea of self-defence, the court instructed the jury, that if they believed from the evidence the deceased and the prisoner were engaged in a sudden and mutual combat, in which no weapon dangerous in itself was used, and during the progress of the fight the prisoner struck the deceased an ordinary blow or blows with his fists or feet, without any intention either to kill the deceased or to do him great bodily harm, but to repel his attack, and that the death of the deceased, was caused thereby accidentally and apart from the prisoner's intention, then the prisoner is guilty of involuntary manslaughter.—This is not error.

5. **Voluntary Manslaughter‖—Case at Bar.**—In such a case the court further instructs the jury, that though no weapon dangerous in itself is used, but only the fists and feet; yet if the jury are satisfied from the evidence that the manner of inflicting the blows was cruel and unusual, and exceeded in number and violence what was necessary to repel the deceased, and he died of such beating; then the prisoner is guilty of voluntary manslaughter.—This is not error.

614 *6. **Instructions—Time for Exceptions—Failure to Object at Proper Time—Effect.¶**—If a party be dissatisfied with an instruction, he ought to state his objection at the time. If no objection be made to an instruction at the time it is given, and no exception taken, or the point saved; but objection be made for the first time, after verdict, and in the form of a motion to set it aside; the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered, according to the law and the evidence, will not set it aside on account of that objection.

7. **Verdict—Impeachment by Jurors.****—As a general rule, the testimony of jurors is inadmissible to impeach their verdict; especially on the ground of their own misconduct.

At the April term 1857 of the Circuit court of the city of Richmond, Henry Bull and Thomas H. Haley were jointly indicted for the murder of Robert B. Farquhar. The indictment charged that they did then and there feloniously and unlaw-

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cited. See opinion of CHRISTIAN, J., in the last case."

See also, monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

§**Involuntary Manslaughter.**—See monographic *note* on "Homicide."

‖**Voluntary Manslaughter.**—See monographic *note* on "Homicide."

¶**Instructions—Time for Exceptions—Failure to Object at Proper Time—Effect.**—If no objection be made to an instruction at the time it is given, and no exception taken nor the point saved, but objection be made for the first time, after verdict, and in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered according to the law and the evidence, will not set it aside on account of that objection. Stoneman v. Com., 25 Gratt. 905, citing the principal case, and Read's Case, 22 Gratt. 924. The principal case is also cited and approved as to this proposition in Thornton v. Com., 24 Gratt. 672; Mitchell v. Com., 75 Va. 865; Price v. Com., 77 Va. 395; Stevenson v. Wallace, 27 Gratt. 94. See, in accord, *foot-note* to Read's Case, 22 Gratt. 924.

But in Danville Bank v. Waddill, 31 Gratt. 477, JUDGE BURKS, delivering the opinion of the court, lays down the established (general) rule to be, that, in jury trials, if a party objects to a ruling, of the presiding judge during the progress of the trial, either in admitting or excluding evidence, or giving or refusing instructions, or otherwise, and intends to except to such ruling, he must make known such intention at the time of the ruling, or at least before verdict, and, if the bill of exceptions cannot be drawn up at once, liberty should be reserved to do so during the term, and if he neglect to prefer exceptions until after the verdict, he will not then be allowed to do so; and cites as his authority Washington, etc., Tel. Co. v. Hobson, 15 Gratt. 122, 138; Martz v. Martz, 25 Gratt. 361; Peery v. Peery, 26 Gratt. 320, 324; Winston v. Giles, 27 Gratt. 530; Page v. Clopton, 30 Gratt. 415. He then cited the principal case as laying down the proposition set out above in the last preceding paragraph, and said that it was not necessary to determine in the case at bar whether the general rule laid down at the beginning of this paragraph is to be regarded as modified by the principal case and Stevenson v. Wallace, 27 Gratt. 94, in its application to instructions to which objection is made for the first time by way of motion to set aside the verdict of the jury.

See *foot-note* to this case from a list of other cases approving the proposition laid down by it.

In Newberry v. Williams, 89 Va. 301, 15 S. E. Rep. 865, LEWIS, P., delivering the opinion of the court, said: "The rule is well established in this state, as declared by JUDGE BURKS in Danville Bank v. Waddill, 31 Gratt. 469, *notwithstanding what was said in Bull's Case, 14 Gratt. 613*, that if a party objects to a ruling of the court during the trial, either in admitting or excluding evidence, or giving or refusing instructions, or otherwise, and intends to except to such ruling, he must make known such intention at the time of the ruling, or at least before verdict, and if the bill of exceptions cannot be drawn up at once, liberty should be reserved to do so during the term, and if he neglect to prefer exceptions until after verdict, he will not then be allowed to do so." (Italics ours.)

Again, in Danks v. Rodeheaver, 26 W. Va. 296, JUDGE GREEN makes a review of the Virginia and West Virginia cases in point, and, after laying down the proposition of the principal case as contained in the first paragraph of this note, quotes at length from Danville Bank v. Waddill, 31 Gratt. 477, and says that, in his judgment, it is impossible to regard the ruling laid down or deducible from the decisions in the principal case, and Stevenson v. Wallace, 27 Gratt. 94 (which follows the principal case), as modifications of the general rule (*i. e.* the rule as above laid down from Danville Bank v. Waddill) deducible from the current of Virginia cases; but that these two cases must be regarded as in irreconcilable conflict with the general rule. In this case, the general rule as set out by by Danville v. Waddill, is expressly approved.

See generally, monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192; monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

Verdict—Impeachment by Jurors.—As to the proposition, that as a general rule the testimony of

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fully, willfully, and of their malice aforethought, violently and cruelly, with their hands, fists and feet, beat, choke, strike and kick the said Robert B. Farquhar, &c., &c.; but it omitted the word "deliberately."

When the prisoners were brought to the bar, they demurred to the indictment; but their demurrer was overruled. They then pleaded "not guilty;" and elected to be tried separately: Whereupon, Bull was put upon his trial; and was found guilty of voluntary manslaughter; and was sentenced to the penitentiary for three years.

On the trial, the commonwealth offered to prove the dying declarations of the deceased, which were objected to by the prisoner's counsel; but the objection was overruled, and the evidence admitted: To which the prisoner excepted. It appeared in evidence that on the morning of the day on which Farquhar died, his brother informed the mayor of the city that he was dying; and the mayor sent two police officers to hear his statement of the cause of his death. When they arrived at the place, they found there the physician who attended Farquhar, and the Reverend
615 T. V. Moore, *who had been conversing with him. At the instance of the policemen, Mr. Moore, having first enquired of the physician whether it might be done with propriety, undertook to inform Farquhar that he was dying; and did make the communication to him; though there is a slight variance between what he states he said, and the statement of one of the policemen. Mr. Moore stated that he said, "Mr. Farquhar, it is the opinion of the doctors that you cannot possibly recover, and in view of this fact it is necessary, for legal purposes, that your testimony should be taken in regard to the causes of the injuries under which you are now suffering." The policeman stated, that Mr. Moore told him that in the opinion of his physician, unless he could be relieved of that shortness of breath under which he was then suffering, he would die very soon, and that there were persons there sent by the mayor, to hear his last statement of what he was then suffering, and who inflicted it. They both agree that he then made the statements to which they testify; and that he was asked if the statements he had made were made as his dying declarations; to which he answered that they were. The policeman stated further, that after the statement was made Mr. Moore then informed him that the doctors were of opinion that he was certainly dying; and that he would die very soon. That Mr. Moore then requested the witness to repeat to Farquhar what he had previously said; and then Mr. Moore asked him if he made that statement again, and did he make it as a dying declaration; and he said he did. It was proved that Farquhar was entirely conscious and rational at the time he made the statement; and that he died about an hour afterwards.

After the verdict was tendered, the prisoner moved the court to set it aside, and grant him a new trial, on the ground that the verdict was contrary to the law and the evidence. But the court overruled
616 the motion; *and the prisoner excepted. The bill of exceptions contained the evidence given on the trial and not the facts proved. But this court was of opinion that, looking at the evidence of the commonwealth and so much of the evidence on behalf of the prisoner as was not in conflict with the evidence of the commonwealth, the verdict was not contrary to the evidence.

After the court had overruled the motion for a new trial, as stated in the second bill of exceptions, and that bill had been signed and sealed, the prisoner removed the court to set aside the verdict and grant him a new trial, on the ground that the court had misdirected the jury in regard to the law, in an instruction which the court gave at the instance and request of the jury. That instruction was as follows: "If the jury believe from the evidence that the deceased and the prisoner were engaged in a sudden and mutual combat, in which no weapon dangerous in itself was used, and during the progress of the fight the prisoner struck the deceased an ordinary blow or blows with his fists or feet, without any intention either to kill the deceased or to do him any great bodily harm, but to repel his attack; and that the death of the deceased was caused thereby accidentally and apart from the prisoner's intention, then the prisoner is guilty of involuntary manslaughter. If, however, though no weapon dangerous in itself was used, but only the fists and feet, yet if the jury are satisfied from the evidence that the manner of inflicting the blows was cruel and unusual, and exceeded in number and violence what was necessary to repel the deceased, and the deceased died of such beating, then the prisoner is guilty of voluntary manslaughter."

After this instruction was given, the court, at the instance of the prisoner, instructed the jury as follows: "But if the jury shall upon the whole evidence,
617 entertain *a reasonable doubt that the deceased came to his death by violence inflicted by the prisoner at the bar, then they must acquit him."

The court overruled the motion; and the prisoner again excepted.

After this last motion was overruled, the

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jurors is inadmissible to impeach their verdict, especially on the ground of their own misconduct, the principal case was cited and approved in Howard v. McCall, 21 Gratt. 212; Read v. Com., 22 Gratt. 947, and *foot-note*; Steptoe v. Flood, 31 Gratt. 344, and *foot-note*; Danville Bank v. Waddill, 31 Gratt. 493; Moses v. Cromwell, 78 Va. 676; Taylor v. Com., 90 Va. 117, 17 S. E. Rep. 812; Vanmeter v. Kitzmiller, 5 W. Va. 381; State v. Cartright, 20 W. Va. 43; Probst v. Braeunlich, 24 W. Va. 359, 360.

See generally, monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

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prisoner again moved the court to set aside the verdict and grant him a new trial, upon the ground of the misconduct and irregularity of the jury. To sustain this motion, eight of the jurors were examined. The jury had been hung for six days, ten or eleven of them being in favor of a verdict of voluntary manslaughter, and one in favor of a verdict of acquittal, or at most, of involuntary manslaughter. It was proposed to this juror, that if he would concur in a verdict of voluntary manslaughter, the jury would sign a petition to the governor for the pardon of the prisoner. This he at length agreed to do, and did in fact unite in the verdict, on that understanding with the other members of the jury; though at the time, as he swore, he did not believe he was guilty of that offence. The court refused to set aside the verdict on this ground; and the prisoner again excepted. And judgment having been rendered on the verdict, he applied to this court for a writ of error; which was awarded.

Gilmer and August, for the prisoner, insisted:

1st. That the demurrer to the indictment should have been sustained; because the word "deliberately," employed in the statute to describe the offence, was not in the indictment. They cited Howel's Case, 5 Gratt. 664.

2d. That the statements of the deceased, introduced as dying declarations, were not properly admissible. They cited Wharton's Crim. Law, p. 308, 309; Roscoe's Crim. Evi. 31; 1 Greenl. Evi. § 158; King's
618 Case, *2 Va. Cas. 78; Vass' Case, 3 Leigh 786; Hill's Case. 2 Gratt. 594.

3d. That the verdict was contrary to law and the evidence. They cited Wharton's Crim. Evi. 35, 36, 212; Davis' Crim. Law 88, 89; Grainger v. The State, 5 Yerg. R. 459; Young v. The State, 11 Humph. R. 200; Brown's Case, 2 Leigh 769; Parsons' Case, 2 Rob. R. 71; Hill's Case, 2 Gratt. 594; McWhirt's Case, 3 Gratt. 594; Grayson's Case, 6 Gratt. 712, 7 Gratt. 613; Vaiden's Case, 12 Gratt. 717; Oliver v. The State, 17 Alab. R. 587; Bishop's Cr. Law, § 242, 243; Carroll v. The State, 23 Alab. R. 28.

4th. That a new trial should be awarded, on the ground of the misconduct of the jury. To show the testimony of the jurors was admissible to prove their own misconduct, they cited Cochran v. Street, 1 Wash. 79; Price's ex'or v. Warren, 1 Hen. & Munf. 385; Crawford v. The State, 2 Yerg. R. 60; Cochran v. The State, 7 Humph. 544; McCaul's Case, 1 Va. Cas. 271; Kennedy's Case, 2 Va. Cas. 510; Thomas' Case, Id. 479; Overbee's Case, 1 Rob. R. 756; Howle's adm'r v. Dunn, 1 Leigh 455; Martin's Case, 2 Leigh 745; McCarter's Case, 11 Leigh 633; Hall's Case, 6 Leigh 615; Thompson's Case, 8 Gratt. 637; Stanton v. The State, 13 Ark. R. 317; Grinnell v. Phillips, 1 Mass. R. 529; Murdock v. Summer, 22 Pick. R. 156; Shobe v. Bell, 1 Rand. 39; Harnsbarger's adm'r v. Kinney, 6 Gratt. 287.

The Attorney General, for the commonwealth:

1st. On the question arising on the demurrer, referred to Wick's Case, 2 Va. Cas. 387.

2d. On the question as to the admissibility of the dying declarations of the deceased, he referred to Vass' Case, 3 Leigh 786; Hill's Case, 2 Gratt. 594; 1 Greenl. Evi. § 156 to 162.

3d. On the question whether the
619 verdict was against *evidence, he referred to the cases cited on the other side, especially Vaiden's Case, 12 Gratt. 714, which was the last case on the subject, and settled the principles on which new trials were to be granted on this ground.

On the question of the instruction of the court, he referred to Arch. Cr. Pr. 223, 224, Waterman's notes; Wharton's Cr. Law 35, 36; Crawford v. The State, 2 Yerg. R. 60; McWhirt's Case, 3 Gratt. 594; Davis' Cr. Law 73, 93, 97, 98.

4th. On the question of the competency of the jurors to testify against their own verdict, besides the cases cited by the counsel for the prisoner, he referred to Ch. J. Shaw in Murdock v. Summer, 22 Pick. R. 156; Anderson, &c. v. Fox, 2 Hen. & Munf. 245; Vaise v. Delaval, 1 T. R. 11; Owen v. Warburton, 4 Bos. & Pul. 326; Wharton's Cr. Law, § 3, p. 155, and cases referred to in the note; Clark v. Stevenson, 2 Wm. Bl. R. 803; Aylett v. Jewel, Id. 1299; Woodfall's Case, 5 Burr. R. 2661; Rex v. Wooller, 3 Eng. C. L. R. 270; Hindle v. Birch, 4 Id. 6; Burgess v. Langley, 44 Id. 377; Horner v. Watson, 25 Id. 595; Hartwright v. Badham, 11 Price 383; Cooke v. Green, Id. 736; Straker v. Graham, 4 Mees. & Welsb. 721; Grinnell v. Phillips, 1 Mass. R. 529; Bridge v. Eggleston, 14 Id. 245; Hannum v. The Inhabitants of Belchertown, 19 Pick. R. 311; The State v. Freeman, 5 Conn. R. 348; Robbins v. Windover & al., 2 Tyler's R. 11; State v. Ayer, 3 Foster's R. 301; Dana v. Tucker, 4 John. R. 487; Jackson v. Dickison, 15 Id. 309; Smith v. Cheetham, 3 Caine's R. 57; The People on the relation of John Hormer v. Columbia Common Pleas, 1 Wehd. R. 297; Cluggage v. Swan, 4 Binn. R. 150; Cowperthwaite v. Jones, 2 Dall. R. 55; Richie v. Holbrooke, 7 Serg. & Rawle 458; Clark v. Carter, 12 Georgia R. 500; Burns v. Paine, 8 Texas R. 159; Steele's heirs v. Logan, 3 A. K. Marsh. R. 394; Stanton v. The State, 13 Ark. R. 37;
620 The State v. McCleod, *1 Hawks' R. 344; The State v. Godwin, 5 Ired. R. 401; Burnell v. The State, 3 Indiana R. 167; Barlow v. The State, 2 Blackf. R. 114; Sawyer v. Stephenson, Breese R. 6; Funkhouser v. Guard, Siddell & Co., Id. 44; Hudson v. The State, 9 Yerg. R. 408; Overbee's Case, 1 Rob. R. 756.

MONCURE, J., delivered the opinion of the court:

The court is of opinion, that the Circuit court did not err in overruling the demurrer to the indictment. The only question which seems to be raised, or intended to be raised by the demurrer, is, Whether, in an indict-

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ment for murder, the offence should be described in the terms used in the statute defining murder in the first degree. This identical question was raised by the demurrer to the indictment in Livingston's Case, decided during the present term of this court, supra 592; and it is only necessary to refer to the opinion delivered by Judge Daniel in that case, for the reasons of the court for sustaining the judgment of the Circuit court in overruling the demurrer in this case.

The court is further of opinion, that the Circuit court did not err in overruling the objection of the prisoner to the introduction of the dying declarations of the deceased as evidence. The alleged ground of the objection is, that no sufficient foundation for their introduction had been laid. The rule of law on this subject is now well settled, that to render dying declarations admissible evidence, they must be shown to have been made when the declarant is under a sense of impending death, and without any exrectation or hope of recovery. Whether so made or not, is a preliminary question to be determined by the court on all the circumstances of the case. See 2 Russ. on Crimes 752-767; Vass' Case, 3 Leigh 786; Hill's Case, 2 Gratt. 594. There is no difficulty in the application
621 *of the rule of law just stated to the circumstances of this case; which are fully set forth in the first bill of exceptions. According to the facts as stated by the Reverend Mr. Moore, there can be no doubt of the admissibility of the evidence. The declarations were made in about an hour before the declarant's death, on being informed of the opinion of his physicians that he could not possibly recover, and when all his acts and words indicate that he had not the slightest hope of recovery. There is some variance between the facts as stated by that witness, and as stated by the witness Tyler. If the variance were material, we would have to regard that statement as true which would sustain the judgment of the Circuit court. But the variance is immaterial. When the deceased first made the declarations, according to the evidence of Tyler, he may possibly have had some faint hope of recovery. But if he had, it must have been utterly extinguished by the information subsequently received from his physicians, through Mr. Moore, that he was certainly dying, and would die very soon. After he received that information, he repeated or reaffirmed the declarations; which made them competent evidence, if they would not otherwise have been so.

The court is further of opinion, that the Circuit court did not err in overruling the motion of the prisoner to set aside the verdict, upon the ground that it was contrary to law and evidence. The bill of exceptions states the evidence of the witnesses examined on the trial, instead of the facts appearing to the court to be proved by such evidence. See Vaiden's Case, 12 Gratt. 717. This court cannot therefore, according to our well settled rule on the subject, take cognizance of the case and reverse the judgment, unless, by rejecting all the parol evidence for the exceptor, and giving full force and credit to that of the adverse party, the decision of the court below still
622 appears to *be wrong. Id. and the cases therein cited. Applying that rule to this case, it certainly does not appear that the decision is wrong; or at least that there is any error therein to the prejudice of the prisoner. Full force and effect must, according to that rule, be given to the dying declarations as proved by Tyler, that the prisoner struck and kicked the deceased without provocation, and for no cause except that the prisoner and those who joined him in the affray said the deceased had talked about a young lady in Haley's house, which the deceased said he had never done: and also to the evidence of two of the brothers of the deceased, who proved that the prisoner said he did kick the deceased, and intended and tried to kill him. Regarding these as facts, and taking them in connection with the other evidence of the commonwealth regarded in the same way, the prisoner was certainly guilty of voluntary manslaughter at least. But the result will not be varied, even if the objection to the form of the bill of exceptions be disregarded, and all the evidence therein set forth, as well for as against the prisoner, be considered. In pursuing that mode of deciding the case, it would of course be necessary to disregard all the evidence of the prisoner in conflict with the evidence against him. But there is in fact no such conflict as, in any view of the conflicting evidence, could have the effect of reducing the offence below the grade of voluntary manslaughter, if full force and effect be given to the evidence against the prisoner which is consistent with the evidence in his favor.

The court is further of opinion, that the Circuit court did not err in overruling the motion of the prisoner to set aside the verdict, upon the ground that the court had misdirected the jury in regard to the law, in an instruction which the court gave, at the instance and request of the jury. The instruction is in these words: "If the
623 jury believe from the evidence *that the deceased and the prisoner were engaged in a sudden and mutual combat, in which no weapon dangerous in itself was used, and during the progress of the fight the prisoner struck the deceased an ordinary blow or blows with his fists or feet, without any intention, either to kill the deceased or to do him any great bodily harm, but to repel his attack, and that the death of the deceased was caused thereby, accidentally and apart from the prisoner's intention; then the prisoner is guilty of involuntary manslaughter. If, however, though no weapon dangerous in itself was used, but only the fists and feet; yet if the jury are satisfied from the evidence that the manner of inflicting the blows was cruel and unusual, and exceeded in number and violence what was necessary to repel

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the deceased, and the deceased died of such beating; then the prisoner is guilty of voluntary manslaughter." An objection is taken to each branch of this instruction ---the first, which defines involuntary, and the second, voluntary manslaughter. The objection taken to the first branch is, that it embraces a case of excusable homicide, se defendendo, or by misadventure. The objection is based on the words "to repel his attack," used in the instruction; and it was contended that a person has a right to repel an attack, using no more force than is necessary for the purpose; and that if death be caused thereby, accidentally and apart from his intention, he is guilty of no offence. "For (in the language of writers on criminal law) no man is required by law to remain defenceless, and suffer another to beat him as long as he pleases without resistance, although it be evident that the other does not aim at his life; but he may lawfully exert so much force as is necessary to compel him to desist." Davis' Cr. Law 78; 1 East P. C. 286. The objection taken to the second branch of the instruction is, that in declaring the prisoner guilty of voluntary manslaughter,
624 *if his "manner of inflicting the blows was cruel and unusual, and they exceeded in number and violence what was necessary to repel the deceased," &c., the instruction refers to an actual necessity, and not a necessity reasonably believed by the prisoner to exist.

The court is of opinion, that whatever objection might well be taken to particular words in the instruction, detached from the context, none can properly be taken to the instruction considered altogether. The words "to repel his attack," are explained by the rest of the instruction; and especially the commencement of it, which supposes that "the deceased and the prisoner were engaged in a sudden and mutual combat," and that "during the progress of the fight, the prisoner struck the deceased an ordinary blow," &c. By the very terms of the instruction, all idea of self-defence is excluded, blame is imputed to both parties, and certainly to the prisoner, from the beginning to the end of the affray, and he must be guilty at least of manslaughter. The words "to repel his attack," construed with the context, plainly mean "to maintain the fight," and might well have been omitted, without altering the sense.—Though, if taken in their literal meaning, they would not, in their connection, render the instruction erroneous. Men engaged in a sudden and mutual combat do not often inflict blows merely to repel the attack of each other. But they may possibly do so; and if, in doing so, one kills the other, he is guilty of manslaughter; because the mutual combat, in the progress of which the mortal blow is given, is an unlawful act. The word "necessary," in the second branch of the instruction, means reasonably necessary, or what the prisoner, under all the circumstances, might reasonably believe to be necessary. The instruction, however, must be construed in reference to all the circumstances of the case; and so construed, there cannot
625 be any doubt as to its meaning *or propriety. There was no evidence on either side tending to make out a case of self-defence or misadventure. The whole evidence tended to make out a case of manslaughter at least. The jury were no doubt all satisfied that it was manslaughter; but whether voluntary or involuntary, they were in doubt, or disagreed. They therefore requested the court to define the difference between the two, and the court defined it in reference to the case which the evidence tended to prove; that is, a case in which the homicide is committed in the course of a sudden and mutual combat, by blows inflicted with fists or feet; the court telling the jury, in effect, that in such cases, if the blows were ordinary blows, inflicted without any intention to kill or do great bodily harm, the offence was involuntary manslaughter; but if the blows were cruel and unusual, and excessive in number and violence, the offence was voluntary manslaughter. It does not appear that the prisoner was dissatisfied with this instruction at the time it was given; but the contrary is to be presumed. He did not except to it, nor save the point; but asked the court further to instruct the jury, that if upon the whole evidence they should entertain a reasonable doubt that the deceased came to his death by violence inflicted by the prisoner, then they must acquit him; which further instruction the court gave, in the very words in which it was asked. It cannot be expected that a court, in the hurry of a criminal trial, can be always ready to define a crime, or discriminate between the different grades of a crime, in the same accuracy of language which would be used by a writer on criminal law. If a party be dissatisfied with an instruction, he ought to state his objections at the time, in order that the court may have an opportunity of removing them. If no objection be made at the time, nor an exception be then taken, or the point saved;
but objection be made, for the first
626 time, after *verdict, and in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered, according to the law and the evidence, will not set it aside on account of that objection. Viewing the case in that aspect, this court certainly cannot say that the Circuit court erred in refusing to set aside the verdict for misdirection.

The court is further of opinion, that the Circuit court did not err in overruling the motion of the prisoner to set aside the verdict, upon the ground of the misconduct and irregularity of the jury. The alleged misconduct is, that McKenna, one of the jury, being of opinion that the prisoner was guilty, at most, of involuntary manslaughter, yet concurred in the verdict

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finding him guilty of voluntary manslaughter, upon an understanding and agreement with the rest of the jury, that all would unite in a petition to the governor to pardon him. The only evidence of the said misconduct, is the affidavit of the juror, taken the day after the jury had returned their verdict and were discharged, and his testimony, and that of seven other jurors, taken three days thereafter in court. It may be conceded, for the purposes of this case, that the said juror, and all who concurred with him in the said understanding and agreement, were guilty of a misdemeanor, for which they were liable to be punished by fine and imprisonment. And it may also be conceded, that the alleged misconduct would have been good ground for setting aside the verdict, if it had been established by admissible and sufficient testimony. But the question is, Whether the testimony of the jurors was sufficient, or even admissible evidence to prove it?

In England, the authorities were formerly unsettled and conflicting on the question, Whether the testimony *of jurors 627 is admissible to impeach their verdict? The affirmative of the question seems to have been held in Philips v. Fowler, Barnes 441; Parr v. Seames, Id. 438; Millish v. Arnold, Bunb. R. 51; and Aylett v. Jewel, 2 Wm. Black. R. 1299; and the negative, in Prior v. Powers, 1 Keb. R. 811. But in Vaise v. Delaval, 1 T. R. 11, which is considered a leading case on this subject, there was a motion for a rule to set aside a verdict upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won. Lord Mansfield, Ch. J., said, "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such misconduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source," &c. This case was soon followed by Owen v. Warburton, 4 Bos. & Pul. 326, in which Sir James Mansfield, Ch. J., said, "We have conversed with the other judges upon this subject, and we are all of opinion that the affidavit of a juryman cannot be received. It is singular, indeed, that almost the only evidence of which the case admits, should be shut out; but, considering the arts which might be used, if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him." The last two cases above cited have firmly settled the question in England; and the practice has never since been changed or shaken.

In the United States, there has been some conflict of judicial opinion upon the question, especially in the earlier cases; but the practice appears to be now 628 *generally settled, to reject the testimony of jurors when offered to impeach their verdict. The cases on the subject are too numerous to be cited. Most of them were referred to in the argument of this case; and are also collected and commented upon in 1 Graham & Waterman on New Trials 61-131; 2 Id. 577-594; and 3 Id. 1428-1450. Some of them, and of the English cases, are reviewed in The State v. Freeman, 5 Conn. R. 348, in which Hosmer, C. J., delivering the opinion of the court, concludes by saying, "The opinion of almost the whole legal world is adverse to the reception of the testimony in question, and in my opinion, on invincible foundations." In Johnson v. Davenport, 3 J. J. Marsh. R. 390, the court, in refusing a new trial, said, "The testimony of one or more of the jurors, to prove such misconduct of the jury as would invalidate their verdict or to question the purity of the motives by which they had been influenced in rendering it, or to explain the ground either of law or fact which influenced them, with a view to impeach the verdict which they had returned, is inadmissible, according to the whole current of modern decisions. The dangerous tendency of receiving testimony of the jurors for such a purpose, is too obvious to require comment." "It is indeed very difficult (the court further said) to lay down any precise rule, the application of which to each particular case would be sufficient to determine whether the affidavits of the jurors ought to be received to invalidate their verdict. It seems to be universally agreed, that if received at all, it should be with great caution; and we are of opinion that their admissibility should be confined to cases of mistake clearly made out, and which may be conceded as true, without subjecting the jury to any imputation of impure motives or palpable impropriety of conduct, and in relation to the proof of which there should be no reasonable ground for suspicion 629 *that they might have been tampered with." Tennessee, it is believed, is the only state in which it is now considered as settled that the testimony of jurors is admissible, and may be sufficient evidence of their misconduct to set aside their verdict. It was so held in an early case, Crawford v. The State, 2 Yerg. R. 60 (a case very similar in its features to this); which has been since followed in other cases, and especially in Cochran v. The State, 7 Humph. R. 544. But in Hudson's Case, 9 Yerg. R. 408, the court said, "It is a dangerous principle, and we are not disposed to extend it one step beyond what it has already been carried." And in Norris v. The State, 3 Humph. R. 333, the court adhering to that view, examined the prior cases, to ascertain how far the principle had been carried, and modified the rule accordingly.

In Virginia, the practice has never been settled. In several cases applications have

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been made to set aside verdicts on the testimony of jurors; and in one or two cases the application has prevailed. But in the latter, the testimony tended to prove mere mistake, and not misconduct of the jury. In most of the cases, the court referred to the danger of receiving such testimony, and the great caution with which it ought to be received, if at all. In Cochran v. Street, Wash. 79, the jury were divided in opinion; but the minority, believing that the opinion of the majority was to prevail, therefore concurred in the verdict. The court admitted that "to meddle with the verdict of the jury upon the evidence of some of the jurors, is a delicate business, and should be proceeded in with caution, to prevent the mischief of the jurymen being tampered with;" and referred with approbation to the decision of Lord Mansfield in Vaise v. Delaval, 1 T. R. 11; but as it was clear that the verdict was found under a mistake (the fact having been proved by a large majority of the jury, and denied by none of
630 *them, and it not appearing that there had been any tampering with them to obtain the information), the court awarded a new trial. That case was decided in 1792, when the practice was more unsettled than it now is. Since then, the tendency of judicial opinion has been more and more in favor of the exclusion of such testimony. Whether, if that were a new case, it would now be decided in the same way, is at least a doubtful question. But it rests entirely on the ground of an innocent mistake, clearly proved, showing that the verdict was never assented to by all the jurors, and was not in truth their verdict. In Bridge v. Eggleston, 14 Mass. R. 245, a similar case was decided otherwise. In Price's ex'or v. Fauqua's adm'r, 1 Hen. & Munf. 385, the court unanimously affirmed the judgment of the District court, refusing a new trial, on the affidavits of two of the jurors that they were alone influenced in finding for the plaintiff, by a fact stated in the jury room by one of the jury; the ground assigned for such refusal being "because it would be dangerous to admit a new trial on such information from the jurymen, and the new trial would be against the justice of the case." In Shobe v. Bell, 1 Rand. 39, one of the grounds of a motion for a new trial was that three of the jury were influenced to concur in the verdict by improper motives; and this ground was sustained by the affidavits of four of the jury. The Superior court overruled the motion, and this court affirmed the judgment. In Moffett v. Bowman, 6 Gratt. 219, a motion was made for a new trial, founded on the affidavit of nine of the jurors, stating that the verdict, as returned and recorded, did not contain the verdict which they intended to render, and that the same was returned by them under a mistake as to its legal effect. The manner in which the mistake was made was also stated in the affidavit. The Circuit court overruled the motion. This
631 court, being of opinion, *"from the evidence adduced on the motion for a new trial (which evidence was, under the circumstances, properly received by the Circuit court), that the intention of the jury was not accomplished by their verdict, and not being satisfied with the verdict on the merits, reversed the judgment, and awarded a new trial. In Hansbarger's adm'r v. Kinney, Id. 287, the verdict was set aside conditionally by the Circuit court, upon the evidence of some of the jury that they had been induced to concur in the verdict by a misunderstanding of an instruction of the court. This court reversed the judgment, being of opinion, "that to permit a verdict, which, in the opinion of the court that tried the cause was not contrary to the evidence, and by which, for ought that appears to this court, full justice was done, to be set aside upon the evidence of a few of the jurors, made under the circumstances described by the record, respecting their understanding of an instruction of the court upon questions of law raised at the trial, would lead to dangerous consequences, as holding out inducements to tamper with the jurors, after they had dispersed, and may have forgotten the circumstances which did actually occur." In Thompson's Case, 8 Gratt. 637, the court waived the decision of the question as to the competency of the evidence of jurors to impeach or invalidate their own verdict (it not being necessary in that case to decide it), but took occasion to say, "The question is now well settled in England against the competency, and the great preponderance of American authority is the same way." In Koiner v. Rankin's heirs, 11 Gratt. 420, Judge Lee, in his opinion, in which the other judges concurred, remarks, that "while affidavits of jurors will generally be received in support of the verdict, they will not readily be received to invalidate it." "The leaning of the courts of most approved authority is against
632 the practice of grounding *motions for new trials upon them; and a disposition has been manifested, greatly to restrict the class of cases in which, upon such affidavits, new trials will be allowed."

In view of all the authorities, and of the reason on which they are founded, we think that, as a general rule, the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct. And, without intending to decide that there are no exceptions to the rule, we think that even in cases in which the testimony may be admissible, it ought to be received with very great caution. A contrary rule would hold out to unsuccessful parties and their friends, the strongest temptation to tamper with jurors after their discharge, and would otherwise be productive of the greatest evils. A corrupt juror, wishing to favor one of the parties, might propose to decide the case by lot, knowing that he could have the verdict set aside if it did not suit him: Or, wishing to insure the discharge of a prisoner tried for felony, might refuse to concur with the other jurors in finding a true verdict of guilty, unless they would unite with him in a petition

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for a pardon, believing that he could have the verdict set aside if the pardon were refused. In almost every case, especially every case of felony in which the jury is kept together for several days, a plausible ground might be shown for setting aside the verdict; upon the sufficiency of which the court would have to decide according to its own discretion. Thus, the value of jury trial would be greatly impaired, and the whole administration of justice dependent upon it would be involved in the most painful uncertainty. A juror who comes forward to impeach his verdict on the ground of his own misconduct, has little or no claim to our credit; and the safest genefal rule is to shut the door against him. A person convicted of perjury is an in-
633 competent witness. *Why not a juror who denies the truth of his verdict; and, if his denial be true, thereby convicts himself of the highest moral, if not legal perjury? The verdict is surely the best evidence of his opinion of the case; and he at least should not be permitted, as a general rule, to impeach it. Little or no evil can result from the exclusion of his testimony: none in comparison with the great evils which would result from its admission. The verdict is rendered in open court, and in cases of felony, necessarily in the presence of the prisoner. The jury may be polled, and ought to be, if there is the least doubt of the free concurrence of all the jury in the verdict. In that way, any difficulty or disagreement which may be among them, can generally be discovered. In that way, it was discovered in Harden's Case, 1 Bailey's R. 3, that four of the jurors dissented from the verdict. In that way, doubtless, the same discovery might have been made in Cochran v. Street, 1 Wash. 79; and in the same way, it might have been discovered in Johnson v. Davenport, 3 J. J. Marsh. R. 390, that one of the jurors dissented from the verdict: for he stated in his affidavit, "that if his name had been called and he asked whether he agreed to the verdict, he would have answered in the negative." Is it not more reasonable that this easy legal precaution should be used, than that affidavits should be obtained of the jurors after their discharge, and made the foundation of a motion for a new trial? Again: the court, if not satisfied with the verdict, may and ought to set it aside. And if it improperly refuse to do so, the appellate court may revise and reverse the judgment. So there can be little or no danger that injustice will arise from the operation of the general rule in question.

The court is of opinion, that this case falls under the general rule, and not under any exception to it, and that the testimony of the jurors is not sufficient
634 *or admissible evidence to prove their alleged misconduct, gross as it undoubtedly was. It is not pretended that the verdict was founded on any mistake. The jury all concurred in it, perfectly understood its meaning and effect, and intended that it should operate accordingly. The Circuit court was satisfied with the verdict, as being, sustained by the law and the evidence; and this court concurs in that opinion. We therefore think the Circuit court was right in refusing to set aside the verdict on the ground of the misconduct and irregularity of the jury.

Upon the whole, the court is of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

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635 *Tanner v. The Commonwealth.

October Term, 1857, Richmond.

1. **Larceny—Lost Property.**—Lost property may be the subject of larceny.
2. **Same—Same—What Constitutes.***—To constitute a larceny of lost property, the person finding it must know or have the means of knowing the owner, or have reason to believe that the owner may be discovered, and he must intend at the time of finding the property to appropriate it to his own use.

At the April term 1857 of the Circuit court of the city of Richmond, Floyd Tanner was indicted for larceny in stealing bank notes of the value of one hundred and twenty dollars, the property of Alfred Gwathmey. On the trial he was found guilty, and the jury fixed the term of his imprisonment in the penitentiary at one year: And he thereupon moved the court to set aside the verdict and grant him a new trial, on the ground that the verdict was not warranted by the evidence. But the court overruled the motion, and rendered a judgment upon the verdict. And the prisoner thereupon applied to this court for a writ of error; which was allowed. The facts are stated in the opinion of Judge Allen.

August, for the prisoner.

The Attorney General, for the commonwealth.

ALLEN, P. In Hunt's Case, 13 Gratt. 757, the opinion was expressed that under particular circumstances, goods actually lost might be the subject of larceny. Such was the doctrine established in the cases of Regina v. Thurborn, 5 British Crown Cas. 387; and Regina v. Preston, 6 Id.
636 353. The cases on the subject *are reviewed in a note upon the first and leading case before cited, in 2 Lead. Crim. Cas. 31. It is there shown that according to the whole current of modern authority, as well in this country as in England, with perhaps the exception of one case decided in Tennessee, Porter v. The State, Martin & Yerger 226, lost property may be the subject of larceny; and that if a taking and

*See principal case cited and approved in Perrin v. Com., 87 Va. 557, 13 S. E. Rep. 76; *foot-note* to Hunt v. Com., 13 Gratt. 757.

See also, monographic *note* on "Larceny" appended to Johnson v. Com., 24 Gratt. 555.

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fraudulent intent coexist with a knowledge of the owner, the crime is complete. The correctness of this general proposition has been questioned by the prisoner's counsel, in the argument here, who has insisted that the case in which it is supposed the rule was established, were cases in which the property had been merely mislaid, where the constructive possession remained with the owner, and not to cases where the property had been actually lost by the owner; as where property was left by mistake in the prisoner's store, and he concealed and denied all knowledge of it; or where a servant found a roll of bank notes in a passage of her master's house, and did not inform her master, but denied she had the money; or where a coachman found a box in his coach, which he must have known belonged to a passenger whom he had carried; in these and other cases of a like character cited in 2 Lead. Crim. Cas. 34, the property cannot be said to be lost. For as was said by Parke, B., in Regina v. Thurborn, "Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict."

In such case, where the owner knows where the property is, and could recover the actual possession when he desired it, if it had not been removed by the thief, the property is not lost; and not being abandoned or derelict the owner has
637 still the constructive *possession, as much so as of his horse feeding in the public highway. And so where goods are actually lost by the owner, his property is not divested; and such property draws to it the constructive possession. If in such case the original taking was felonious, with intent to take entire dominion over them at the time, and the finder at the time of taking either know the owner, or from the place where the property is found, or evidence of his previous acquaintance with the ownership of it, or the nature of the marks on it, have the means of ascertaining the owner, or have reason to believe he can be found, the taking under such circumstances with such intent and knowledge is tortious. "Such possession (the judge observes in Ransom v. The State, 22 Conn. R. 153), being tortious, the taking by which it was acquired is not a lawful taking, and therefore trespass may be maintained by the owner against the taker."

But although lost property may thus be the subject of larceny, the cases referred to show that if there are no marks on the property, or other circumstances indicating the owner as aforesaid, the appropriation to the finder's use does not amount to larceny.

In the case of Thurborn, the accused found a note which had been accidentally dropped on the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. But he meant to appropriate it when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally. He then changed it, and appropriated the money taken, to his own use. The jury found that he had reason to believe and did believe it to be prosecutor's property
638 *before he thus changed the note. On these facts the court held that the first taking did not amount to larceny, because the note was really lost, and there was no mark on it, or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, that he believed the owner could not be found, and therefore the original taking was not felonious. And although he took the note with the intention of appropriating it to his own use when he picked it up, yet the possession was lawful, the original taking was not punishable, and the subsequent conversion, though he then knew the owner, was not a trespass.

In the case of the Queen v. Dixon, 7 Cox C. C. 35, the accused found a purse of money in a public place, but which had no mark on it by which its owner could be known; the jury found that the prisoner then believed that the owner could be traced, yet it was decided not to amount to larceny.

In the case of Manson v. The State, 22 Conn. R. 153, a pocket book and money were lost on the public highway near an inn, and within two hours the property was found by the accused at the place where lost. About the time the property was so found the owner gave notice of his loss at the inn, and publicly offered a reward for its restoration. There was no mark upon the property indicating who the owner was, nor any other evidence tending to prove that the accused, at the time of the finding, knew or had the means of knowing the owner. The accused used no means of enquiry or otherwise, to ascertain who was the owner, but concealed the fact that he had found it, and converted it to his own use.

On these facts the court instructed the jury, that if the accused, at the time he found the property, knew, or had the means of knowing the owner, and did not
639 *restore it to him, but converted it to his own use, he was guilty of larceny. This was held to be a misdirection, because the conviction by the charge was made to depend on the question, whether, with a knowledge or the means of knowledge as to the owner, the accused converted the goods to his own use, after he first took them; and not upon the question, whether, at the time of such taking, he intended so to convert them. The subsequent conversion was

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evidence of the intention with which they were first taken, but did not of itself make that taking felonious.

It remains to apply these rules as illustrated by the facts of some of the leading cases, to the present case. The indictment charges the prisoner with having on the 19th of November 1856, stolen two bank notes of fifty dollars each, and two other bank notes of ten dollars each, the property of Alfred Gwathmey.

The jury found him guilty, and ascertained the term of his confinement in the penitentiary at twelve months. The prisoner thereupon moved the court to set the verdict aside, upon the ground that it was contrary to the law and evidence, and to grant him a new trial. The motion was overruled; to which decision the prisoner excepted; and on his motion, the court certified the facts proved on the trial. The facts were few, and are set forth with much precision in the bill of exceptions. They prove that the pocket book with the bank notes it contained were actually lost. The owner had sent a boy with his coat to a store to have it repaired, forgetting that his pocket book was in the pocket. The pocket book was dropped out and lost between the office of the owner and the store, about three squares off, in the city of Richmond. It was further proved that the owner, remembering he had left his pocket book in the coat, went in pursuit of the boy, and overtook him as he was entering the store, and it was then discovered
640 that the pocket book *had been dropped out. It was further proved that the prisoner was seen to pick up something about sixty yards from the office of the owner, and on the way between said office and the store aforesaid, on the morning of the 19th of November, about ten o'clock; what it was, the witness could not say, but he thought it was a pocket book. The accused was arrested about 8 o'clock in the evening of the same day, and while on his way to prison he denied having the money and all knowledge of it. After he was taken to the watch-house and an examination of his person made; two fifty and two ten dollar notes in a little purse were found secreted in the prisoner's cell. After the money was found he was asked what he had done with the pocket book, the other ten dollar note, and the papers that were in the pocket book; to which the prisoner replied, that that was all the money he had found; that the pocket book and papers were with his wife; and if the officer would ask his wife for them, she would give them to him. That the officer went to the house of the prisoner's wife, who did not give him any pocket book, but gave him two papers, which, to the best of the witnesses' recollection, were receipts for some small sums which had been paid; but to whom they were executed, or by whom or for what sums, the witness did not recollect.

There is no fact proved showing that the prisoner, at the time of the finding, knew the owner, or had the means of knowing him, or had reason to believe that he might be found. Nor can such fact be inferred with any reasonable degree of certainty, from any of the facts actually proved. It was not proved that there was any name or mark on the pocket book, or other circumstance to indicate then who was the owner. The interval between the loss of the pocket book and the finding was brief; as it was about ten o'clock in the morning when the coat was sent to the store,
641 the *owner overtook the boy with the coat as he was entering the store, and discovered that the pocket book had been dropped out and lost, and the prisoner about the same hour in the day was seen to pick up something on the way between the office and the store.

But these facts do not warrant the inference that the prisoner saw the pocket book drop from the pocket of the coat. The place was in the public street of the city of Richmond; and the fact that the pocket book must have been accidentally dropped and lost but a few minutes before it was found, does not indicate to the finder who was the owner. It was not proved by the witness who saw him pick it up, that he saw it drop from the coat the boy was carrying, and there is no more reason to infer that it was seen to drop from the coat by the prisoner than by the witness who saw him pick up something which he thought was a pocket book. It is not shown that there was any mark or name on the pocket book to point out the owner; he was examined and does not prove the fact to be so. The papers delivered to the officer by the prisoner's wife are not connected with the prisoner or the pocket book, by any fact proved in the cause; and if they were, it does not appear to whom or by whom the papers were executed.

We have seen from the authorities, that where there are no indicia by which the owner can be found, the appropriation to the finder's use does not amount to larceny; for as it has been held the finder of a chattel actually lost is not bound to take any means to discover the owner; he must know him immediately from marks about the property or otherwise. Of this essential fact to constitute larceny in such case, there is no direct proof, nor can it be inferred with reasonable certainty from the facts proved; the probabilities are against such inference.

The present case is weaker in some
642 respects than *the case of Regina v. Thurborn. There the prisoner meant to appropriate the note found to his own use when he picked it up, and before he had disposed of it he was informed who the owner was, and that he had dropped the note accidentally. Here there is no fact to show that the original taking was not innocent as well as legal. The time when the intention was formed to assume entire dominion over the property, is left to inference. Nor does it appear that when he formed such intention, he had any knowledge of the owner. As, however, for the

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purpose of arriving at the intention with which the possession was first taken, evidence of the conduct of the prisoner and the circumstances, preceding, attending and following the taking would be competent, it is unnecessary to enquire whether, if that were the sole question in this case, the facts proved would establish an original taking animo furandi. There being nothing to indicate the owner at the time, and the property being actually lost, the accused had a legal right to take it. The possession so acquired could not be said to be against the will of any individual; for being lost and having no knowledge of the owner, or means of knowing to whom it belonged at the time of taking, it was uncertain whether any owner would appear. The taking did not amount to a trespass, and so no larceny could have been committed. If these views are correct, the facts proved did not make out the larceny charged, and the verdict should have been set aside, and a new trial granted.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

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643 *Finch v. The Commonwealth.

January Term, 1858, Richmond.

1. **Criminal Law—What Constitutes "Breaking"—Case at Bar.***—An entry into a dwelling-house in the daytime, through a door that was so closed that it came within the casing, and to open which required some degree of force, constitutes in law a breaking: though there was no fastening of any other kind on the door.

2. **Same — Statute — Word "Break."*** — The word "break," in the Code, ch. 162, § 12, p. 728, is borrowed from the law in regard to burglary, and is to be understood as it would be when used in a charge of burglary.

3. **Same—Costs—Liability of Prisoner.**†—A prisoner convicted of a felony, and obtaining a writ of error to the Court of appeals, where the judgment is affirmed, is not responsible for the fees of the clerk or the attorney general. See Code, ch. 211, § 10, 11, p. 782.

Allen Finch was indicted in the Circuit court of Pittsylvania county for a felony. The first count charged that he did feloniously break and enter, in the day time, the store-house of Yancey W. Ingram, adjoining and occupied with the dwelling-house of said Ingram, with intent to commit a larceny. The second count charged that he broke and entered into the dwelling-house of said Ingram, in the day time, with the same intent.

On the trial there were questions whether the prisoner was examined for the fact stated in the second count; and as to the competency of one of the jurors; but these were waived by the counsel for the prisoner in this court. The only question made in this court is, Whether there was in contemplation of law, a breaking into the premises? On that point the judge below instructed the jury, that if from the evidence they should believe that an entry was effected by the prisoner through a door which
644 was open or partially open, *that this was in law no breaking. But if they should believe from the evidence, that an entry was effected by the prisoner through a door that was so closed that it came within the casing of the door, and to open which required some degree of force, that this constituted in law a breaking, though there was no fastening of any other kind on said door. To this instruction the prisoner excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at one year; and there was judgment accordingly. And the prisoner asked for a new trial, which was refused; and at his instance the facts proved were stated on the record. Upon these facts the only question was as to the breaking. It appeared that the door through which the prisoner entered the house was a common batten door; and that it had at the time of said entry no lock, latch or fastening other than as follows: That in dry weather it fitted closely into the casing when pulled to. That it opened on the inside of the house. That there was on the inside of the door a small knob by which it was sometimes pulled open. That in any weather it required some exertion to pull it open by said knob. That the door when pulled to in any weather might be blown open by wind, but it would require a strong wind to blow it open. That on the day when the prisoner entered, the weather was warm and dry, and no wind was blowing. It was proved that the prisoner entered by this door, which was shut until he opened it; and he was found in the house kneeling at a desk, and trying with Ingram's bunch of keys to open a drawer of said desk, in which Ingram kept money. The prisoner lived in the neighborhood and had been frequently in the store. On the application of the prisoner, a supersedeas to the judgment was awarded.

645 *Barksdale, for the prisoner.

The Attorney General, for the commonwealth.

SAMUELS, J. The counsel for the plaintiff in the argument here, properly omitted to rely on the error assigned, because the Circuit court refused to quash the second count in the indictment. The motion to quash was probably made because of some supposed imperfection in the record of the examining court, or of some supposed variance between that record and the said second count of the indictment. On inspection of that record, it plainly appears

*See monographic *note* on "Burglary and House-breaking" appended to Clarke v. Com., 25 Gratt. 908.

†See monographic *note* on "Fines and Costs in Criminal Cases" appended to Pifer v. Com., 14 Gratt. 710.

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that the County court did examine into the criminal fact alleged in said second count.

The counsel also properly omitted to rely on the error assigned, because of the disqualification of the juror Hundley, by his opinion in regard to the case he was to try. He had not expressed his opinion; it was merely hypothetical, depending upon facts of the truth of which he had formed no opinion; he was moreover indifferent between the commonwealth and the prisoner.

No objection was made or can be made to the ruling of the court or the finding of the jury in regard to the entry into the house in the day time, with intent to commit larceny. It was said, however, that the only remaining constituent part of the offence, the breaking, did not take place, and thus the offence is incomplete.

The word "break," used in the statute, is borrowed from the law in regard to burglary, and is therefore to be understood as it would be when used in a charge of burglary.

If then, in any case, a party shall by even slight force remove or displace any thing attached to the house as part thereof, and relied upon by the occupant for safety of the house, it is housebreaking
646 within the *meaning of the statute, if the other constituent parts of the offence exist.

In our case, the door through which the entry was made, was not fastened by any lock, latch or bar, nothing of the kind being there. The door fitted closely within the casing, and when closed some degree of force was required to open it; this was its only fastening. The Circuit court ruled that the opening of the closed door thus fastened was a breaking within the statute, and the jury found accordingly. The decision of the court is sustained by adjudged cases.

In Regina v. Bird, 9 Car. & Payne 44, 38 Eng. C. L. R. 29, the glass of a widow had been cut, but every portion of the glass remained in its place until the prisoner pushed it in. This was held to be a breaking.

In Regina v. Hyams and others, 7 Car. & Payne 441, the raising of a window not fastened though it had a hasp by which it might have been fastened, was held to be a breaking.

Lifting up the flap of a cellar which is kept down by its own weight, has been held, after some difference of opinion, to be a breaking. 2 Arch. Cr. Pl. & Ev. 336, Waterman's notes. These and other cases of like kind indicate the rule in our case. The judgment should be affirmed.

A question is made as to what costs of the commonwealth, if any, shall be taxed and charged against the prisoner in this case and in this court. This question was decided by this court in the case of Anglea, &c. v. Commonwealth, 10 Gratt. 696, so far as it arises upon a taxation of costs upon a conviction of felony in a Circuit court. It was held in that case that the ordinary fees of the clerk, sheriff and attorney for the commonwealth for services in court on behalf of the commonwealth, were not to be taxed or paid by the prisoner. The several statutes referred to in the opinion in that case seem
647 to require the *same decision in this case in this court. This is in conformity with the practice under the law existing since the revisal of 1819, as administered in the late General court, and in this court since it succeeded to the jurisdiction of the General court. If a change had been intended by the Code of 1849, it would have been so declared. This Code is a revision of former laws, and should be construed in reference to them in every case, unless it appears that a change was intended. I am of opinion that no fee of the clerk or of the attorney general for services rendered to the commonwealth, is to be charged to the plaintiff.

The other judges concurred in the opinion of Samuels, J.

Judgment affirmed.

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648 *Huff v. The Commonwealth.

January Term, 1858, Richmond.

1. **Gaming—Indictment*—Averments.†**—An indictment for gaming, under the 1st section of ch. 198 of the Code, must charge the playing of one of the games specified; or it must show by averment that the gaming charged is of the like kind as those specified; that is, that the chances of the game are unequal, all other things being equal.‡

2. **Same—Presentment.***—A presentment for gaming not setting out any offence against the statute, may be quashed on motion.

At the May term 1857 of the Circuit court of Franklin county, Wilson Huff was presented by the grand jury for keeping and exhibiting an unlawful game played with dice, called chuckaluck, at the tavern-house of Samuel S. Helms in the town of Rocky-mount in Franklin county, within twelve months last past.

At the October term 1857 Huff appeared; and before pleading, moved the court to quash the presentment against him; which motion the court overruled; and he excepted. He then pleaded not guilty; and there was a verdict against him for a fine of one hundred dollars, and for two months' im-

*See principal case cited and approved in Nuckolls v. Com., 32 Gratt. 895.

†See monographic *note* on "Gaming" appended to Neal v. Com., 22 Gratt. 917; monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

‡Code, ch. 198, § 1, p. 742. "A free person, who shall keep or exhibit a gaming table, commonly called A B C, or E O table, or faro bank, or a table of the like kind, under any denomination, whether the game or table be played with cards, dice or otherwise, or who shall be a partner, or concerned in interest, in the keeping or exhibiting such table or bank, shall be confined in jail not less than two nor more than twelve months, and be fined not less than one hundred nor more than one thousand dollars."

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prisonment in the county jail: and thereupon the court rendered a judgment against Huff for the fine and the costs; and on the motion of the attorney for the commonwealth, a writ of capias ad audiendum
649 was awarded *against him, returnable to the next term. From this judgment the prisoner applied to this court for a writ of error; which was awarded.

Early, for the appellant.

The Attorney General, for the commonwealth.

ALLEN, P. The Code, chap. 198, § 1, p. 742, provides, that a free person who shall keep or exhibit a gaming table commonly called A B C, or E O table, or faro bank, or a table of the like kind under any denomination, whether the game or table be played with cards, dice or otherwise, shall be confined in jail not less than two nor more than twelve months, and be fined not less than one hundred nor more than one thousand dollars. The plaintiff in error was presented for keeping and exhibiting an unlawful game played with dice, called chuckaluck, at the tavern-house of S. S. Helms in the town of Rockymount in Franklin county, within twelve months last past. Before pleading to the presentment, he moved to quash it, because it does not set forth any penal offence under either of the sections of the Code against unlawful gaming. The motion was overruled, and he then filed the plea of not guilty, and the jury found a verdict of guilty against him, assessed his fine at one hundred dollars, and ascertained the term of his imprisonment in the county jail to be two months. The court thereupon rendered judgment against him for the fine assessed and the costs of the prosecution; and on motion of the attorney for the commonwealth, awarded a capias ad audiendum, returnable to the next term.

The offence charged was treated as coming under the first section of the act against unlawful gaming; and not being one of the gaming tables named in the act, it should appear that it was one of the like kind. It was decided in Wyatt's Case,
650 6 Rand. 694, that the *distinctive feature in the character of the games enumerated is, that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the games or tables. Where the offence charged is the exhibition of any of the gaming tables enumerated, nothing more need be averred, for the statute makes exhibiting of any of the gaming tables named a penal offence; and therefore the offence is sufficiently described by the name set forth in the statute, and no further description is necessary; being one of the enumerated games, the exhibition of it is unlawful. Where the offence charged is for keeping and exhibiting a game not enumerated, there must be some averment showing it to be one of the unequal games belonging to the same class with the enumerated games. Games may be played or exhibited where the chances are equal, all other things being equal; and the playing or betting at such game at an ordinary, race-field or other public place, unless it be one of the excepted games, subjects the party to punishment, though the penalty is different from that prescribed in the 1st section against the keeper or exhibitor of one of the unequal games therein enumerated or coming within the same class. The presentment should show on its face that the offence charged comes within the definition of the statute; if not one of the enumerated games, it must be of the like kind, one of the unequal games included in the class prohibited. This distinctive character of the game is of the essence of the offence described in the 1st section; and unless substantially averred, it does not appear upon the face of the presentment that the offence set forth in the 1st section has been committed. The verdict of guilty in manner and form as in the presentment against him is alleged, may be warranted by the evidence, although the game or table exhibited may not have been unequal.
651 The charge that the game is *unlawful, does not cure the defect. The offence must be so charged as to appear to be unlawful; otherwise, the allegation that an act was unlawful, would dispense with all averments showing it was unlawful. As was held in Roberts' Case, 10 Leigh 686, and Bishop's Case, 13 Gratt. 785, the words "unlawful," or "contrary to law," do not serve to enlarge or extend the force and effect of the terms employed to describe the act, so as to make the act unlawful, when it does not appear to be so by the description itself. I think the objection was properly raised by a motion to quash the presentment. In Bell's Case, 8 Gratt. 600, it was held that a motion to quash is addressed to the discretion of the court, and the court will not on such motion quash the indictment, unless where the court has no jurisdiction; where no indictable offence is charged; or where there is some other substantial and material defect. In this case, being presented for keeping and exhibiting, under the 1st section, the presentment does not charge an offence under that section, and there is no charge for playing or betting at any game, under the 4th section of the act. I think the court erred in overruling the motion to quash the presentment, and for that error the judgment should be reversed and the presentment quashed.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

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652 *Shifflet v. The Commonwealth.

January Term, 1858, Richmond.

1. **Criminal Law—Evidence—Irrelevant Matter.**—On the trial of a prisoner for burning a mill, the commonwealth proves by the owner of the mill, that a

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short time previous to the burning the prisoner had made violent threats against him. It is not competent for the prisoner to ask him, or any other witness, whether other persons had not made threats against him.

2. **Same—Same—Case at Bar.**—In such case the previous threats having been proved, the commonwealth may prove that shortly after the burning, the prisoner violently abused and threatened the owner, and said as he was about to leave; "You have not yet got what I intend to give you."

3. **Evidence—Confessions—Persons in Authority.***—A young man living in the jailer's family, and who occasionally, in the absence of the jailer, attended on the prisoners and kept the keys of the jail, is not a person in authority, whose threat or promise will exclude the confessions of a prisoner in the jail awaiting his trial.

4. **Same—Same—Inducements—Case at Bar.**†—A prisoner is told, in answer to his assertion of his innocence, that the person to whom he is speaking does not believe one word he says, but that such person believes he knows all about it; and his mother too. Prisoner declares that his mother knew nothing about it. He is then told he need not say any thing more about it, for that he had to go to the penitentiary any how. He says he knows that; but that his mother is innocent of it; and he requests the person to whom he is talking to go and tell certain persons he names to come to him. The person then says, What do you mean by what you say? In the name of God and all that is holy, have you let this charge rest on your mother, and she innocent of it? Prisoner again repeats she was innocent, and requests that the persons he had named may be sent for; which is done, and he makes confessions to them. HELD: There was no inducement held out to the prisoner which will exclude his confession.

5. **Appellate Practice—Change of Venue—Failure of Record to Show Indictment Found by Grand Jury.**‡—Where, upon the motion of the prisoner, the venue is changed, and the record sent by the clerk of the court from whence the trial is removed, to the court to which it is sent, does not show that the indictment was found by the grand jury; but the prisoner is tried and convicted; upon a writ of error to the Court of appeals, that court may direct a *certiorari* to the court from whence the case was sent, for a better record: And if it appears from the record *returned, that the indictment was found by the grand jury, the judgment will not be reversed.

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6. **Same—Same—Trial on Indictment including Faulty Counts—Case at Bar.**§—In such case, if it appears from the record returned with the *certiorari*, that the prisoner had appeared, and that the court had, on his motion, quashed one of the counts in the indictment; though on his trial he pleaded to the whole indictment, and was tried on the count which was quashed as well as the others, yet this is not cause for reversing the judgment.

This record, as it was when the prisoner was tried and when the writ of error was obtained, contained a paper purporting to be an indictment found by the grand jury of Greenbrier county, against Zepheniah (alias Cap) Shifflet, for that on the 19th of November 1856 he did feloniously and maliciously burn a certain saw mill and grist mill in said county, belonging to one Joseph F. Caldwell, of the value of one thousand dollars. A second count laid it as the property of another person, and not the property of Shifflet; and a third count laid it as the property of D. C. B. Caldwell. This indictment was endorsed "A true bill. Andrew Johnston, foreman."

The record further shows that at another day, to wit, the 20th of May 1857, the court, upon the application of the prisoner for a change of venue, changed it to the Circuit court of Monroe county, and recognized certain witnesses to attend the next term of that court.

At the October term of the Circuit court of Monroe, the prisoner was arraigned upon the indictment, and pleaded "not guilty." And he was thereupon put upon his trial, and the jury found him guilty, and fixed the time of his imprisonment in the penitentiary at seven years; and the court rendered judgment thereon accordingly.

On the trial several questions were saved, and they are stated in the opinion of Judge Moncure. In the petition for a writ of error, the petitioner raised another question, viz: That the record did not show *that the indictment on which the prisoner was tried, had been found by the grand jury. Upon the application of the prisoner, the court granted him a writ of error to the judgment. And after the case came into this court the attorney general obtained a writ of certiorari to the Circuit court of Greenbrier county, to send up a better record. The record which was received, and by consent made a part of the record as if regularly sent up, showed

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*__Confessions—Persons in Authority.__—The principal case and Smith's Case, 10 Gratt. 734, are cited in Vaughan v. Com., 17 Gratt. 580, as correctly stating the doctrine as to who is a "person in authority."

†__Same—When Admissible as Evidence.__—See principal case and Smith's Case, 10 Gratt. 734, cited in Page v. Com., 27 Gratt. 980; Mitchell v. Com., 33 Gratt. 860, and *foot-note* (p. 845). See also, *foot-note* to Vaughan v. Com., 17 Gratt. 576; Thompson v. Com., 20 Gratt. 724, and *foot-note*; monographic *note* on "Confessions" appended to Schwartz v. Com., 27 Gratt. 1025.

‡__Appellate Practice—Indictment—Record of Finding.__—In Simmons v. Com., 89 Va. 158, 15 S. E. Rep. 386, the principal case is cited as sustaining the proposition that, where there is no record of the finding of an indictment by the grand jury against the accused, the objection may be made for the first time in the appellate court.

In State v. Tingler, 32 W. Va. 547, 9 S. E. Rep. 935, the principal case and Williams' Case, 14 W. Va. 869, were cited as holding that, where there appears an omission in the transcript of the finding of the indictment, *certiorari* is proper to secure a better record.

See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

__Trial for Felony—Continuance—Before Arraignment.__—See *foot-note* to Boswell's Case, 20 Gratt. 860.

§See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

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indeed that the indictment had been found; but it showed also that on the motion of the prisoner, the Circuit court of Greenbrier had quashed the second count in the indictment, and that he had pleaded not guilty.

The case was elaborately argued here, by N. Harrison and Gratton, for the prisoner, and the Attorney General, for the commonwealth.

MONCURE, J. This is a writ of error to a judgment of the Circuit court of Monroe, convicting Zepheniah Shifflet of felony in burning a mill in Greenbrier; the venue having been changed from Greenbrier to Monroe. There are six assignments of error. Five of them were made in the petition for the writ—the sixth, for the first time, in the course of the argument. Why the last was not sooner made, will hereafter appear. I will notice them in the order in which they were made.

The first is founded on the first and second bills of exception; which raise very similar questions. On the trial of the case, the commonwealth having introduced the prosecutor D. C. B. Caldwell as a witness, who, amongst other things, proved, that previous to the burning of the mill the prisoner and himself had had quarrels on different occasions, and that the prisoner had made use of threats and abusive language to him, from which he had been
655 induced to apprehend *violence both to his person and property; thereupon, on the cross-examination of said Caldwell, the prisoner asked the witness if he was not at that time on bad terms with several other of his neighbors besides the prisoner? The court, on the motion of the attorney for the commonwealth, excluded the question, and the prisoner excepted. Afterwards, the commonwealth having introduced another witness, H. F. Hunter, whose evidence tended to show that the prisoner burnt the mill which he is charged with having burnt (other evidence having also been previously introduced by the commonwealth, of a quarrel between the prisoner and prosecutor, and threats used by the former against the latter); thereupon the prisoner asked the witness if he did not know of any other neighbor or neighbors of the prosecutor who had a falling out with him shortly before the mill was burnt, and who had made use of threats of violence against him also. The court, on the motion of the attorney for the commonwealth, excluded this question also; but the prisoner was permitted, without objection, to ask the witness if particular persons had not before that time threatened to burn said mill. The prisoner again excepted. The evidence introduced by the commonwealth to prove the previous quarrels and threats of the prisoner, as mentioned in these bills of exception, was clearly admissible, to connect the prisoner with the offence charged against him, and to show the motive and intention with which it was committed. The questions asked by the prisoner were, I think, as clearly inadmissible, and were therefore properly excluded by the court. To have admitted them, would have been a violation of what is laid down as the first rule governing the introduction of evidence, that it must correspond with the allegations, and be confined to the point in issue. "This rule (as has been well said) excludes all evidence of collateral facts, or those which are
656 incapable *of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it." 1 Greenl. Evi. § 52. These observations plainly apply to this case. It does not appear that there was (and must therefore be presumed that there was not) a particle of evidence connecting any other person than the prisoner with the criminal act charged against him. Mere evidence of the quarrels or threats of any other person, certainly would not have tended to establish such a connection, but would only have tended to excite prejudice in the minds of the jury, and mislead them, and also to take the prosecutor by surprise, who might otherwise have been able to prove that such other person had no connection whatever with the burning of his mill. There is nothing in the case of Rowt's adm'r v. Kiles' adm'r, Gilm. 202, which can give any sanction to the admissibility of such evidence. The issue there was on the plea of non est factum. The defendant, in aid of other evidence tending to prove the paper a forgery, offered testimony to show that a son of the obligee had said he could counterfeit the handwriting of the obligor and imitate it well. This testimony was received without objection. The defendant then offered evidence of the infamous character of the son, which was objected to and excluded; and the defendant excepted, and appealed from the judgment which was rendered against him. His counsel in this court, Mr. Stanard, maintained that the declarations of the son having been received without objection, all accessory evidence should have been admitted; and testimony as to his character was therefore admissible. Upon this ground, it would
657 seem, the *judgment was reversed. Judge Coalter in his opinion, says, "As the first branch of the evidence was not objected to by the plaintiff, we must at present, perhaps, take it to be legally received, and that consequently the other part was improperly rejected." Id. 206. See also what he says at the conclusion of the same paragraph on p. 207. That this was the ground of reversal is, I think, confirmed by the same case reported in 1 Leigh 216, which is also an authority to sustain the propriety of the exclusion of the evidence offered and excluded in this case.

The second assignment of error is founded

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on the third bill of exceptions, which was taken to the opinion of the court overruling the prisoner's motion to exclude Joseph Crane's evidence of the prisoner's confession, on the ground that the witness had not heard the whole but only detached parts of it; and permitting the said evidence to go to the jury in connection with the testimony of other witnesses who were present during the whole of the conversation, and whom the commonwealth's attorney proposed to introduce, and did introduce to prove the same conversation and confession. I think this evidence was clearly admissible; and as the counsel for the prisoner, in the argument before this court, did not rely upon this assignment of error, and indeed waived it, I deem it unnecessary to say any thing more on the subject.

The third assignment of error is founded on the fourth bill of exceptions. The prosecutor Caldwell, after testifying that a few nights before the burning of his mill, the prisoner came to his house, and abused him, saying just as he left, "D—n you, I will pay you," or "You shall suffer for what you have done;" stated further, that a few days after the mill was burned, the prisoner approached him, cocked his rifle, changed his pistol from one pocket to the other, commenced abusing witness as
658 he approached him, and *continued to do so in a very violent manner, and said just as he left, "You have not yet got what I intend to give you." The prisoner moved the court to exclude so much of said evidence as related to a conversation subsequent to the burning of the mill. But the court overruled the motion, and the prisoner excepted. The evidence was relevant to the issue and plainly admissible. It tended to prove an admission of the prisoner, made a few days after the burning of the mill, that he had executed, but in part only, the threat of revenge which he had made against the prosecutor a few days before. Its competency rests on the same principle which sustains the competency of the evidence of that threat. Both tend strongly to connect the prisoner with the criminal act. The previous threat indicated a general purpose of revenge. The subsequent admission indicated that some act had been done in execution of that purpose. In the short interval between the threat and the admission, the prosecutor's mill was burned. It does not appear that during that interval he suffered in any other way.

The fourth assignment of error is founded on the fifth and last bill of exceptions, which was taken to the opinion of the court overruling the motion of the prisoner to exclude the confessions made by the prisoner to the witness Margrave, on the ground that they were not free and voluntary, within the meaning of the law. The subject of the admissibility of confessions as evidence has recently been fully considered by this court in the case of Smith v. The Commonwealth, 10 Gratt. 734. Judge Lee in his opinion in that case, in which a majority of the court concurred, comes to the following conclusion: "The rule that may be fairly deduced from authoritative decisions upon the subject is, that a confession may be given in evidence unless it appear that it was obtained from the party by some inducement of a worldly or temporal
659 character in the *nature of a threat, or promise of benefit, held out to him in respect of his escape from the consequences of the offence or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such a person." Let us apply this rule to the present case, and enquire, 1st. Was Margrave a person in authority, within the meaning of the rule? 2dly. Did he hold out to the prisoner such an inducement to confess as the rule requires? 3dly. Did he thereby obtain the confessions in question? And,

First, Was he a person in authority? The only ground on which it can be contended that he was, is, that he lived in the family of the jailer of Greenbrier county while the prisoner was confined in the jail of said county; that he sometimes had the keys of the jail; that he attended about the jail; that when the jailer was absent, he carried the keys and had control of the jail, and that a son of the jailer did some things which he did; and that when he was not using the keys, the wife of the jailer kept them. He was neither a deputy sheriff or deputy jailer, or sworn officer of any kind. He was a mere menial of the jailer, and held the same, or nearly the same, relation to the jail as did the jailer's wife and son. He was not in the presence of the jailer when he held out the alleged inducement. The decisions excluding confessions have already, it has been often said, gone too far. "And in the more recent cases (says Judge Lee in Smith's Case, 10 Gratt. 739), the judges have plainly manifested a disposition not only not to carry the doctrine any further, but also, to some extent, to retrace their steps, and to adhere more closely to the proper discrimination to be made between the different kinds of inducements that may be supposed to have led to a confession, and the characters of the parties by whom the same may appear to have been held out." I know of no case in which it has been held that a person
660 *occupying such a relation to the prisoner as was occupied by the witness Margrave in this case, is a person in authority within the meaning of the rule in question. Persons in authority within the meaning of that rule, are generally, if not always persons engaged in the apprehension, prosecution or examination of the prisoner. The prosecutor, the officer who makes the arrest, and the magistrate before whom the prisoner is carried, are clearly persons in authority; and inducements held out in their presence, without their objection, are regarded as held out by them. There are others who may also be persons in authority. If a jailer in whose jail the party making the confession is confined, be such a person (as to which I express no opinion), there is, I think, neither

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reason nor authority for saying, that a mere member of the family of the jailer, holding no office of any kind, nor having any connection with the prisoner further than to attend about the jail, and in the absence of the jailer to have control of it and carry the keys, is a person in authority within the meaning of the rule. If he is, so also, it seems, would be the wife of the jailer in this case, who kept the keys when the witness was not using them; and the son of the jailer, who sometimes acted for him. What power could any such subordinates be reasonably supposed to have, to execute any promise or threat they might make to a prisoner, "in respect of his escape from the consequences of the offence, or the mitigation of the punishment." It has been sometimes held that the wife of a prosecutor is a person in authority. But only, it seems, where the offence, in some way or other, especially concerns her. In Hardwick's Case, 1 Carr. & Payne 98, 11 Eng. C. L. 328, in note, a confession made before a magistrate was objected to on the ground that the wife of the constable had told the prisoner previously that he had better confess. Baron Wood overruled the ob-
661 jection, *and it would seem, on the ground that the constable's wife was not a person having authority. Joy 262. I think, therefore, that the witness Margrave was not a person in authority. But even if he was,

Secondly, Did he hold out to the prisoner such an inducement to confess as the rule requires? "The doctrine of inducements (says Baron Parke) has been carried to the verge of common sense." In Regina v. Baldry, 2 Denn. C. C. 430, 12 Eng. L. & E. R. 590, recently decided by the English court of criminal appeal, the same learned judge expressed the opinion, "that the rule has been extended quite too far." But I doubt whether in any case it has been extended so far as to make what was said by the witness to the prisoner in this case such a promise or threat as would amount to an inducement, within the meaning of the rule. The inducement, according to the rule before stated, must have reference to the prisoner's escape from the consequences of the offence, or to the mitigation of the punishment. And it must be calculated to lead the prisoner to suppose it would be better for him to admit himself to be guilty of the offence, though he never committed it. Joy on Confessions 13; 2 Russ. 826, 845. If the prisoner be told that it will be better for him to confess, or worse for him not to confess, or words to that effect be addressed to him, the inducement will be sufficient to exclude the confession. 1 Greenl. Evi. § 219. In such a case, the question does not turn on what may have been the precise words used, but whether the words used were such as to convey to the mind of the prisoner an intimation that it will be better for him to confess that he committed the crime, or worse for him if he does not. Wharton 259; Garner's Case, 1 Denn. C. C. 329. The apparent conflict in the cases on this subject has, no doubt, in a great degree arisen from the different constructions which judges have placed upon similar words
662 when *used under different circumstances and in a different connection. A great deal must be left to the discretion of the judge in such cases, who must decide whether, under all the circumstances, the words used express or imply a promise or threat, and were so understood by the prisoner. We see cases in the books in which it is difficult to discover a promise or a threat in the words used to induce the confessions which were excluded: And yet, the judges who decide those cases may have discovered it very plainly. It will not do, therefore, to say that because certain words have been held in certain cases to imply a promise or a threat, the same or similar words must be held in every case to imply a promise or a threat. About the rule itself there is no dispute; that there must be a promise or a threat. The only difficulty is in the application of the rule; and in that there is sometimes much difficulty: But in this case I think there is very little. Let us now see how the rule applies to the facts of the case.

The witness stated that he went into the jail where the prisoner was confined, and that prisoner said, "I do not know what they are keeping me up here for; I have never done any thing." Witness then said, "I do not believe one word you say. I believe you know all about it, and your mother too." To which prisoner replied that witness was mistaken; and that his mother knew nothing about it. Witness then remarked to prisoner, "It is not worth while for you to say any thing more to me about it, for you have got to go to the penitentiary any how." Prisoner said, "I know that. I am satisfied I will have to go, but mother is innocent of it; and there were older men than me engaged in it, and I want you to go and tell Captain Crane, and J. H. Wetzel, D. C. B. Caldwell and D. H. Stalnaker to come down here." Witness said, "What do you mean by what you
663 say? In the *name of God and all that is holy, have you let this charge rest on your mother, and she innocent of it?" "Yes (prisoner replied), she is innocent of it, but there are older men than me engaged in it, and I am determined to have those men arrested." Witness said, "Are you joking with me?" Prisoner replied, "No, sir, I am not joking with you—will you go and tell Crane, Wetzel, Caldwell and Stalnaker to come down here?" Witness stated that he accordingly went for the men thus named. He also stated that the night before the conversation above mentioned, prisoner had requested him to go and tell Captain Crane he wished to have a private talk with him; which witness had done. He then mentioned another confession made by the prisoner about two months thereafter; but it is unnecessary to set forth that more particularly. The witness also stated that the prisoner had always, previous to the said conversation, denied having com-

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mitted the offence charged against him; and stated in conclusion, that he had never made use of any threat or promise to induce the prisoner to make any confession. So that if he did make any such threat or promise, expressly or by implication, it must be found in what he said to the prisoner as before set forth. Is it to be found there? I think not. Much less a threat or promise "in respect to the prisoner's escape from the consequences of the offence or to the mitigation of the punishment." But for some of the adjudged cases, I do not think there could be the least doubt or difficulty upon the question. Mills' Case, 6 Carr. & Payne, 146, 25 Eng. C. L. R. 324, was very much relied on in the argument. It was a nisi prius decision and certainly extended the rule very far. A constable, whilst he had the prisoner in custody, asked him whether he had committed the felony? He denied it. The constable then said, "It is of no use for you to deny it for there is the man and boy who will swear they
664 saw you do *it." Gurney, B., held this was an inducement, and refused to receive the statement. "These words (says Mr. Joy) seem to have been construed by the learned judge as the same, in effect, as if the constable had said, it will be better for you to confess, for they will swear against you and convict you, whether you do or not." Joy on Confessions 7.

The observations made by that author on the next case he notices, to wit, Shepherd's, seem to be alike applicable to Mills' Case. "The manner (he says) in which the words were used (meaning the words used by the constable to the prisoner in Shepherd's Case), may have been considered by the learned judge, who saw and heard the witness, to be of a threatening nature, and calculated to lead the prisoner untruly to confess himself guilty." Id. 8. He says in a note, that Shepherd's Case has been controverted. And yet it seems to be a stronger case for the exclusion of the confession than Mills.' But surely neither of those cases can justly be said to be like this. There, a constable made an arrest, and used words to the prisoner, which the judge who saw and heard the witness construed to imply that it would be better for the prisoner to confess. Here, a person attending about a jail, and having control of it in the absence of the jailer, but not being an officer of any kind, had a conversation with a prisoner confined in the jail, which seems to have been casual, and brought on by the prisoner himself, in which conversation the words used by such person do not naturally import any promise or threat, and were not so construed by the judge who saw and heard the witnesses. Griffith's Case, 2 Russ. 832, 838, was also relied on. But what was said by the prosecutor there, connected with the reply of the prisoner, plainly implied an understanding on the part of the latter, that if she would confess, she would not be taken before the
665 magistrates. On the *other hand, I would refer to Thornton's Case, 1 Moody's C. C. R. 27, in which a constable had harshly interrogated a boy of fourteen years of age, when under detention without a warrant, and accused him of telling falsehoods, and in a manner calculated to intimidate, and made him cry, but held out no promise or threat as to his escaping from the charge against him. The confession was held admissible by seven judges out of ten. Joy 13, and 2 Russ. 847–8, where the case is fully stated.

But it was argued, that the witness led the prisoner to believe that his mother would be benefited by his confession; and that, in effect, the witness not only advised, but most earnestly appealed to the prisoner to confess his guilt. I do not so construe the words of the witness; nor do I perceive how the prisoner's mother could be benefited by his confession of his own guilt, especially if he were innocent. And we have seen that the inducement, in order to exclude the evidence, must be calculated to make the prisoner believe that it would be better for him to confess his guilt, though he were innocent. But even if he could have benefited his mother by confessing his own guilt, it would not have been such a benefit as the rule contemplates. See Nolan's Case, 1 Crawf. & Dix C. C. 74, referred to in Joy 16, and Russ. 847. I therefore think the witness held out to the prisoner no such inducement to confess as the rule requires. But if he did, it remains to enquire,

Thirdly, Did he thereby obtain the confessions in question? If an inducement is held out and a confession immediately made, the presumption would be conclusive, in the absence of evidence to the contrary, that the confession was obtained by the inducement. But the circumstances of the case may repel the presumption, and show that the confession was made irrespectively of the supposed inducement.
666 And such I *think is the case here, if it can be said that any inducement was held out by the witness. He had never, he says, made use of any threat or promise to induce the prisoner to make any confession. The night before his conversation with the prisoner, before stated, the prisoner requested him to go and tell Capt. Crane he wished to have a private talk with him. The said conversation was commenced by the prisoner; and, both in the course and at the conclusion of it, he repeated the request that witness would go and tell Capt. Crane and also three other persons to come down to the jail. These circumstances indicate that the purpose of the prisoner to make the confession, such as it was, existed prior to his said conversation with the witness, and was not induced thereby. I see nothing in that conversation, or the relation of the parties, which was adequate to induce it. What induced it, does not appear. He no doubt had a motive. "I take it, no man ever makes a confession voluntarily (says Taunton, J.), without proposing to himself in his own mind some advantage to be derived from it." Green's Case, 25 Eng. C. L. R.

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581. But such an inducement cannot render the confession inadmissible. It is said in 2 Russ. 847, that if the proposal to confess comes from the prisoner, it seems his confession is admissible, although the prosecutor, in consideration of his doing so says he will do all he can for him. In support of this observation, Green's Case, supra, is cited. I therefore think the witness did not obtain the confessions by any inducements held out by him; and in every view of the case, I am of opinion that the confessions were admissible evidence.

The fifth assignment of error, and the last taken in the petition, is, that the court erred in entering up a judgment on the verdict, or in trying the case at all, because, beyond the endorsement on the indictment, there was nothing to show that the
667 grand jury had *ever found a true bill in the case. This objection was not taken in the court below, but, for the first time, in the petition. The prisoner's counsel contends, however, that it is "a fatal objection; whether made before or after verdict, whether upon a motion in arrest of judgment in the court below, or upon an assignment of errors, for the first time, in an appellate court." And for this, he cites Cawood's Case, 2 Va. Cas. 527. That case seems to sustain the position; and the objection would probably be fatal, if the finding of the grand jury was not in fact recorded. As the record originally came up to this court, it did not appear that the finding had been recorded. The prisoner had been indicted in Greenbrier, and on his motion the venue had been changed to Monroe. The clerk of the Circuit court of Greenbrier, instead of sending to the clerk of the Circuit court of Monroe a certified copy of the record of the case, as directed by the Code, ch. 208, § 24, p. 776, only sent the original indictment, with the endorsement thereon of the finding thereof, signed by the foreman of the grand jury, and a certified copy of the order changing the venue, remanding the prisoner to the jail of Greenbrier for removal to the jail of Monroe, and recognizing the witness on behalf of the commonwealth to attend as such on the first day of the next Circuit court of Monroe. At that court, the prisoner was arraigned and pleaded not guilty to the indictment, and was tried, and convicted thereon. The petition for a writ of error to the judgment was accompanied by a copy of the record of the case in the Circuit court of Monroe, which embraced only so much of the record of the case in the Circuit court of Greenbrier as had been sent or certified by the clerk of the latter to the clerk of the former as aforesaid. After the writ of error was awarded, this court, on the motion of the attorney general, awarded a certiorari, to be directed to
668 *the clerk of the Circuit court of Greenbrier, to certify the record of the case in that court more fully to this court. There has been no regular return of the certiorari by the clerk of that court to this. But he certified a copy of the record of the proceedings in the case in that court to the clerk of the Circuit court of Monroe, who has sent a certified copy to this court; which, by consent of the attorney general and the counsel for the prisoner, is to be regarded as a copy of the proceedings in the Circuit court of Greenbrier, duly certified to this court, in obedience to the certiorari. If this addition can properly be made to the record on which the case is to be determined by this court, it will remove the ground of the objection now under consideration, as it shows that in fact the finding of the indictment by the grand jury was duly recorded in the Circuit court of Greenbrier.

But it is contended on behalf of the prisoner, that this court had no right to award a certiorari to the clerk of the Circuit court of Greenbrier; and that no part of the proceedings of that court which had not been certified to, or was not before the Circuit court of Monroe when the case was tried therein, can properly be certified to and be regarded as part of the record before this court. It is said that this court has no power to award a certiorari, except where it is given by statute; and that the only statute giving such power, is the Code, ch. 182, § 7, p. 684, which provides that the appellate court "may, in any case, award a writ of certiorari to the clerk of the court below, and have brought before it, when part of a record is omitted, the whole or any part of such record:" and it is contended that the Circuit court of Monroe, and not of Greenbrier, is "the court below," within the meaning of this provision. I think that both of these courts are "the court below," according to the very terms as well as the true intent and mean-
669 ing of the statute. The *law authorizing the venue to be changed for the trial of a case, makes the two courts in effect but one court, as to that case; which is proceeded with in the court to which the venue is changed, from the point to which it had proceeded in the first court, when the change was made. There is but one record of the case. But part of it is in one court and part of it in the other. The law, for the sake of convenience, makes a certified copy of the record of the case in the first court, sufficient for the purpose of further proceedings in the other court. But it does not make that copy the record itself; and whenever it is necessary to know what is the true record of the case in the first court, recourse can only be had to that court or the clerk thereof. If the prisoner had raised the objection in the Circuit court of Greenbrier, before the venue was changed, that there was no record of the finding of the grand jury, the record itself would at once have answered the objection. If he had raised it in the Circuit court of Monroe, after the venue was changed, a perfect copy of the record of the case in Greenbrier would have been ordered and obtained by the Circuit court of Monroe, and would have answered the objection. He raised it in neither of those courts, but for the first time in this court. Is this court powerless to

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obtain a perfect copy of the record for the purpose of ascertaining whether the objection is well founded or not? I think not. Cawood's Case shows that the certiorari was properly awarded in this case, as the venue had been changed in that case, and a certiorari was awarded to the clerk of the court in which the prosecution was commenced. It is said that that was an adjourned case, and the writ was awarded on the motion of the prisoner. I do not think these facts material to the question. The case was argued by able counsel, and with great ability. No question was raised as to the power of the court to award the writ, or as to the propriety of that
670 *mode of proceeding. It would hardly have been moved for, if it had not been considered necessary by the counsel for the prisoner, to have a full copy of the record of the court in which the indictment was found, for the purpose of ascertaining whether the finding was recorded. And yet that was not necessary, if, as now contended, this court can look only for that purpose to the record of the court which rendered the judgment. For the record of that court certainly did not show that the finding was recorded. It devolves on the plaintiff in error to show that there is error in the judgment; and he must show it by the record. In this case, he only shows that there was a chasm in the record, as it originally came up to this court, and that the finding of the indictment may or may not have been recorded. It devolved on him to fill up that chasm, and show whether or not the finding was in fact recorded. He cannot complain that the burden which devolved on him has been borne by the commonwealth. It is said that the person as to whom the finding was recorded, might have been a different person from the prisoner. I think there is nothing in that objection. An indictment was found against the prisoner in Greenbrier. He moved for and obtained a change of venue to Monroe, where, without raising the question of identity, he pleaded to the indictment, and was tried and convicted: and the copy of the record now certified to us shows that the finding of that indictment was duly recorded.

But that copy (in connection with the residue of the record) discloses another ground of objection to the judgment, which was taken, for the first time, in the argument before this court, and constitutes the sixth and last assignment of error, to wit, that the prisoner was tried and convicted upon the whole indictment, although the second count had been quashed. He was arraigned in the Circuit court of
671 Greenbrier, and *on his motion the second count of the indictment was quashed: thereupon he pleaded not guilty to the first and third counts, and moved for a change of venue; which was accordingly ordered on a subsequent day of the term. A copy of that order only, with the original indictment and endorsement thereon, having been sent to the Circuit court of Monroe, he was again arraigned in the court, and pleaded not guilty to the indictment, without taking any notice of the order which had been made in the Circuit court of Greenbrier quashing the second count. A general verdict of guilty was found against him, and judgment was rendered accordingly. If it be conceded that he did not, in effect, waive the benefit of the order quashing the second count, and that it was error to arraign and try him on the whole indictment after that count had been quashed, still I think it is not an error to his prejudice, and therefore not good ground for the reversal of the judgment. At common law, there was a settled distinction between a general verdict in civil and in criminal proceedings. In the former case, if some of the counts were bad when entire damages were given, it was necessary to arrest the judgment, because the court could not apportion the damages: while in the latter, the court ascertained the penalty, and could apply it to the good counts which were supported by the evidence; and therefore, where the defendant was found guilty of the charge in general, if there were any good counts, the verdict was sufficient, and an entire judgment might have been given. 1 Chit. Cr. Law 249, 640. At an early period in this state, the common law rule in civil cases was changed by statute, which provided, that "when there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good; but the defendant may apply to the court to instruct the jury to disregard the faulty count." 1 Rev. Code of 1819,
672 *p. 251, § 104. The rule in criminal cases remained unchanged by statute until a very recent period, as will be presently noticed.

In Kirk's Case, 9 Leigh 627, it was held that the common law rule was applicable to a conviction for felony, punishable by imprisonment in the penitentiary, and that the judgment should not be reversed if any count was good, even though the court below overruled the motion of the prisoner to quash the bad counts. In Mowbray's Case, 11 Leigh 643, and Clere's Case, 3 Gratt. 615, it was held, contrary to Kirk's Case, that the common law rule was not applicable to offences punishable by confinement in the penitentiary, as the reason of the rule did not apply. Thus stood the law and the adjudications upon it when the act of March 14, 1848, was passed, containing a provision (see Sess. Acts, p. 152, § 43), which has been since substantially embodied in the Code, p. 778, § 34, in these words: "When there are several counts in an indictment or information, and a general verdict of guilty is found, judgment shall be entered against the accused, if any count be good, though others be faulty. But on the trial, the court, on the motion of the accused, may instruct the jury to disregard any count that is faulty." See Rand's Case, 9 Gratt. 738, in which the cases and statutes on this subject are reviewed in the opinion of the court, delivered by Judge

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Daniel. The effect of the provision in the Code is to make the common law rule applicable to all criminal cases, whatever may be the mode of punishment, and however the measure of it may be ascertained. But the accused is effectually protected from injury, by the right which is given him to have the faulty counts excluded from the consideration of the jury. If he does not avail himself of that right; if he does not move the court to instruct the jury to disregard the faulty counts, how can he
673 complain of injury? *How is he prejudiced by the judgment? Is not the presumption conclusive, that if he does not make the motion, it is because there is no evidence to sustain the faulty count, or it can do him no harm? In this case, the first and third counts are certainly good, even if the second be faulty, and a general verdict of guilty has been found. Why should not a judgment be entered against the accused according to the direction of the statute? A judgment has been entered. Why should it be reversed? Is it because it was error in the court to try the prisoner on the whole indictment, when one of the counts had been quashed? He voluntarily pleaded to the whole indictment, and had only to move the court to exclude the second count for the jury, the court having already decided it to be faulty. He would have made that motion, if he could have derived any benefit from it.

I think there is no error in the judgment, and am for affirming it.

The other judges concurred in the opinion of Moncure, J.

Judgment affirmed.

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674 *Boyle v. The Commonwealth.*

January Term, 1858, Richmond.

Sale of Ardent Spirits—Indictment—Allegations.†—An indictment for selling ardent spirits without a license, to be drunk where sold, must allege that the selling was by "retail."‡

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*For monographic note on Indictments, Informations and Presentments, see end of case.

†Sale of Ardent Spirits—Indictment—Allegations.—"In Boyle's Case (14 Gratt. 674), it was held that the indictment must state the mode in which the sale was made, as inference can never supply a total want of averment in regard to an essential part of an offence." Arrington v. Com., 87 Va. 98, 12 S. E. Rep. 224.

Again, in Bailey v. Com., 78 Va. 21, it is said: "In no case can argument or inference supply the total want of averment of an essential part or element of the offence. Minor's Crim. Synopsis, 225; Peas' Case 2 Gratt. 629; Hampton's Case, 3 Gratt. 590; Howel's Case, 5 Gratt. 664; *Boyle's Case, 14 Gratt. 674;* Young's Case, 15 Gratt. 664."

See also, *foot-note* to Glass v. Com., 33 Gratt. 827; monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 887; monographic *note* on "Indictments, Informations and Presentments" at end of principal case.

‡See JUDGE SAMUELS' opinion for the statute.

In June 1857 the grand jury impanneled in the Circuit court of the city of Lynchburg, found an indictment against John D. Boyle, for that on, &c., at, &c., "he did, without license so to do, sell ardent spirits, to be drunk where sold, in a room occupied by him," &c. The indictment omitted the words "by retail."

Boyle appeared and demurred to the indictment; but his demurrer was overruled. And there was a verdict and judgment against him, for the fine of thirty dollars and the costs. Whereupon he applied to this court for a writ of error; which as allowed.

Mosby, for the appellant.

The Attorney General, for the commonwealth.

SAMUELS, J. It has been long and well settled by the courts of England, and by the courts of Virginia, that an indictment for any offence must allege every fact entering into the legal definition of such offence. In cases of indictments for offences at common law, set forms and technical terms appropriate to each particular offence, have been sanctioned by long use and by adjudications of courts, as being sufficiently descriptive of the offence.
675 In case of indictment under *the statutes, it is proper always, and sometimes indispensable to use the language of the statute creating or defining the particular offence. Questions sometimes occur in cases of either class, whether the offence alleged is sufficiently described by words equivalent to, or synonymous with those in which it is described by the law.

The prosecution in this case seems to be founded on the latter clause of § 18, ch. 38, p. 209 of the Code of Virginia, in these words: "And if any person sell, by retail, wine, ardent spirits, or a mixture thereof, to be drunk in or at the store, or other place of sale, he shall, unless he be licensed to keep an ordinary at such store or place, forfeit thirty dollars." The demurrer filed by the plaintiff in error to the indictment presents the question, whether the offence is so described as to bring it within the law.

It is seen by inspection of this indictment, that it is not alleged therein, in what mode the sale was made. Yet by the statute, it is made an ingredient in the offence, that the sale be by retail. Without this constituent part, the offence is not complete. It was insisted by the attorney general, that inasmuch as the indictment alleges that the ardent spirits were sold to be drunk at the place of sale; and inasmuch as ardent spirits are necessarily drunk in such quantities as can be sold only by retail, the allegation is equivalent to an allegation of sale by retail. If we yielded to this argument, we should be going further than the courts have yet gone; at most, they have only held in some cases that a direct averment of fact was sufficient, because such fact was equivalent to the fact

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which is made part of the offence; they have never yet held that argument or inference may supply a total want of averment of any kind in regard to an essential part of an offence. See The Common-
676 wealth v. Peas, 4 Leigh *692; S. C. 2 Gratt. 629, in the Appendix; 1 Arch. Cr. Pl. 85, and notes, Waterman's edition.

I am of opinion to reverse the judgment, and sustain the demurrer to the indictment.

The other judges concurred in the opinion of Samuels, J.

Judgment reversed.

INDICTMENTS, INFORMATIONS, AND PRESENTMENTS.

IN GENERAL.

I. Subjects of Treatment Defined.
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I. SUBJECTS OF TREATMENT DEFINED.

A. INDICTMENT.—An indictment is a written accusation against one or more persons for a crime or misdemeanor, presented to, and preferred upon oath, or affirmation by, a grand jury legally convoked. 3 Bla. Com. 299; Co. Litt. 126; 2 Hale, Pl. Cr. 152; Bac. Abr. Com. Dig.; 1 Chitty, Cr. Law 168; Bouvier's Law Dict. 1018.

B. INFORMATION.—An information is a written statement filed and presented on behalf of the state by the prosecuting attorney, accusing the defendant of an offence which is by law subject to prosecution in that way, and as a general rule it must contain all the substantial requisites of an indictment. 10 Enc. Pl. & Pr. 351.

C. PRESENTMENT.—A presentment is the written notice taken by a grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them at the suit of the government. 4 Bl. Com. 301.

"A presentment made in the ordinary way by a grand jury is regarded, in the practice at common law, as nothing more than instructions given by the grand jury to the proper officer of the court for framing an indictment for an offence which they find to have been committed. 1 Bl. Comm. 301; 1 Chitt. Cr. L. 162. When the indictment has been prepared by him, it is submitted to them; and upon their finding it a true bill, the prosecution commences upon that indictment. The presentment merging in the indictment ceases and becomes extinct. If, however, the officer prosecuting for the court, who is the representative of the Crown, and whose concurrence and co-operation in the prosecution are always required, declines framing an indictment upon these instructions, the presentment ceases to exist for any purpose." LOMAX, J., in Christian's Case, 7 Gratt. 635.

II. FINDING OF INDICTMENT.

A. NECESSITY OF GRAND JURY.—Every indictment must be found by a grand jury legally selected, duly constituted and competent for the purpose. State v. Williams, 14 W. Va. 869; Va. Code 1889, § 3990; Bell v. Com., 8 Gratt. 600; Matthew's Case, 18 Gratt. 989. See also, State v. Whitt, 39 W. Va. 468, 19 S. E. Rep. 874.

B. QUALIFICATION OF GRAND JURORS.

1. GENERALLY.—A grand jury should be composed of persons qualified to serve in that capacity under the law, such qualifications being regulated by statute. Shinn v. Com., 32 Gratt. 899; State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225; Com. v. Burton, 4 Leigh 645; Com. v. St. Clair, 1 Gratt. 556; Kerby v. Com., 7 Leigh 747; Com. v. Cunningham, 6 Gratt. 695; Com. v. Helmondollor, 4 Gratt. 536; Com. v. Carter, 2 Va. Cas. 319; Com. v. Cherry, 2 Va. Cas. 20.

Incompetency of Persons Not Sworn on Jury.—The design of the statute in requiring courts to select from qualified voters a certain number of persons, who shall be grand jurors for a certain period thereafter, is to secure a sufficient number of grand jurors for that period. When a qualified grand jury is obtained from those thus selected, it is no valid objection to it that others on the list of venire may perchance be disqualified. The fact that any one on the list of venire is incompetent to serve is not sufficient of itself to vitiate an indictment found by a grand jury each one of which possesses every necessary qualification. Shinn v. Com., 32 Gratt. 899.

2. CONSIDERATION OF VARIOUS QUALIFICATIONS AND DISQUALIFICATIONS.

a. Householder or Freeholder.—It is sometimes required by express statute that grand jurors, to be competent—as such, shall be either householders or freeholders. Com. v. St. Clair, 1 Gratt. 556; State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225; Kerby v. Com., 7 Leigh 747; Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883; Com. v. Carter, 2 Va. Cas. 319; Wysor v. Com., 6 Gratt. 711; Com. v. Cunningham, 6 Gratt. 695; Moore v. Com., 9 Leigh 639; Com. v. Helmondollor, 4 Gratt. 536; Com. v. Burton, 4 Leigh 645; Com. v. Reynolds, 4 Leigh 663; Com. v. Burcher, 2 Rob. 826.

Freeholder—Who Is One.—A person having the equitable interest in land, and entitled to call for legal title, is a freeholder qualified to serve as a grand juror. Com. v. Helmondollor, 4 Gratt. 536.

A Purchaser in Possession under a Parol Contract.—A purchaser of land by parol contract, who is in possession, and has paid the purchase money, is a freeholder, and qualified to be a grand juror: though a writ of right brought against him by a third person, for the recovery of the land, is pending. Com. v. Cunningham, 6 Gratt. 695.

A Grantor by Deed of Trust, Remaining in Possession.—If a person has executed a deed of trust of all his land to secure the payment of a debt to his creditor; and the day of payment is past; but the land is not sold by the trustee, and the grantor continues in the possession of the land (although in strictness of law, the freehold may be vested in the trustee, yet, by the equitable construction of the act concerning juries), he is not disqualified from being a grand juror. Com. v. William Carter, 2 Va. Cas. 319.

Contract to Sell by Articles under Seal.—It seems that one who has contracted by articles under seal to sell his land, but has not yet conveyed it by deed, and therefore still holds the legal title, is a freeholder qualified to serve on a grand jury. Com. v. Reynolds, 4 Leigh 663.

A Person Whose Title Is Undetermined Not a Freeholder.—A party in possession of land under a contract of purchase, having refused to accept a conveyance tendered to him, and instituted a chancery suit in which the question as to sufficiency of the title is yet undetermined, is not a freeholder qualified to serve as a grand juror. Kerby v. Com., 7 Leigh 747.

b. Alienage.—Where a bill of indictment is found by a grand jury, one of whom is an alien, or other-

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wise disqualified by law, the bill of presentment may be avoided by plea. And this is by force of the common law. Com. v. Cherry, 2 Va. Cas. 20.

c. Former Service as Juror.—A plea in abatement will not lie to an indictment because two or more of the grand jury which found the indictment had served on another grand jury at the same time. Richardson v. Com., 76 Va. 1007.

d. Jury Commissioner.—Being a jury commissioner does not disqualify a man for serving on the grand jury. State v. Martin, 38 W. Va. 568, 18 S. E. Rep. 748.

e. Census Taker.—An appointment under law of congress to take the census of a county, does not disqualify the appointee from being a member of the grand jury thereof. Com. v. Strother, 1 Va. Cas. 186.

f. Persons Exempted Not Disqualified.—Persons over sixty years of age are not disqualified from serving on grand juries; though they are exempted from the service if they choose to claim the exemption. Booth v. Com., 16 Gratt. 519.

C. SELECTING, SUMMONING AND IMPANELING.

1. VENIRE FACIAS.—At common law one process of summoning a grand jury was a precept, either in the name of the king, or of two or more justices of the peace, directed to the sheriff. This was anterior to and independent of any action of the court, the object being to have the grand jury in attendance at the commencement of the term. The court, however, had power to have a grand jury summoned as occasion might require. Burton's Case, 4 Leigh 645; Curtis v. Com., 87 Va. 589, 13 S. E. Rep. 73.

Virginia Statute.—By statute in Virginia, until a comparatively recent period, the sheriff was required *ex officio*, to summon a grand jury, to attend on the first day of every term prescribed by law, as a substitute for the precept mentioned above. And now the statute, Code 1887, § 3976, provides that a *venire facias* to summon a regular grand jury shall be issued by the clerk prior to the commencement of each term at which such grand jury is required. Curtis v. Com., 87 Va. 591, 13 S. E. Rep. 73.

Award of Process—Record Thereof.—It has never been held that the award of process to summons a grand jury must affirmatively appear by the record and there is no principle for so holding. Curtis v. Com., 87 Va. 589, 13 S. E. Rep. 73. And it was decided in Robinson v. Com., 88 Va. 900, 14 S. E. Rep. 627, that "where threecord does not affirmatively show that an order to summons a grand jury was made, but is silent in respect thereto, it must be presumed that such an order was made." The order itself is not a necessary part of a record of the case, since the commencement of the case was the finding of the indictment, and that was necessarily subsequent to the making of the order. Snodgrass v. Com., 89 Va. 679, 17 S. E. Rep. 238. And it was held in Taylor v. Com., 90 Va. 109, 17 S. E. Rep. 812, that it is sufficient if the record shows that the venire was issued by order of the court.

At What Time the Venire Should Be Issued.—§ 3976 of Va. Code 1887, provides that a *venire facias* to summon a regular grand jury shall be issued by the clerk prior to the commencement of each term at which a grand jury is required. Curtis v. Com., 87 Va. 591, 13 S. E. Rep. 73.

Venire Facias Incorrectly Dated.—Where a *venire facias* for the grand jury was dated October, instead of September, by inadvertence or mistake, and afterwards corrected in accordance with the fact, and the grand jury duly summoned at the right time, it was held no ground for disturbing the judgment. Davis v. Com., 89 Va. 132, 15 S. E. Rep. 388.

Venire Facias Not Per Se Part of the Record.—The *venire facias* can only become part of the record by bill of exceptions. Taylor v. Com., 90 Va. 109, 17 S. E. Rep. 812.

Venire Facias Conforming to Statute Passed after Accused Was Indicted.—The *venire facias* having been issued on the 18th of August 1871, properly conformed to the provisions of the act of March 29, 1871, Sess. Acts 1870-71, ch. 262, p. 357, which went into operation on 1st of July 1871; though this act was not in force at the time the prisoner was arrested, committed and indicted. Price v. Com., 21 Gratt. 846.

2. NUMBER FROM WHICH JURY CHOSEN.—The number of persons summoned, from which the jury is formed, is fixed by statute. Shinn v. Com., 32 Gratt. 899; Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883, Va. Code 1887, § 3976; W. Va. Code 1899, p. 1011. See also, Mesmer v. Com., 26 Gratt. 976.

3. PRESUMPTION OF RECORD EVIDENCE OF LEGAL ORGANIZATION.—As a general rule the officers charged with the organization of a grand jury are presumed to have done their duty, and the presumption is that the jury is duly and legally constituted. Mesmer v. Com., 26 Gratt. 976. And where an indictment filled the whole of a sheet of paper, and was then folded in another half sheet of the same size, on which half sheet the attorney endorsed "Commonwealth v. Joseph Burgess, Indictment," and immediately below, in the handwriting of the foreman of the grand jury, was endorsed, "A true bill," and where the record showed that the grand jury appeared in court and openly presented the indictment as a true bill, such must be considered as the indictment on which the grand jury passed and on which the jury found their verdict. Burgess v. Com., 2 Va. Cas. 483.

4. NUMBER NECESSARY TO BE SWORN.—Although one of the forty-eight persons directed by the judge to be summoned to serve as grand jurors for the ensuing twelve months, may be incompetent to serve as a grand juror, a grand jury of sixteen selected from this list, all of whom are competent, is a legal and duly qualified grand jury. Shinn v. Com., 23 Gratt. 899. See also, Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

5. EXCUSING JURORS.—A court may excuse a grand juror if it substitute one who is qualified. Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

Supplying Deficiency.—Where a statute expressly authorizes and requires the court, if a sufficient number of jurors summoned are not in attendance to constitute a grand jury, to cause a sufficient number to be returned from the by-standers or from the county or corporation at large, it is no objection if the court, because a sufficient number of the jurors summoned are not in attendance, causes the required number to be returned from the county at large. Richardson v. Com., 76 Va. 1007; Minor's Syn. Cr. Law 247.

6. SPECIAL GRAND JURY.—Where one of the grand jury finding an indictment was incompetent, and for that reason the grand jury was dismissed and the indictment quashed, the court may direct a special grand jury of eight to be summoned and impaneled at the same term; and an indictment found by this grand jury is valid. Shinn v. Com., 32 Gratt. 899.

No Venire Facias Required to Summon.—There is no requirement that a *venire facias* shall issue to summon a special grand jury, as in case of a regular

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grand jury. Robinson v. Com., 88 Va. 903, 14 S. E. Rep. 627.

D. THE OATH.—A third count of an indictment was objected to, because it did not appear on its face, that it had been found upon the oath of the grand jury. The court held that, "that difficulty is obviated by the fact of the grand jury having been actually sworn in open court, before the indictment was found, as appears from a transcript of the record filed with the petition; and therefore, the whole indictment must necessarily have been found upon oath of the grand jury. Huffman v. Com., 6 Rand. 685.

Oath Administered by Clerk De Facto—Effect.—Upon a presentment for gaming, defendant pleads in abatement, that the clerk *de facto*, who administered the oath to the grand jury that made the presentment, was not clerk *de jure*, at the time. *Held*, the plea is naught. Hord v. Com., 4 Leigh 674.

E. THE CHARGE.—Failure to charge the grand jury, as provided by § 3982 of the Code, does not vitiate an indictment found by them. Porterfield v. Com., 91 Va. 801, 22 S. E. Rep. 352; Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

Erroneous Charge.—When once the indictment has been returned "A true bill," it is immaterial whether the court erred in charging or omitting to charge the grand jury as the question then is to try the case and learn whether the accused is guilty. Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

F. POWER OF GRAND JURY—WHENCE DERIVED.—A grand jury must derive its power from and exercise its functions under the authority of a legally constituted court. Jackson v. Com., 18 Gratt. 795.

1. TERM OF COURT.

a. Term to Which Defendant Is Held.—When a party is held to answer at a particular term and no indictment is found at that term section 4001 of Va. Code 1887, provides that if that term and another elapse without an indictment having been found against the accused he shall be discharged from his imprisonment. Waller v. Com., 84 Va. 492, 5 S. E. Rep. 364; Glover v. Com., 86 Va. 382, 18 S. E. Rep. 420. See also, Jones v. Com., 19 Gratt. 478; Bell's Case, 8 Gratt. 600; Bell's Case, 7 Gratt. 646; Com. v. Adcock, 8 Gratt. 661; Com. v. Lovett, 2 Va. Cas. 74; Wortham v. Com., 5 Rand. 669; Hall v. Com., 78 Va. 678.

Special Session Not Counted.—A special session of a superior court of law held for the trial of offences is not the third term within the meaning of the act (1 Rev. Code of 1819, ch. 169, § 28), but is a substitute for it, and therefore, where there was a failure to hold two regular terms, and then a special session was held, at which the prisoner was not tried; but being at the regular term succeeding the special session, he ought not to be discharged from the crime, but may be tried. Com. v. Lovett, 2 Va. Cas. 74.

Faulty Indictment.—Section 12, ch. 158, W. Va. Code of 1891 provides that the prisoner if not indicted before the end of a second term shall be discharged. Though an indictment for a minor grade of offence, or a faulty indictment, be found, which the state refuses to prosecute, it is equivalent to the case of no indictment found, and under the plain intent of the statute the state is allowed to detain the defendant under the mittimus by the justice until the end of the second term. Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

Indicted in One Court, Held for Trial in Another.—In November 1893, a prisoner was indicted and remanded in a county court for trial and demanded to be tried in the circuit court, whereupon he was remanded for trial in that court; and at the next term of the circuit court, the cause was continued upon the motion of the commonwealth; and at the following term the court dismissed the said indictment of its own motion in the absence of the prisoner, and over his objection upon the ground that it had no jurisdiction to try the case, but without prejudice to the right of the commonwealth to arrest, indict, and try the accused for the offence for which he was tried. After said judgment was entered, and before the accused was actually released from custody, another warrant was issued against him for the same offence, and upon it he was committed to jail to answer an indictment in the county court. At the June term of the said court, he was again indicted for the same offence. He then pleaded "not guilty" and his cause was continued. Whereupon he sued out a writ of *habeas corpus*, alleging that the order of the said circuit court operated as an acquittal of the accused of the offence for which he was in custody. The prisoner also contended in this case that he was entitled to be discharged from imprisonment because no presentment or indictment was made against him before the end of the second term of the court in which he was held to answer, as is provided by section 4001 of the Code 1887. The court held that he was not entitled to be discharged from imprisonment under section 4001 of the Code, because he was under indictment during the whole time he was held to answer in the circuit court, and at no time did two terms of the county court elapse without indictment while he was held to answer in that court. After the prisoner demanded to be tried in the circuit court, and the case was removed to that court, the county court had no further jurisdiction over the case till after the indictment was dismissed in the said circuit court, and the prisoner had been rearrested under a new warrant issued for that purpose. Dulin v. Lillard, Sheriff, 91 Va. 778, 20 S. E. Rep. 821.

b. Character of Term.—But under a provision that if a person remains in custody without presentment, indictment, or information found or filed against him before the end of the second term of the court in which he is held to answer, he shall be entitled to a discharge. If the offence is one for which he can only be tried on an indictment two terms must pass at which indictments can be found, and it is not sufficient to warrant a discharge, no matter how many terms may pass at which informations may be found. Jones v. Com., 19 Gratt. 481; 10 Enc. Pl. & Pr. 384.

When Information Found before End of Second Term of No Avail.—A felony being triable on an indictment only, under section 18, ch. 207 (Acts of Assembly 1866-7, pp. 928-9), which is in part as follows, "A person in jail on a criminal charge shall be discharged from imprisonment if a presentment, indictment or information be not found or filed against him before the end of the second term of the court in which he is held to answer, unless it appear to the court, etc.," that kind of accusation must be made within the period limited by the statute; which the nature of the offence requires. Therefore, when the offence is a felony, it is necessary that an indictment shall be found against the prisoner "before the end of the second term of court in which he is held to answer, unless, etc." The filing

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of an information being unauthorized in such a case, is of no avail. Jones v. Com., 19 Gratt. 478.

Indictment for Different Offence.—A prisoner was arrested for housebreaking with intent to kill and rob. Subsequently he was indicted for burglary and grand larceny, and was held under this indictment until the third grand jury, which had met since his arrest, indicted him for a felonious assault. Upon the last indictment he was tried and convicted. The prisoner contended that he was entitled to his discharge because the indictment on which he was tried was not found until the third term at which a grand jury was impaneled after his arrest. *Held*, the simple requirement of the statute is that some indictment shall be found before the end of the second term, or else the accused shall be discharged from imprisonment. Manifestly the present case does not come within the statute, for here, the accused was indicted by the first grand jury that met after his arrest, and the commonwealth has only done what she had a right to do, exercised her election as to the indictment upon which the prisoner should be tried. Waller v. Com., 84 Va. 494, 5 S. E. Rep. 364.

c. How Calculated.—A term of the court at which a prisoner is held to answer is, within the meaning of section 4001 of Code 1881, which provides in substance that if two terms of court elapse while the prisoner is held in custody, without an indictment having been found against him, and the failure to indict is not the result of any exceptions therein enumerated, he should be discharged from his imprisonment, a term complete by commencing on the first day. Therefore, where during a term of court accused is sent on for indictment, that term is not considered one of the two terms at which he must be indicted under the above statute. Bell v. Com., 8 Gratt. 600; Jones v. Com., 19 Gratt. 478; Glover v. Com., 86 Va. 382, 10 S. E. Rep. 420.

A different doctrine from that stated in the last paragraph was held in Hall v. Com., 78 Va. 678, which to that extent is overruled by Glover v. Com., 86 Va. 382, 10 S. E. Rep. 420.

A prisoner being sent on for further trial by an examining court, which sat during the session of the circuit court to which he is sent for further trial; that term of the circuit court is not one of the two at which the statute directs that he shall be indicted, or that he shall be discharged from imprisonment. Bell's Case, 7 Gratt. 646.

Remedy for Improper Refusal to Discharge.—Where, before the indictment was found, a motion was made and improperly overruled to discharge the prisoner on the ground that two terms had elapsed since he had been held to answer, without any indictment having been found against him this remedy was not by writ of error, but by *habeas corpus*, which is too late after final judgment. Glover v. Com., 86 Va. 382, 10 S. E. Rep. 420.

2. SECOND OR NEW INDICTMENT.—"The simple requirement of the statute is that some indictment shall be found before the end of the second term, or else the accused shall be discharged from imprisonment, although liable to be again arrested and tried upon any indictment that may be subsequently found against him." Waller v. Com., 84 Va. 494, 5 S. E. Rep. 364.

Second Indictment When Verdict Set Aside.—A prisoner indicted for embezzling the goods of W. was at the fifth term tried and convicted of the offence; but the verdict was set aside for a variance between the allegation and the proof, as to the ownership of the goods; and the case continued. At the next term of the court the attorney for the commonwealth entered a *nolle prosequi* upon the indictment; and the prisoner was indicted again for the same offence; the indictment in the first count being the same as in the former indictment, and another count charging the goods embezzled to be the goods of A. Upon his arraignment he moved the court to discharge him from arrest, on the ground that three regular terms of the court had been held since he was examined and remanded for trial without his being indicted. The attorney for the commonwealth opposed the motion and offered the record of the proceedings of the circuit court upon the first indictment, to show that he had been indicted, tried and convicted; which was objected to by the prisoner. *Held*, that the second indictment being for the same act of embezzlement as the first, and the prisoner having been indicted, tried and convicted in time, and the verdict set aside for the variance, the second indictment was proper and in time; and the prisoner is not entitled to be discharged. Com. v. Adcock, 8 Gratt. 661.

3. SECRECY.—A grand juror cannot for any purpose be interrogated as to his action as a grand juror; nor is it an error for the court to refuse to permit a witness to be interrogated as to his action as a grand juror with a view of showing his prejudice. State v. Baltimore, etc., R. Co., 15 W. Va. 362.

a. Proof of Testimony before Grand Jury.

By Grand Jurors.—Whether a grand juror is a competent witness at the trial to prove contradictory testimony given by a witness before the grand jury, was left undecided in the case of Little v. Com., 25 Gratt. 932.

By Third Persons.—A third person who was present may be called to prove statements made by a witness before the grand jury different from those made on the trial. Little v. Com., 25 Gratt. 932.

b. Grand Jurors' Votes Cannot Be Inquired into.—Where two or more of the grand jury which found an indictment had served on another grand jury at the same time, how they voted on the indictment as members of the first grand jury, cannot properly be inquired into. Richardson v. Com., 76 Va. 1007.

G. DISCHARGE OF GRAND JURY.—It is within the discretion of a court to discharge a grand jury. It is a common-law power. Our Code recognizes this power in saying that "when one grand jury has been discharged, another may, by order of the court, be summoned to attend the same term." W. Va. Code 1891, § 10, ch. 157, and section 9 says that, when one grand jury has found an indictment not a true bill, another indictment may be sent to it, or acted on by another grand jury, showing that the state may have another grand jury, and persist in her prosecution. Of course it can do so when there is no finding at all. Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

H. PROCEEDINGS BY AND BEFORE GRAND JURY.

1. INITIATING PROCEEDINGS.—When an indictment has been prepared by the proper officer of the court, it is submitted to the grand jury, and upon their finding it a true bill, the prosecution commences upon that indictment. Com. v. Christian, 7 Gratt. 631; Minor's Syn. Cr. Law 251.

Indictment Drawn by Counsel for Defendant.—Indictments drawn by counsel for the defendant and intended to present to the court questions in moot form will not be taken into consideration by the supreme court of appeals of this state. Peel

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Splint Coal Co. v. State, 36 W. Va. 802, 15 S. E. Rep. 1000.

2. PRESENCE OF OR INTERFERENCE BY OTHERS THAN GRAND JURORS.

Prosecuting Attorney.—The prosecuting attorney may be with the grand jury up to the time of the action of the grand jury in determining the result. State v. Baker, 33 W. Va. 319, 10 S. E. Rep. 639.

A plea in abatement to an indictment which avers that the prosecuting attorney, of his own motion, without authority of the law, went into the grand jury room while the grand jury was in session, and there, in the presence of the grand jury, examined certain witnesses, upon whose testimony the indictment was found, and there talked in the presence of the grand jury about said testimony of said witnesses, and thus unlawfully conspired against the defendant to have said grand jury find said indictment, does not present cause for abating the indictment, and was properly rejected. State v. Baker, 33 W. Va. 319, 10 S. E. Rep. 639.

An Officer.—A plea in abatement will not lie to an indictment because the sheriff or a deputy were in the grand jury's room, when they were deliberating and examining the witnesses, upon whose testimony the indictment was found. Richardson v. The Commonwealth, 76 Va. 1007.

An Outsider.—A plea setting forth that after the grand jury was impaneled and sent to their room to enquire of the indictment, a person, not a member of the grand jury or a sworn officer of the court, was admitted and examined other witnesses sent before the grand jury, was rejected. *Held*, no error, because plea did not allege that the person was not a witness sworn and sent to the grand jury by the court, but inferentially alleges that he was a witness. Lawrence v. Com., 86 Va. 573, 10 S. E. Rep. 840.

3. CONCURRENCE ON FINDING.— It is not necessary that sixteen of the grand jury should concur to make a presentment or find a bill of indictment; but if twelve agree, it is sufficient. Com. v. Sayers, 8 Leigh 722.

I. OBJECTIONS.

1. HOW MADE.

a. Plea in Abatement.—Want of qualifications or other objections to a grand jury are to be made effective by a plea in abatement, and writ of error in case of adverse decision on it. Cherry's Case, 2 Va. Cas. 20; Long's Case, 2 Va. Cas. 318; Moore's Case, 9 Leigh 639; Kerby's Case, 7 Leigh 747; Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883; Booth's Case, 16 Gratt. 520.

Grand Juror Not a Freeholder.—In a prosecution for a misdemeanor at the instance of a voluntary prosecutor, the defendant files a plea in abatement, that one of the grand jurors who found the indictment was not a freeholder; and the issue made up on that plea is found for the defendant, and the indictment quashed. *Held*, the court should give judgment for the costs against the prosecutor. Com. v. St. Clair, 1 Gratt. 556.

Grand Juror a Mill Owner.—A plea in abatement, that one of the grand jury is the owner of a mill, is good. The Commonwealth v. Benjamin Long, 2 Va. Cas. 318.

Grand Jury Not Summoned According to Law.—A plea in abatement lies to an indictment on the ground that the grand jury which found the indictment had not been summoned according to law, and also because one of the grand jurors was not qualified to serve as such. Early v. Commonwealth, 86 Va. 924, 11 S. E. Rep. 795.

Where a statute expressly authorizes and requires the court, if a sufficient number of the jurors summoned, are not in attendance to constitute a grand jury, to cause a sufficient number to be retained from the bystanders or from the county or corporation at large, a plea in abatement will not lie to an indictment because a sufficient number of the jurors summoned are not in attendance and the court causes the required number to be retained from the county at large. Richardson v. The Commonwealth, 76 Va. 1007. Minor's Syn. Crim. Law 247.

Mere Irregularity in Selecting No Ground for Plea.—But it was said in Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883, that mere irregularity in the manner of selecting a grand jury, when objection does not go to the competency of jurors, cannot be taken advantage of even by plea of abatement.

Objection Removed by Statute in West Virginia.—No plea in abatement lies to any indictment for any objection to any grand juror arising under § 5 of Act of November, 1863, p. 109. Bradford v. State, 4 W. Va. 763.

The incompetency or disqualification of a grand juror is no ground to abate or quash the indictment. W. Va. Code 1891, ch. 157, § 12; State v. Martin, 38 W. Va. 568, 18 S. E. Rep. 748.

An indictment will not be quashed or abated on the ground that one of the grand jurors who found it was not a freeholder, for § 2, ch. 138 of the Acts of 1882, which provides that the lists from which the grand jurors shall be drawn shall contain only freeholders, is clearly modified by the 12th sec., which says, in effect, that if one drawn on the grand jury is not a freeholder, that fact shall not vitiate an indictment found by him. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

Trial of Issue.—Upon an indictment for a felony, the prisoner pleads in abatement that one of the grand jurors who found the indictment against him, was at the time a surveyor of the highway; and the attorney for the commonwealth takes issue upon the plea. The issue should be tried by a jury. Day v. Com., 2 Gratt. 562. But when the questions raised are matters of record they are tried by the court. State v. Martin, 38 W. Va. 568, 18 S. E. Rep. 748.

Waiver of Plea.—A plea in abatement raising objections to the manner of organizing the jury, or to the qualifications of grand jurors, is waived by pleading the general issue alone. Early v. Com., 86 Va. 921, 11 S. E. Rep. 795.

b. Motion to Quash.—The incompetency of one grand juror is sufficient to render an indictment found by a grand jury of which he is a member, defective, for which defect it will be quashed. Shinn v. Com., 32 Gratt. 899; Commonwealth v. Burton, 4 Leigh 645.

2. WHEN MADE.—It is well settled that objections to the mode of summoning a grand jury, or to disqualifications of particular jurors, must be made at a preliminary stage of the case before a plea to the merits, otherwise they are to be considered as waived. Curtis v. Commonwealth, 87 Va. 590, 13 S. E. Rep. 73; Early v. Commonwealth, 86 Va. 921, 11 S. E. Rep. 795; Taylor v. Com., 90 Va. 109, 17 S. E. Rep. 812. Unless indeed the proceeding be void *ab initio*. Curtis v. Com., 87 Va. 590, 13 S. E. Rep. 73.

Objection to the qualification of an individual grand juror can be taken after indictment found. Com. v. Long, 2 Va. Cas. 318; Day v. Com., 2 Gratt. 562; Com. v. St. Clair, 1 Gratt. 556.

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Cannot Be Raised for First Time in Appellate Court.—Objection that the grand jury was not constituted, and foreman not selected and sworn as required by law, cannot be raised for the first time in the appellate court, but must be by plea in abatement. Taylor v. Com., 90 Va. 109, 17 S. E. Rep. 812.

When Too Late to Plead Irregularities before Committing Justice.—But after a prisoner has been tried by an examining court and remanded for further trial before the circuit court, and an indictment found against him, it is too late to plead in abatement that there were irregularities in his examination before the committing magistrate. Clore's Case, 8 Gratt. 606.

3. UNAVAILABLE OBJECTIONS.—Excusing a competent juror does not impair the indictment if his place is filled by a competent one. Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

Improper Discharge of Grand Jury.—The improper discharge of a grand jury does not impair an indictment found by a subsequent jury. Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 883.

Deceit Practiced by Grand Juror.—A corrupt nomination of himself to the sheriff, by a citizen of the commonwealth, to serve on the grand jury; or a false conspiracy or corrupt agreement between the sheriff and himself for that purpose is sufficient to avoid an indictment or presentment found by a grand jury so constituted. Commonwealth v. Cherry, 2 Va. Cas. 20; Commonwealth v. Thompson, 4 Leigh 667.

III. RETURN OF INDICTMENT.

A. NECESSITY.—When a bill of indictment is found by the grand jury and endorsed "a true bill" by the foreman, it should be brought into court, presented by the grand jury, and then the finding should be recorded. Simmons v. Com., 89 Va. 156, 15 S. E. Rep. 386; McKinney's Case, 8 Gratt. 589; Shiffiet's Case, 14 Gratt. 652; Price's Case, 21 Gratt. 846; State v. Heaton, 23 W. Va. 778; Com. v. Cawood, 2 Va. Cas. 527; Minor's Syn. Crim. Law 249.

B. RECORD OF RETURN.—"The bill of indictment is sent or delivered to the grand jury, who, after hearing all the evidence adduced by the commonwealth, decide whether it be a true bill or not. If they find it so, the foreman of the grand jury endorses on it 'a true bill,' and signs his name as foreman, and then the bill is brought into court by the whole grand jury, and in open court it is publicly delivered to the clerk, who records the fact. It is necessary that it should be presented publicly by the grand jury; that is the evidence required by law to prove that it is sanctioned by the accusing body, and until it is so presented by the grand jury, with the endorsement aforesaid, the party charged by it is not indicted, nor is he required, or bound to answer to any charge against him, which is not so presented." Per BROCKENBROUGH, J., in Com. v. Cawood, 2 Va. Cas. 541; State v. Heaton, 23 W. Va. 778; Simmons v. Com., 89 Va. 156, 15 S. E. Rep. 386.

Record Sufficient.—Where the order book contains an entry that the grand jury returned into court and presented "an indictment against O. H. for murder—a true bill," such was held a sufficient record of the finding of an indictment. Hodges v. Com., 89 Va. 265, 15 S. E. Rep. 513.

Record Insufficient.—Where there was copied into the record, a paper, having the regular form of an indictment for murder against the prisoner, having upon it the endorsement, "a true bill," and it appeared from the certificate of the clerk, that this was the precise indictment upon which the prisoner was arraigned, to which he pleaded not guilty, and for the trial of the issue on which the jury was impanelled; but it did not appear from any part of the record, that there was any entry made, that this indictment had been presented by the grand jury as "a true bill." It was held not to be a sufficient record of the fact that the bill was brought into court by the whole grand jury and in open court publicly delivered to the clerk as was required by law. Commonwealth v. Cawood, 2 Va. Cas. 528.

Defect May Be Shown after General Issue Is Pleaded.—It was held in Commonwealth v. Cawood, 2 Va. Cas. 527, that it was not too late, after the prisoner had pleaded the general issue to the indictment, to set up the fact that the record did not show that the indictment had been brought into court by the whole grand jury, and in open court publicly delivered to the clerk.

1. RECORDING.—When a bill of indictment is found by the grand jury and endorsed "a true bill" by the foreman, it should be brought into court, presented by the grand jury, and then the finding should be recorded. An omission to record the finding, cannot be supplied by a paper purporting to be an indict ment, with an endorsement, "a true bill," signed by the person who was foreman of the grand jury at that term. Nor can it be supplied by the recital in the record that he stands indicted, nor by his arraignment, nor by his plea of not guilty. It cannot be intended that he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury is as essential, as the recording of the verdict of the jury. Com. v. Cawood, 2 Va. Cas. 527; Simmons v. Com., 89 Va. 156, 15 S. E. Rep. 386; McKinney's Case, 8 Gratt. 589; Shiffiet's Case, 14 Gratt. 652; Price's Case, 21 Gratt. 846; State v. Gilmore, 9 W. Va. 641; State v. Fitzpatrick, 8 W. Va. 707.

An Indictment against Many Only Recorded as to One—Effect.—On the 26th day of October, 1876, the grand jury, in and for the body of the county of Ritchie, in attendance upon the circuit court of said county, then in session, upon their oaths found an indictment; and the entry on the record of the finding of the indictment was as follows, viz.: "An indictment against B. S. Compton for trespass. A true bill." The indictment appearing in the record, and certified by the clerk as being the indictment found in the cause, was against Benjamin S. Compton, J. C. Gilman, G. Slutter, John O'Brien, Patsey Ames, Martin Ames, Martin King, Thomas Faulkner, John Tate, George Tate, Charles Gilman and Henry Keneline, for willful trespass. The defendants by their attorney, moved the court to quash the indictment in the cause, upon the ground that there was no record of the finding of the same; and the court sustaining the motion to quash, as to all the defendants, except the defendant *Compton*. Whereupon the said B. S. Compton, by his attorney, moved the court to quash said indictment, as to him, for errors appearing on the face of the indictment, and on the ground that there was no record of the finding of said indictment as to him. This motion was overruled. *Held*, that if the indictment in the case at bar had been against the several persons therein charged and if there had been a record of the finding of the indictment as to all the persons therein charged, a part of them on trial before a jury might have been found guilty, and a part, not guilty. Indeed one of the parties indicted might have been found guilty, and all of the others found not guilty.

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Drake & Cochren's Case, 6 Gratt. 665, determined that, although the indictment is against two persons jointly, and the record of the finding of the indictment only shows the finding as to one person, the entry is sufficient to show that the indictment was found against such one person. Upon the authority of that case the entry upon the record is sufficient to show that the indictment was found against Benjamin S. Compton, if the entry upon the record of the finding against "B. S. Compton" is sufficient to identify the indictment against "Benjamin S. Compton." And it was the opinion of the court that an entry against B. S. Compton was sufficient to identify an indictment against Benjamin S. Compton. That the quashing of the indictment for the cause aforesaid did not, under the circumstances, amount to or operate to quash the indictment as to the defendant, Compton, but in fact only operated a dismissal of the indictment as to all the defendants therein named, except said Compton. State v. Compton, 13 W. Va. 852.

Record Not Showing That Defendant Was Indicted—Effect.—An indictment against Luke McKinney, John McKinney, and Joseph McKinney was sent to the grand jury, which indictment was returned to the court with the following endorsement:

"Commonwealth v. Luke McKinney, Thomas McKinney, John McKinney.

"Indictment for wilful trespass to personal property. A true bill.

"WILLIAM ROYSE, Foreman."

The record of the court set out that the grand jury adjourned on yesterday, appeared pursuant to the order of the adjournment, and retired to their room; and after some time returned into court, and presented an indictment against Thomas McKinney, Luke McKinney, and John McKinney for wilful trespass to personal property, a true bill. A writ of *venire facias* was issued against the parties, which was served on Luke, John and Joseph McKinney; and thereupon Joseph McKinney appeared and moved the court to quash the said indictment as to him, or to set aside the service of *venire facias* upon him, and discharge him from further prosecution in the cause, for want of any sufficient record of the finding of any bill of indictment against him. The court was of opinion that the sheriff's return of the *venire facias* as to Joseph McKinney should be quashed, and the said Joseph discharged from further prosecution upon the indictment, because it did not appear from the record that the said Joseph had been indicted; and it was not competent for the court to alter the record in that respect. Com. v. McKinney, 8 Gratt. 589; Cawood's Case, 2 Va. Cas. 527.

Name of Defendants Not Given.—Record states, that two indictments against surveyors of roads are found true bills by grand jury, not naming the surveyors. *Held*, this is not a record of indictments found against any particular surveyors. Com. v. Snider, 2 Leigh 744.

Court May Look to Indictment When Record Is Uncertain.—The record of the court states that the grand jury presented the following indictments as "true bills," viz. one against M. N., one against, etc., setting out eight names, and then one against Thomas and Richard Whitehead, and one against R. H. G. C. not true bills. Though it is doubtful whether the indictment against Willis and Whitehead belongs to the first or the last class, the court may look to the indictment and the endorsement upon it by the foreman to ascertain the fact. Whitehead v. Com., 19 Gratt. 640.

Record Necessary.—The record of the finding of the grand jury is as essential as the record of the verdict of the jury, as it is the only legal proof of the finding of the indictment. State v. Gilmore, 9 W. Va. 641.

a. How the Record Should Describe the Finding.—"The recording of the finding of the grand jury on the record book need only describe the offence with which the accused is charged as a felony or a misdemeanor." State v. Heaton, 23 W. Va. 774. See also, State v. Whitt, 39 W. Va. 468, 19 S. E. Rep. 873.

The record of the finding of indictment under statute for maliciously shooting, stabbing, cutting, etc., is as follows: "An indictment against Charles W. Crookham, malicious stabbing, a true bill." There was a motion made to quash the indictment, because there was not a proper entry made of the finding thereof by the grand jury. It was insisted that the entry should have been upon the record an indictment for "a felony." It was held that all malicious stabbings are felonies, but all felonies are not malicious stabbings; that the words "malicious stabbings" used in the record of the finding of the indictment much more nearly indicate the character of the offence charged in the indictment than the word "felony" would, and therefore it is sufficient. Crookham v. State, 5 W. Va. 510.

Finding Not an Accurate Description—Effect.—If the recording of the finding by the grand jury on the record book does describe the offence particularly, and the offence so described is not an accurate description of the offence named in the indictment found by the grand jury, it will not vitiate the indictment, unless the offence, as it is recorded, is in irreconcilable conflict with the offence found by the grand jury. State v. Heaton, 23 W. Va. 773; Drake & Cochren's Case, 6 Gratt. 665; State v. Fitzpatrick, 8 W. Va. 707; State v. Gilmore, 9 W. Va. 641; State v. Geyer, 44 W. Va. 649, 29 S. E. Rep. 1020.

An Irreconcilable Conflict—Effect.—"If an entry on the record should be irreconcilably in conflict with an indictment on which an accused is to be tried, the prisoner could not be properly tried on such an indictment for the record would show that no such indictment had ever been found by the grand jury." State v. Heaton, 23 W. Va. 774; State v. Whitt, 39 W. Va. 468, 19 S. E. Rep. 874. Thus where the record showed that the finding of the grand jury was for a felony while the indictment presented was not good otherwise than for a misdemeanor, there was an irreconcilable conflict between the two, and treating the record as an absolute verity it could not be contradicted, and it therefore showed that no such indictment as was there presented had been found by the grand jury; and, there being no record of an indictment for the misdemeanor there was presented a case in which a motion in arrest of judgment if made, should have been entered and allowed to prevail. State v. Whitt, 39 W. Va. 468, 19 S. E. Rep. 874.

b. Erasure of Part of Record—Effect.—A record stated that the grand jury "returned into court, and among other things, presented an indictment against Thomas Nutter for felonious assault and battery." "A true bill." The prisoner pleaded "not guilty." He aftewards asked for leave to withdraw his plea of "not guilty" which was granted. And thereupon he moved the court to strike the cause from the docket, because the finding of the indictment was not recorded. The ground of

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this motion was that in the order book of the court the four words, "presented an indictment against" had been erased. It appeared from the statement of the clerk that after he had written the words, he had erased them by drawing his pen repeatedly across each of the said words and had then rubbed his finger over them causing a blot for their whole length; he intended to have interlined them, but the interlineation had never been made by him or any other person. The four words were, however, legible and the erasing marks of the pen over them were plain and the large black mark or blot extended over the words apparently made by them, whilst the ink of the erasing marks, or the words, or perhaps both were undried. The court was of the opinion that the motion to strike the case from the docket should be overruled. Com. v. Nutter, 8 Gratt. 699.

c. What Process Should Follow Indictment or Presentment for Misdemeanor.—Where an indictment or presentment is found by a grand jury against any person for a misdemeanor, to which the law has affixed an infamous or corporate punishment, the court before which such presentment or indictment is found, may, in its discretion award a *capias* in the first instance. Com. v. McClenegan, 3 H. & M. 575; Com. v. McClenegan, 1 Va. Cas. 155; Com. v. Goode, 2 Va. Cas. 200; and, where the punishment is of an inferior nature, and two *venire facias* have been returned not found, there also the court may award a *capias*. Com. v. McClenegan, 3 H. & M. 575; Com. v. McClenegan, 1 Va. Cas. 155.

IV. LOST INDICTMENT—CANNOT BE SUPPLIED.

In a prosecution for a felony or misdemeanor, if the indictment is lost at any time before the trial, though after arraignment and plea, the party cannot be tried. The Act, Code 1849, ch. 180, p. 679, authorizing a lost record or paper to be substituted by an authenticated copy or proof of its contents, applies only to civil cases, and does not extend to records or papers in criminal proceedings. Bradshaw v. Com., 16 Gratt. 507.

V. THE INDICTMENT.

A. NECESSARY IN CASE OF FELONIES.—No person shall be put upon trial for any felony, unless upon an indictment found by a grand jury in a court of competent jurisdiction. Va. Code of 1887, § 3090; Simmons v. Com., 89 Va. 156, 15 S. E. Rep. 386; Jones v. Com., 19 Gratt. 481; Matthews v. Com., 18 Gratt. 969; Com. v. Barrett, 9 Leigh 665; Com. v. Cawood, 2 Va. Cas. 527.

B. WHEN FOUND.—"When an indictment is preferred to a grand jury, and they endorse upon it 'A true bill,' according to 4 Blackstone 305, 'the indictment is then said to be found, and the party stands indicted,' and in the language of 1 Chitty 219, the endorsement 'A true bill,' made upon the bill, becomes a part of the indictment, and renders it a complete accusation against the prisoner." Per BARBOUR, J., in Commonwealth v. Cawood, 2 Va. Cas. 527; Price v. Com., 21 Gratt. 846.

C. GENERAL MATTERS OF FORM.

1. CAPTION—PURPOSE OF.—That which precedes the indictment in the transcript, sometimes called the caption, is a part of the record, though no part of the indictment, and may be looked to in order to ascertain whether the inferior court had jurisdiction. Robinson v. Com., 88 Va. 900, 14 S. E. Rep. 627.

Caption Sufficient.—The caption of the indictment setting forth the county, is sufficient without entitling it of the superior court. Taylor v. Com., 2 Va. Cas. 94.

The caption of an indictment being "Virginia, Prince William county, to wit:" is sufficient, without its being entitled as of "the Superior Court of Law for the county of Prince William." Burgess v. Com., 2 Va. Cas. 483.

Surplusage.—The caption of an indictment was: "Fourth Judicial Circuit, Mineral County Court, in the Circuit Court of Mineral County." It was held that the insertion of the word "Court" after the words "Mineral County" was a clerical error, and must be treated as mere surplusage, and is cured after verdict. State v. Gilmore, 9 W. Va. 641.

Caption Applies to Whole Indictment and Each Count Thereof.—An indictment contained two counts. The caption was "Virginia—Roanoke County, to wit." The petitioner demurred to the entire indictment alleging as to the second count that it had no caption and no venue was laid. *Held*, that the caption "Virginia—Roanoke County, to wit" applies to the whole indictment and to each count in it. Wright v. Com., 82 Va. 185.

Name of County in Margin Not Indispensable.—It seems that the naming of the county in the margin is not indispensable, if it be found in the body of the indictment. Tefft's Case, 8 Leigh 721; Minor's Syn. Cr. Law 252.

2. ALLEGATION OF JURISDICTION.—An indictment laying the offence as committed in the county of N., in the parish of H., without the words, within the jurisdiction of this court, or, within the county, or the district composed of the counties for which the court is held, was bad, after verdict, until the act of January 24th, 1804, which enacted "that after the verdict of twelve men, no judgment on any indictment, or information for felony, or any other offence whatsoever, shall be stayed or reversed for any supposed defect or imperfection in any such indictment or information, so as the felony, or offence therein charged to have been committed, or done, be plainly and in substance set forth with convenient certainty, so as to enable the court to give judgment thereupon according to the very right of the cause, any former law, custom, or usage, to the contrary notwithstanding." Com. v. Richards, 1 Va. Cas. 1.

The omission to charge that the offence was committed "within the jurisdiction of the court," the county itself being named, is cured by verdict. Taylor v. Com., 2 Va. Cas. 94.

It is necessary to aver and to prove the place where the crime with which the accused stands charged was committed. It is not sufficient to aver that the offence was committed "within the jurisdiction of the court" which is a conclusion of law. Early v. Com., 93 Va. 767, 24 S. E. Rep. 936.

3. DATE.—It is not necessary that the indictment should show on its face, the date when it was found. Burgess v. Com., 2 Va. Cas. 483; Haught v. Com., 2 Va. Cas. 3.

Omitting to State Grand Jury Was Attending Court.—An indictment is not bad for its omission to state that the grand jury was attending the court. State v. Williams (W. Va.), 38 S. E. Rep. 495.

4. OMISSION IN INDICTMENT CURED BY RECORD.—In a bill of indictment with three counts, if in the third count is omitted to be stated that the grand jury "on their oath" present (the first two counts being regular in that respect), the objection is obviated by the fact, that the record states, that

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the grand jury were sworn in open court. Huffman v. Com., 6 Rand. 685.

5. INDORSEMENTS.

a. Indorsement of Prosecutor.—Code 1887, section 3991 does not require the name of the prosecutor to be written at the foot of the indictment for a felony, but only for a misdemeanor. Thompson v. Com., 88 Va. 45, 13 S. E. Rep. 304.

In an indictment for a trespass or misdemeanor, it is not necessary to insert the name or surname of a prosecutor at the foot of the indictment, if it appears that the indictment was found true on the evidence of a witness sent to the grand jury, either at their own request, or by direction of the court, and this whether there was a previous presentment or not. Wortham v. Com., 5 Rand. 669.

Misdescription of Prosecutor.—A plea in abatement of an indictment for a trespass, or a misdemeanor, alleging that the prosecutor is not a laborer, but an husbandman, is bad on demurrer. Haught v. Com., 2 Va. Cas. 3.

Omission of Title of Prosecutor.—The omission to write the title or profession of the prosecutor at the foot of an information or indictment, is no ground of exception, either by motion to quash or plea in abatement. Com. v. Dever, 10 Leigh 685.

What Words Sufficient to Show One the Prosecutor.—At the foot of the indictment these words were written: "By the information of James Baker, laborer of Harrison County, sworn in Court, and endorsed as prosecutor at his request." The above words were held sufficient to show that James Baker was the prosecutor. Haught v. Com., 2 Va. Cas. 3.

Prosecutor Insolvent.—An indictment will not be dismissed, though the prosecutor be insolvent, if the court would *ex officio* have directed a prosecution to be instituted. Com. v. Hill, 9 Leigh 601.

Prosecutor a Competent Witness in Support of Indictment.—On an indictment for an assault and battery on the voluntary information of the person assaulted, the informer and prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted. Gilliam v. Com., 4 Leigh 688.

b. Endorsement of Witnesses—Statutory.—Statutes provide that the name of the witnesses upon whose evidence the grand jury make their indictment shall be written on the foot of the indictment. Shelton v. Com., 89 Va. 450, 16 S. E. Rep. 355; Porterfield v. Com., 91 Va. 801, 22 S. E. Rep. 352; State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413; State v. Enoch, 26 W. Va. 253; Com. v. Dever, 10 Leigh 685; Com. v. Williams, 5 Gratt. 702.

Indictment—How Affected by Omission.—But these statutes are directory only, and the omission of such names does not vitiate the indictment. State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413; Shelton v. Com., 89 Va. 450, 16 S. E. Rep. 355; Porterfield v. Com., 91 Va. 801, 22 S. E. Rep. 352; State v. Enoch, 26 W. Va. 253; Com. v. Dever, 10 Leigh 685; Com. v. Williams, 5 Gratt. 702; Lawrence v. Com., 86 Va. 573, 10 S. E. Rep. 840.

Omission Does Not Exclude Witness.—The omission of the names of witnesses in the indorsement of an indictment will not operate to exclude such witnesses from testifying at the trial. Lawrence's Case, 30 Gratt. 853.

6. INDORSEMENT OF FINDING.—The only proper indorsement on an indictment is "a true bill" or, not "a true bill" with the name of the foreman; and anything more is not a part of the finding of the grand jury, but mere surplusage. Thompson v. Com., 20 Gratt. 724; State v. Heaton, 23 W. Va. 773.

If, therefore, such additions are made, and are incorrect, or even inconsistent with the indictment, they will not vitiate it, as they will be regarded as no part of the finding of the grand jury. State v. Heaton, 23 W. Va. 773; Thompson v. Com., 20 Gratt. 724.

Endorsement on Different Sheet of Paper.—An indictment filled the whole of a sheet of paper, and was then folded in another half sheet of the same size, on which half sheet the attorney endorsed "Commonwealth v. Joseph Burgess, Indictment": and immediately below, in the handwriting of the foreman of the grand jury, was endorsed, "A true bill. Robert Hamilton, foreman." Although the said half sheet of paper was blank, except the endorsements, and although it was not otherwise attached to the indictment than being folded around it, yet the indictment enveloped by it must be considered as the indictment on which the grand jury passed, and on which the jury found their verdict. If the objection were a good one, it comes too late after verdict. Burgess v. Com., 2 Va. Cas. 483.

Incorrect Endorsement.—An indictment for a felony is endorsed "A true gun," which is signed by the foreman. The jury present the paper in court as an indictment, it is read to them by the clerk as their indictment, and assented to by them; it is entered on the record as an indictment, and the prisoner is tried upon the plea of not guilty. Upon a motion to arrest the judgment, *held*, no indorsement is necessary on the indictment to constitute it such; and the mistaken endorsement cannot invalidate it. White v. Com., 29 Gratt. 824.

Indictment with Verdict of Guilty Endorsed on It.—A prisoner was indicted and convicted of unlawful shooting, but the court set aside the verdict and awarded a new trial. He was again tried under the same indictment and convicted. He moved in arrest of judgment on the ground that the indictment was sent to the grand jury with the former verdict of guilty written thereon. The court held that the objection was not well taken, for it was not made before verdict, and certainly the court had no power to emasculate the record by erasing therefrom the former verdict. Besides, if there were any merit in the objection, a motion in arrest of judgment was not the proper remedy. Forbes v. Com., 90 Va. 550, 19 S. E. Rep. 164.

Record Not Affirmatively Showing Proper Endorsement.—A petition for rehearing for the first time made a point that it did not appear that the indictment had the indorsement, "a true bill." The record did not show that the indictment had not such an indorsement. It said that the grand jury "reported an indictment against Frank Cross for a felony, 'a true bill.'" *Held*, the report of the grand jury imports that it has such indorsement. The absence of a statement that there was such indorsement does not prove that there was not. It says in effect that there was. Brotherton v. People, 75 N. Y. 159; Whart Cr. Pl. & Prac., sec. 369.

But the record says that the grand jury declared it "a true bill." That is enough. JUDGE DADE in the Burgess' Case, 2 Va. Cas. 487; White's Case, 29 Gratt. 824; Price's Case, 21 Gratt. 846. There is nothing of any substance in the *quære* on this point in State v. Heaton, 23 W. Va. 773. If there were anything in the point, it comes too late after plea. Burgess' Case, 2 Va. Cas. 487; Whart. Cr. Pl. & Prac.,

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sec. 369. A later certificate of the clerk shows there was such indorsement. Per BRANNON, P., in State v. Cross, 44 W. Va. 315, 29 S. E. Rep. 533.

Endorsement Not Essential.—It was said by DADE, J., in Burgess v. Com., 2 Va. Cas. 483, that "in this case, it is not absolutely necessary to decide, whether the endorsement, 'a true bill,' be indispensably requisite to constitute an indictment. If it were necessary to decide this point, it might well deserve to be enquired, whether the law books, in declaring this endorsement to be necessary, to make the paper an indictment, have reference to any other than the mere inceptive stages, while the subject is in the hands of the grand jury. A written charge preferred by the attorney to the grand jury, is not, when handed to them, an indictment, nor does it become so until sanctioned by them, which sanction is indicated by the above endorsement. So far, and in this stage of the proceedings, the endorsement does indeed stamp on the paper, its character of an indictment. But when a still more solemn act has been done, when the grand jury has appeared in court, and there openly presented this charge as a true bill, of which a record has been forthwith made by the court, this higher solemnity may well be supposed to take the place of any minor one, and it would scarcely seem necessary to look beyond this." This as the opinion itself shows was mere *obiter dicta*. But in Price v. Com., 21 Gratt. 846, the very point was squarely presented to the court; and it was decided chiefly on the *dicta* in Burgess v. Com., 2 Va. Cas. 483, that such endorsement though usual is not necessary and the record of the finding of the jury, upon the order book of the court is a proper evidence of that fact. See also, White v. Com., 29 Gratt. 824; Crump v. Com., 98 Va. 833, 23 S. E. Rep. 760.

It was said by GREEN, J., in State v. Heaton, 23 W. Va. 773, that, "I am not now prepared to say, that in this state the endorsing on an indictment the words 'a true bill' and the signing of such endorsement by the foreman of the grand jury, would under any circumstances be dispensed with. There is no decision binding on us, in which it has been so held. And certainly this long-established and useful practice ought to be followed as the recognized and proper mode of avoiding difficulties, even if it were held not to be absolutely necessary."

But in the later case of State v. Hill, 46 W. Va. —, 35 S. E. Rep. 831, it was expressly decided that the fact that an indictment is not endorsed "A true bill" and signed by the foreman of the grand jury, is not a fatal defect.

The record showed that the grand jury returned into court having found the following indictments, to wit: State v. Thacker Coal & Coke Company, a corporation. An indictment for a misdemeanor. A true bill. A. B. Straton, Foreman. It was claimed by the defendant's counsel that it did not appear from the record that the indictment was endorsed on the back of it, "a true bill," and signed by the foreman. The court held as follows: "The record, it is true, leaves out the word 'indorsed,' but it shows that the grand jury returned into court the indictment against the defendant, 'A true bill,' signed by A. B. Straton, foreman. The indictment is not signed on the face of it. There is but one thing it could mean,—that the indictment was returned into court with the indorsement on it as stated on the record. The indorsement is no part of the indictment, further than as a mark of identification, and it is hard to conceive how the record of the finding of the indictment by the grand jury could be made up, other than from the indorsement upon the indictment itself. It is the record of the finding as returned by the grand jury." State v. Thacker Coal & Coke Co. (W. Va.), 38 S. E. Rep. 539.

7. CONCLUSION OF INDICTMENT.

a. Contra Pacem—Necessity of Such Conclusion.- It is an old rule in the law of criminal procedure that an indictment must conclude against the peace and dignity of the government whose law has been violated, and the requirement of this conclusion, in words appropriate to our form of government has been incorporated into the constitution of Virginia and West Virginia. Brown v. Com., 86 Va. 466, 10 S. E. Rep. 745; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654.

Omission Fatal.—The rule thus established is strictly applied and the omission thus formally to conclude an indictment, is fatal. Earley v. Com., 86 Va. 921, 11 S. E. Rep. 795; Thompson v. Com., 20 Gratt. 724; Com. v. Carney, 4 Gratt. 546.

W. Virginia Not Equivalent to West Virginia.—An indictment for larceny concluded against the peace and dignity of the state of W. Virginia. The fifth section of the first article of the constitution provides that indictments shall conclude, "against the peace and dignity of the State of West Virginia." The court held that when the constitution of the state requires an indictment to conclude in certain form and words, the indictment is not good unless it concludes in the exact language of the constitution; that in this case, there is not a literal compliance and consequently the indictment is insufficient. Lemons v. State, 4 W. Va. 755.

Prisoner Cannot Waive Defect.—And a prisoner, by failing to demur, or moving to quash, or moving in arrest of judgment, on an indictment not in the exact language required by the constitution, cannot be held to have waived his right to make objections to the indictment in the appellate court; the right being a constitutional, and not a personal right. Lemons v. State, 4 W. Va. 755.

Adding Name of State.—The constitution, adopted on the 4th Thursday of August, 1872, required all indictments to conclude "against the peace and dignity of the state," an indictment concluding "against the peace and dignity of the state of West Virginia" is not repugnant to the constitution: for the conclusion is precisely that prescribed by the constitution, and the words "of West Virginia" that are added to the conclusion should be considered as mere surplusage or additional designation, inasmuch as they do not indicate a state different from the one intended as having been offended in its peace and dignity. State v. Allen, 8 W. Va. 660; Brown v. Com., 86 Va. 466, 10 S. E. Rep. 745.

b. Contra Formam—When Necessary.—Where the offence is entirely created by statute; or where the offence at common law is made by statute a crime of a higher nature, as a misdemeanor, a felony; or where the offence existed at common law, but a different punishment is inflicted by statute, there the averment should be *contra formam statuti*. See *note* appended to the case of Chiles v. Com., 2 Va. Cas. 260.

When Necessary.—But where the offence was felony at common law, but an act ousts the offender of some benefit which the common law allowed him, as of benefit of clergy, the averment is unnecessary because the statute neither creates a new offence nor adds a new penalty, and it cannot be said with propriety that the offence was committed contrary

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to the provisions of such an enactment. See *note* appended to the case of Chiles v. Com., 2 Va. Cas. 260.

8. SIGNING BY PROSECUTING ATTORNEY.—It is not required at common law that the indictment be signed by a prosecuting officer, and there is no statute requiring it in Virginia. If such signature were essential to the validity of an indictment, the grand jury would be completely under control of the prosecuting officer. Thompson v. Com., 88 Va. 45, 13 S. E. Rep. 304.

VI. INFORMATION.

A. BY WHOM FILED.—"At common law, indeed, a criminal information might have been 'filed by the attorney general *ex officio*, upon his own discretion, without any leave of the court,' or 'by the king's crown or attorney in the court of king's bench,' usually called the master of the crown office, who is for this purpose the standing officer of the public. Neither of these methods of procedure now obtain in this state, if, indeed, they ever did, which seems at least doubtful." 1 Bish. Cr. Prac., §§ 604, 605, 606; Com. v. Ayres, 6 Gratt. 668; Christian's Case, 7 Gratt. 637.

For a long series of years, by a practice unknown to the common law in England, presentments have been allowed to stand in this state as the foundation for an information in cases of misdemeanor, or the commonwealth's attorney has been allowed, by express statute, to file an information upon a complaint in writing, verified by the oath of a competent witness. Code 1873, ch. 201, § 2; Code 1887, § 3990; Christian's Case, 7 Gratt. 637. Per HINTON, J., in Wilson v. Com., 87 Va. 95, 12 S. E. Rep. 108.

B. VERIFICATION, AFFIDAVIT OR COMPLAINT. —Under § 3990, Va. Code 1887, an information cannot be maintained unless filed upon a presentment or indictment by a grand jury or upon a complaint in writing verified by the oath of a competent witness. Wilson v. Com., 87 Va. 94, 12 S. E. Rep. 108.

Quashed Indictment Not Sufficient.—An indictment being quashed because one of the grand jurors who found it was not a freeholder, the indictment is not sufficient foundation for a rule upon the party to show cause why an information should not be filed against him. Com. v. Ayres, 6 Gratt. 668.

When Presentment Sufficient.—A presentment of a grand jury, to be a proper foundation for an information, must contain every matter necessary to render the act imputed to the defendant unlawful; and the supposed offence must be described with at least reasonable certainty. Bishop v. Commonwealth, 13 Gratt. 785.

C. AMENDMENT.

1. WHEN ALLOWED.—On an information for perjury, the attorney for the commonwealth, may be allowed to amend the information in accordance with the presentment on which it is founded, after the appearance of the defendant and a motion by him to quash it. Com. v. Lodge, 6 Gratt. 699.

2. WHEN NOT ALLOWED.—When an oath has been taken in order to procure a marriage license, and the license issued and the marriage had accordingly, the party may be indicted for a misdemeanor. But if this is not charged in the presentment, nor in either count of the information, while it is competent for the court in a proper case, to permit the attorney for the commonwealth to file an amended information, yet in this case such leave should not be given, as the offence charged in the presentment does not amount to a misdemeanor. Commonwealth v. Williamson, 4 Gratt. 554.

D. MISCELLANEOUS—SUSPENSION OF ATTORNEY FOR MALPRACTICE.—By the provision of the statute 1 Rev. Code, ch. 76, § 6, a court cannot, for malpractice of an attorney or counsellor, committed in its presence, suspend the license of the party offending, in a summary way, but must direct an information to be filed against him, and inflict the punishment on the verdict of guilt found on such information. *Ex parte* Fisher, 6 Leigh 619.

Carrying Off Line Fence.—Information charged that defendant did knowingly and wilfully, without lawful authority, cut down and carry off a line tree between his land and the land of a certain J. H. contrary to the form of the statute. *Held*, the offence was not so charged as to be punishable by any law in force in Virginia. Com. v. Powell, 8 Leigh 719.

Using Means to Prevent Witnesses from Attending Court.—Using means to prevent, and preventing a witness from attending court, who had been duly summoned, is a contempt of court, which may be punished by information. Com. v. Feely, 2 Va. Cas. 1.

Justice May Be Removed for Misbehavior.—A justice of the peace may be amerced and removed from office, upon an information against him, in a superior court of criminal jurisdiction, for misbehavior in office. Commonwealth v. Alexander, 4 H. & M. 522.

Information or Indictment Proper to Remove Public Officer.—Proceeding by information or indictment in the county or corporation court, or by writ of *quo warranto* in the circuit or corporation court, is the proper mode to remove a sheriff or other officer from office in Virginia. Alexander's Case, 1 Va. Cas. 156; Mann's Case, 1 Va. Cas. 308; Wallace's Case, 2 Va. Cas. 130; 1 Min. Inst. 110; Royall v. Thomas, 28 Gratt. 130; Va. Code 1887, ch. 145, § 3022, etc. See also, State v. Matthews, 44 W. Va. 372, 29 S. E. Rep. 994.

A Civil Proceeding.—An information in the nature of a writ of *quo warranto*, though in form a criminal proceeding, yet is in substance a civil proceeding, for the trial of a civil right; and, therefore, the act which limits the prosecution of informations on any penal law to one year, does not apply to any such information. Com. v. Birchett, 2 Va. Cas. 51.

Fine Going Entirely to Informer Not Recoverable by Information.—The penalty of $150 imposed by the act of 1797 on tavern keepers suffering the game of faro in their houses, could not be recovered by information for the use of the commonwealth, the penalty being given to the person suing for the same, and it being no offence at common law. Com. v. Richards, (1803), 1 Va. Cas. 133.

Soon, it was provided otherwise, by statute. See 1 Rev. Code 1803, p. 373, § 7; 1 Rev. Code 1819, p. 569, § 23. Where a fine or a part thereof goes to the commonwealth, it may be recovered in the name of the commonwealth by presentment, indictment, or information; or where no corporal punishment is prescribed, by warrant, if the fine does not exceed $20, but if exceeding that amount, by the action of debt, or action on the case, or by motion. Va. Code 1878, §§ 712, 715; So. Express Co. v. Com., at relation of Walker (1895), 92 Va. 59, 22 S. E. Rep. 809. But where the forfeiture goes entirely to the informer, as, in a proceeding for a fine against telegraph company, under § 1292 of the Code, the proceeding is by action, and need not be in the name of the commonwealth. Western Union Telegraph Co. v. Tyler (1893), 90 Va. 297, 18 S. E. Rep. 280.

When an Information Does Not Lie.—When a presentment is in a circuit court, for an offence for

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which the penalty prescribed by law does not exceed twenty dollars, the court cannot proceed by way of information, but only in a summary way under the statute of 1 Rev. Code, ch. 169, § 65; Webb v. Com., 2 Leigh 721; Minor's Syn. Cr. Law 250. And it was held in Hendrick v. Andrick, 1 Va. Cas. 267, that an information *qui tam* did not lie to recover a penalty imposed by statute which makes the penalty "recoverable on warranty, petition or action, as the case may be."

And it is declared by statute that a prisoner cannot be put on trial for a felony on an information but only on an indictment found by a grand jury of a court of competent jurisdiction. Com. v. Barrett, 9 Leigh 665; Matthews v. Com., 18 Gratt. 989; Jones v. Com., 19 Gratt. 478.

Party Waiving Filing of Information in Lower Court Cannot Complain in Appellate Court.—In December 1874, E. was elected by the legislature judge of the county courts of G. and B. counties, and on the 12th of the same month commissioned as such; the commissioner stating that he was elected to fill the unexpired term of his predecessor. In December, 1879, W. was elected judge of the same counties, and commissioned as such on the 20th of the same month. Without objection on the part of E., W. entered, at once, upon the duties of the office. On 3rd day of May, 1880, E. filed petition in the circuit court, in which after setting forth the grounds of his claim to the office of judge of the county court for the counties of G. & B., he prayed that a rule should be issued against the said W., to appear before said court and show cause why leave should not be given him to file an information in the nature of a writ of *quo warranto* at the relation of petitioner, to determine and test their respective rights in the premises. Upon regular proceedings taken judgment was given in favor of E. Upon writ of error it was objected that the information in the nature of a writ of *quo warranto* was not filed by the commonwealth, but that the proceedings were all had upon petition filed by E. It was held that the record showed that an information had been ordered by the court, but that W. by his counsel waived in open court the filing of any information; that but for this waiver, no doubt, an information in proper form, in the name of the commonwealth would have been filed at once; that having been waived in the court below he could not be heard to say, in the appellate court, that the proceedings were irregular because the information was not filed. The Bland and Giles County Judge Case, 33 Gratt. 443.

VII. PRESENTMENT.

A. GENERAL INCIDENTS.—"A presentment made in the ordinary way by a grand jury is regarded, in the practice at common law, as nothing more than instructions given by the grand jury to the proper officer of the court for framing an indictment for an offence which they find to have been committed." Per LOMAX, J., in Commonwealth v. Christian, 7 Gratt. 631.

Commencement of the Prosecution.—A presentment for a misdemeanor is the commencement of the prosecution of an offence, and if found before the running of the statute of limitations will prevent the statute from barring the prosecution although an information or indictment be not found until after the running of the statute. Commonwealth v. Christian, 7 Gratt. 631.

May Be Ground for Either an Information or an Indictment.—A presentment for a misdemeanor did not conclude "against the peace and dignity of the commonwealth." On this presentment process issued and the defendant appeared and pleaded "not guilty"; and the cause was continued. At the term he, by leave of the court, withdrew his plea; and then moved to quash the presentment for the defect aforesaid; but the attorney for the commonwealth suggesting that an information might be filed upon the presentment, the court overruled the motion to quash, and on the motion of the attorney ordered a rule upon the defendant to show cause why an information should not be filed upon the presentment. Upon this rule the defendant appeared and again moved to quash the presentment. It was said by the court: "No objection is seen in the completeness and sufficiency of this presentment, as a foundation for a rule for an information according to the Virginia practice, though it did omit the conclusion required by the constitution in indictments—'against the peace and dignity of the commonwealth.' If for that or any other technical defect or informality in the presentment, regarding it as an indictment, the commonwealth's attorney should apprehend that the prosecution might not, perhaps, be sustainable, and the real justice of the case be sacrificed, why should he be precluded by the erroneous or doubtful step which he had at first elected to take, from resorting to another course of proceeding, which was originally open to him, whereby the real justice of the prosecution would be attainable? It is not shown that the change of the mode of proceeding could cause any surprise, or any wrong to the defendant. Every matter of fair defence and exculpation, was still fully open to him under this new phase of the prosecution. Why should not the court allow, for the purpose of attaining substantial justice, the correction of pending proceedings in this case, that is allowable in other cases? No reason, therefore, can be perceived, why the commonwealth's attorney, waiving the proceedings upon the summons to answer, should not be permitted to resort to the alternative which he might have originally elected, a summons upon the presentment to show cause why an information should not be filed." Commonwealth v. Christian, 7 Gratt. 639.

The court distinguished the above case from Chichester's Case, 1 Va. Cas. 312, saying: "The prosecution was there instituted by indictment, and was proceeded upon in the only way marked out in cases of indictments. The prosecution rested upon the indictment alone; and if not sustainable upon the indictment, it could not be sustained at all; and the defendant when discharged from the indictment must, of course would, be discharged from the prosecution. The indictment was for its defectiveness quashed, and thereby that prosecution terminated. It is a well settled principle, that the court will not in any case grant an information, where the prosecutor has already preferred an indictment, and the grand jury found a true bill, although it was quashed for insufficiency (Anon. 8 Mod. 187). Here the prosecution was by presentment, which was not as was the indictment, the act of the prosecutor, at least in part, but it was the act of the grand jury. The presentment had not been quashed. It was still a pending prosecution, from which the defendant had never been discharged." Commonwealth v. Christian, 7 Gratt. 640.

When a Proper Foundation for an Information.—A presentment of a grand jury, to be a proper foundation for an information, must contain every matter

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necessary to render the act imputed to the defendant unlawful; and the supposed offence must be described with at least certainty. Bishop v. Com., 13 Gratt. 785.

Defective Presentment a Good Foundation for an Information.—A presentment is a good foundation for an information, though technically defective. It should not be quashed for such technical defect, if the attorney for the commonwealth asks for a rule for an information. Commonwealth v. Christian, 7 Gratt. 631.

Sufficiency of Presentment May Be Objected to in the Appellate Court.—Upon a rule to show cause why an information should not be filed, the defendant appears and moves the court to quash the presentment on the ground that it does not charge any offence against him; but the motion is overruled. The information is then filed, and he pleads "not guilty"; and on the trial there is a verdict and judgment against him. Upon a writ of error to the appellate court, he may object to the insufficiency of the presentment. Bishop v. Com., 13 Gratt. 785.

When Necessary.—In petty cases where the only punishment is a fine limited to an amount not exceeding $20, the proceedings ought to be by summons to answer the presentment, and an information is not proper. Va. Code 1873, ch. 201, § 22; Va. Code 1887, ch. 196, § 4009; Webb's Case, 2 Leigh 721; Minor's Syn. Cr. Law 250.

Trial on Presentment.—"The presentment has in Virginia the character in itself, of a criminal proceeding, until it is embodied and merged in an indictment for the same offence, or in an information filed upon it; and may stand in the place of an indictment, on which the prosecution for a misdemeanor may proceed, without indictment or information, as was decided in Towles' Case, 5 Leigh 806." Per LOMAX, J., in Commonwealth v. Christian, 7 Gratt. 631.

Regular Practice.—A presentment was subscribed by the foreman of the grand jury, with the name of the individual who was the prosecutor written at the foot, but was not endorsed "a true bill" under the signature of the foreman, nor was it signed by the commonwealth's attorney. Upon this a process was awarded and prosecution carried on without the filing of an information. It was objected that such was irregular practice. *Held*, practice was regular. Commonwealth v. Towles, 5 Leigh 806.

Presentment Referred to in Minutes of Court Part of the Record.—A presentment of a grand jury in a county or corporation court, referred to in the minutes of the court, but without being spread at large upon them, is a part of the records of the court. Myers v. Com., 2 Va. Cas. 160.

Presentment—Does Not Have to Appear on Record in Ex Tenso.—It is not necessary to the validity of a presentment by the grand jury, that it should appear upon the record book in *ex tenso*. Commonwealth v. Tiernan, 4 Gratt. 545.

Statement of Time.—Since the Act, Code 1860, ch. 207, § 11, no mode of stating the time of an offence in an indictment or presentment can vitiate it. Sledd v. Com., 19 Gratt. 813.

Specifying Neither Time Nor Place.—Upon a presentment for unlawful gaming at cards at a particular place within six months next proceeding, process is issued summoning the defendant to answer a presentment for unlawful gaming at cards, generally, without specifying place or time. *Held*, such process is good and sufficient. Word v. Com., 3 Leigh 743.

Infant Should Defend Himself in Person or by Attorney.—Upon a presentment against an infant for a misdemeanor, the infant has a right to appear and defend himself in person or by attorney, and it is error to assign him a guardian and to try the case on a plea pleaded for him by the guardian. Word v. Com., 3 Leigh 743.

A Dismission Not a Retraxit.—A dismission of a presentment is not a *retraxit*, nor is a *retraxit* known to the criminal law, where the prosecution is carried on by the commonwealth. Wortham v. Com., 5 Rand. 669.

Proof Insufficient to Support Charge.—On a presentment for gaming, the defendant was charged with the offence committed at the booth of Price Skinner; the proof was of gaming at the booth of Clarke, the said Skinner having no right, interest, or agency in the booth. *Held*, this proof is insufficient to support the charge. Commonwealth v. Butts, 2 Va. Cas. 18.

Plea in Abatement.—Upon a presentment by a grand jury for gaming, defendant tenders plea in abatement, that one of the grand jurors nominated himself to the sheriff to be put on the panel of the grand jury, and thereupon the sheriff put his name on the panel, summoned him to serve, without alleging that this nomination of himself by the grand juror was corrupt, or that there was a false conspiracy between him and the sheriff for returning him on the panel. *Held*, the plea is naught, and the court ought not to permit it to be filed. Commonwealth v. Thompson, 4 Leigh 667. It was decided in Com. v. Long, 2 Va. Cas. 318, that two pleas in abatement to the same presentment are admissible.

Motion to Quash after Information Filed.—*Quære:* If a person who has been regularly summoned to show cause why an information shall not be filed upon a presentment found against him by the grand jury, and fails to appear, can he, after the information has been filed, move the court to quash the presentment. Commonwealth v. Scott, 5 Gratt. 697.

When Objection to Presentment Too Late after Verdict.—The judgment cannot be arrested, after verdict against a defendant, whether the witnesses on whose evidence it was found, were called for by the grand jury, or sent to them by the court, or because the name of the prosecutor was not written at the foot of the information. Commonwealth v. Chalmers, 2 Va. Cas. 76.

VIII. SERVICE OF COPY OF INDICTMENT.

It is provided by § 1, ch. 159, W. Va. Code 1891, that the accused shall be allowed a copy of the indictment. Eastham v. Holt, 43 W. Va. 599, 27 S. E. Rep. 888. It was decided in this case that where a judge instead of allowing the original indictment to go into the hands of the attorneys for the prisoner, ordered the clerk to furnish a copy within an hour, and it was furnished, that this was not an error, as the Code of 1891, ch. 159, § 1, does not give the accused or his counsel the original indictment, but a copy.

IX. CHARGING THE OFFENCE.

A. SUFFICIENCY OF INDICTMENT OR INFORMATION.—"Where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars." Per LEWIS, P., in Boyd v. Com., 77 Va. 55.

When an Indictment is Sufficient in Law.—An indictment is sufficient in law, which shows on its

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face, first, that it has been found by competent authority, in accordance with law; second, that a particular person mentioned therein, has done, within the jurisdiction of the indictors, specific acts at a specified time; third, that such acts, so done, constitute what the court can see, as a question of law, to be a crime justifying the punishment sought to be inflicted. State v. Williams, 14 W. Va. 869.

a. Degree of Certainty.—An indictment must fully and plainly inform the accused of the precise crime, for which he is to be tried, so that he may know against what to prepare his defence, and may plead the judgment in bar of another indictment against him for the same offence. State v. Schnelle, 24 W. Va. 778; Head's Case, 11 Gratt. 819; Arrington v. Com., 87 Va. 98, 12 S. E. Rep. 224.

A rule not affected by the statute now brought into § 4011 of Code of 1887, which provides that "no exception shall be allowed for any defect or want of form in any presentment, indictment, or information" for an offence against the revenue laws, but that "the court shall give judgment therein according to the very right of the case." Young's Case, 15 Gratt. 664; Arrington v. Com., 87 Va. 96, 12 S. E. Rep. 224.

Every indictment must set forth a complete offence, omitting no ingredient which enters into the composition of it. Hampton's Case, 3 Gratt. 591.

And it was said in Thomas v. Com., 2 Rob. 795, that "in all indictments, the offence charged should be averred distinctly and directly, and not by way of intendment or argument."

Libel—Innuendo.—It is an elementary rule of pleading that whatever is alleged must be alleged with certainty, and one of the means of insuring certainty in a complaint or indictment for slander or libel is an innuendo. State v. Aler, 39 W. Va. 549, 20 S. E. Rep. 585.

Violation of Public Law.—Every indictment must show upon its face that some public law of the state has been violated, and that the offender has been indicted therefor, in the manner and within the time prescribed by the law of the land. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 645.

Sufficient Certainty in an Information.—An information, which charged that "John Feely did use means to prevent, and did then and there prevent, one Samuel Wright from attending as a witness to give evidence to prove the execution of a deed of trust, which deed of trust was executed by the said John Feely to John Draper, after he, the said Samuel Wright, had been duly summoned to attend court as a witness, to prove, etc., by virtue of a summons issued by the clerk of said court who was duly authorized to issue said summons, which act of the said John Feely is contrary to the laws and usages of the commonwealth, against the peace and dignity of the commonwealth," etc., was held to set forth the offence charged with sufficient certainty. Com. v. John Feely, 2 Va. Cas. 1.

Sufficiency May Be Questioned in Appellate Court.—Upon a rule to show cause why an information should not be filed, the defendant appeared and moved the court to quash the presentment on the ground that it did not charge any offence against him, but the motion was overruled. The information was then filed, and he pleaded "not guilty"; and on trial there was a verdict and judgment against him. Upon a writ of error to the appellate court, he may object to the insufficiency of the presentment. Bishop v. Com., 13 Gratt. 785.

b. Necessity of Charging Facts.—It is a general rule that in every indictment the charge must be sufficiently explicit to support itself, for no latitude of intention can be allowed to include any thing more than is expressed. The indictment must charge the crime with such certainty and precision that it may be understood by any one, alleging all the requisites that constitute the offence, that every averment must be so stated that the party accused may know the general nature of the crime of which he is called upon to answer. 1 Chit. Crim. Law 172. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 647.

What Information for Bribery at an Election Should State.—In an information against a justice of the peace for bribery in the election of a clerk, it ought to be stated with certainty, that an election was holden, and that, at that election, the vote was given. Newell v. Com., 2 Wash. 113 (88).

When Indictment Need Not State That Prisoner Was Free.—In prosecutions under statutes, which declare that persons "being free," shall be punished in a particular manner, different from that prescribed for slaves, it is unnecessary to charge in the indictment the prisoner as being free; for the description of the person in such cases, does not enter into, nor make part of the *offence*. Young v. Com., 2 Va. Cas. 328.

c. Matters of Judicial Notice.—Under Acts 1885-6, p. 259, § 5, it is not necessary in the indictment to allege that the magisterial district therein mentioned had voted against license, for that was a fact of which the court would take judicial notice.

Indictment May Be True and Also Insufficient.—If the indictment may be true, and still the accused may not be guilty of the offence described in the statute the indictment is insufficient. Com. v. Young, 15 Gratt. 666; Boyd v. Com., 77 Va. 55; State v. Riffe, 10 W. Va. 797.

d. Sufficiency of Inartificial Language.—Grammatical errors or the misspelling of words in an indictment are not fatal to it, where they do not affect the sense, and where from the whole context the words as well as the meaning can be determined with certainty by a person of ordinary intelligence. State v. Halida, 28 W. Va. 499.

Clerical Error Not a Fatal Defect.—An indictment charged that M. A. McGahan "on the 28th day of April, 1898, and thence continually, until the day of finding this indictment, at the county of Mineral, a certain ill-governed and disorderly house, unlawfully did keep and maintain, and in said house, for her own lucre and gain, certain evil-disposed persons, as well men as women, of evil name, fame, and conversation, to come together, on the days and times aforesaid, there unlawfully and willingly did cause and procure; and the said person in the said house at unlawful times, as well in the night as in the day on the daytimes aforesaid, there to be and remain, drinking, tippling, cursing, swearing, quarreling, and otherwise misbehaving themselves, unlawfully did permit and suffer; to the common nuisance of all people of this state, and against the peace and dignity of the state." Defendant demurred to the said indictment, assigning as grounds of demurrer that in using the language, "and the said person in the said house at unlawful times," etc., the indictment charges that but one person was disorderly: and the fact that one person only should behave badly at a hotel and saloon, by tippling, cursing swearing, etc., is not sufficient to sustain such a charge, as it is a crime which one person, acting alone, could not commit. *The court held* that if the

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sense be clear, nice exceptions ought not to be regarded; and even when the sense of the word may be ambiguous, this will not be fatal, if it is sufficiently shown by the contract in what sense the phrase or word was intended to be used. That the use of the singular word "person" instead of the plural of that word was a mere mistake in leaving off the "s" as it is clearly shown by what follows; and that the indictment would not be held bad for that defect. State v. McGahan (W. Va.), 37 S. E. Rep. 573.

Omission of Conjunction "and."—The record of an indictment showed that it was a joint indictment against Columbus Hash and Rowen Hash for a felony. But the indictment charged that the offence was committed by "Columbus Hash, Rowen Hash," omitting the copulative conjunction "and." It was claimed the indictment was insensible and uncertain as to the number of persons charged with the offence set forth. The court decided that the objection was not well taken, for in every instance in which the expression occurs in the indictment, the words "Columbus Hash" are followed by a comma, and then come the words "Rowen Hash"; that the use of the comma clearly indicated that the words "Columbus Hash" represented the name of one of the two persons jointly indicted, and the words "Rowen Hash" represented the name of the other, and that, by necessary intendment, the meaning is the same as if the expression had been written Columbus Hash and Rowen Hash. Hash v. Com., 88 Va. 174, 13 S. E. Rep. 396.

Misspelling of Name Therein.—Special verdict found the prisoner guilty of transferring a certificate of debt of the commonwealth, purporting to be signed by two auditors of public accounts, *knowing* it to be forged; if parol proof of the official appointment of the auditors was sufficient, and if the misspelling of the christian name of one of the auditors in the indictment was not material, *held*, that the law was for the defendant. Com. v. Kearns, 1 Va. Cas. 108.

B. STATUTORY OFFENCE.—An indictment upon a statute must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it. Com. v. Hampton, 3 Gratt. 590; Boyd v. Com., 77 Va. 52; Arrington v. Com., 87 Va. 99, 12 S. E. Rep. 224; Com. v. Peas, 2 Gratt. 629.

1. LANGUAGE OF THE STATUTE.—JUDGE MONCURE, in delivering the opinion of the court in Com. v. Young, 15 Gratt. 666, said: "In an indictment for a statutory offence, it is generally proper and safest to describe the offence in the very terms used by the statute for that purpose. But it is sufficient to use in the indictment such terms in the description, as that, if true, the accused must of necessity be guilty of the offence described in the statute; and especially so in a case, falling, as this does, in that class, concerning which the law provides, that 'no exception shall be allowed for any defect or want of form in the presentment, indictment or information, but the court shall give judgment thereon according to the very right of the case.' Code, ch. 207, sec. 24, p. 773." State v. Riffe, 10 W. Va. 797; Boyle v. Com., 14 Gratt. 674; State v. Mitchell (W. Va.), 35 S. E. Rep. 845; Dull v. Com., 25 Gratt. 974; Benton v. Com., 91 Va. 793, 21 S. E. Rep. 495; Howel v. Com., 5 Gratt. 664; Scott v. Com., 77 Va. 344; Helfrick v. Com., 29 Gratt. 845; Jones v. Com., 79 Va. 214; Whitlock v. Com., 89 Va. 338, 15 S. E. Rep. 893; State v. Boggess, 36 W. Va. 718, 15 S. E. Rep. 423; State v. Pennington, 41 W. Va. 599, 23 S. E. Rep. 918.

The allegation in the indictment, that the defendant "carried on the business of a druggist without a license thereof," using as it does the language of the statute, is sufficient. State v. Enoch, 26 W. Va. 253.

And it was decided in Bailey v. Com., 78 Va. 20, that in describing an offence under a statute, the indictment must follow the statute, and any material variance will be fatal.

An indictment charging that the accused made an assault with a rock, and did feloniously, maliciously, and unlawfully beat, wound, ill treat, and cause bodily injury, with intent in so doing to maim, disfigure, etc., sufficiently conforms to § 3671 of Code of 1887. Jones v. Com., 87 Va. 63, 12 S. E. Rep. 226.

Surplus Matter Will Not Vitiate.—An indictment, which charges an offence in the language of the statute, will not be held bad because it contains surplus matter. State v. Hall, 26 W. Va. 236.

Words of Statute When Expanded.—Though it is generally sufficient to follow the very words of the statute, "not unfrequently other rules will require it to be expanded beyond the statutory terms. It must fully state the offence, and if this cannot be done in the mere statutory words, it must be expanded beyond them." State v. Mitchell (W. Va.), 35 S. E. Rep. 845.

In indictments it is generally proper and sufficient to describe the offence in the very terms used by the statute for the purpose. Young's Case, 15 Gratt. 666; Burner's Case, 13 Gratt. 778. To this general rule there are exceptions. Thus in some cases it is necessary for the allegation in the indictment to go beyond the words used in the statute; numerous examples are given of this in Bishop's Crim. Pro., vol. 1, § 369 to 374. An instance where the words of the statute ought not to be used, though not properly an exception to this general rule, exists, where a statute on which an indictment is founded, enumerates the offences or intent necessary to constitute the offences disjunctively, the indictment is fatally defective, which uses the words of the statute charging them disjunctively. See Wharton's Crim. Law, vol. 1, § 295; 1 Bishop's Crim. Pro. § 334; State v. Charlton, 11 W. Va. 334.

2. FORMER OFFENCE OR CONVICTION—INCREASED PUNISHMENT.—Where a greater punishment may be inflicted for the second or subsequent violation of the penal law than for the first under statute (Va. Code 1849, p. 752, § 25; Va. Code 1887, § 905), the indictment must set out the time and place of the first conviction, and must show that the previous conviction was for an offence committed before the commission of that for which the prisoner is on trial. Rand v. Com., 9 Gratt. 738.

It seems that the first conviction must be a final judgment and not a judgment suspended on a writ of error. White v. Com., 79 Va. 611; Hurst's Guide & Manuel, p. 618, § 920. See also, on this subject, Stover v. Com., 92 Va. 780, 23 S. E. Rep. 874; Rider v. Com., 16 Gratt. 499; Thomas v. Com., 22 Gratt. 912; Pryor v. Com. (Va.), 26 S. E. Rep. 864.

Under Code 1887, § 3907, declaring that, whenever it is alleged in the indictment on which a person is convicted of petit larceny that he has been before sentenced for a like offence, he shall be confined in jail, etc., and for a third offence shall be sent to the penitentiary, etc., an indictment for petit larceny which, in the first of two substantially similar counts, alleges two prior convictions for a like offence charges a felony, and is therefore triable by the county court, though the second count, because

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of formal defects, charges only a misdemeanor. Pryor v. Com. (Va.), 26 S. E. Rep. 864.

A statute increasing the punishment for a second conviction of the same offence, passed after the commission of the first is not *ex post facto*, and unconstitutional. Rand v. Com., 9 Gratt. 738.

C. INTENT OR KNOWLEDGE.

1. KNOWLEDGE.—Under section 1, chapter 26, of Criminal Procedure of 1878-79, making it an indictable offence for obstructing a road, guilty knowledge is a part of the definition of the offence, and it is essential that the scienter should be charged in the indictment. Failure of the indictment to aver the scienter is fatal. Bailey v. Com., 78 Va. 19.

2. FELONIOUSLY.—The word "feloniously" must be used in every indictment for felony. Randall v. Com., 24 Gratt. 646; Barker's Case, 2 Va. Cas. 122; Trimble's Case, 2 Va. Cas. 143; State v. Whitt, 39 W. Va. 468, 19 S. E. Rep. 873; Dull v. Com., 25 Gratt. 974.

The averment that the act was done "feloniously" is so important that the omission of it is an error even after verdict for which the judgment will be arrested. Randall v. Com., 24 Gratt. 647; State v. Whitt, 39 W. Va. 468, 19 S. E. Rep. 873.

Insertion of Word "Feloniously" after Discharge of Grand Jury.—If an indictment for felony found by a grand jury omitted to charge, that the criminal act done was done feloniously, and after the grand jury was discharged the word "feloniously" was inserted in the indictment so as to render it in form a good indictment, when before it was fatally defective, and the defendant pleaded *not guilty*, and the jury found a verdict against him, he may then move the court to have the indictment restored to its original and true form, and when so restored judgment may be arrested for the fatal defect in the indictment. State of West Virginia v. Vest, 21 W. Va. 796.

3. FRAUDULENT.—Where an act is made an offence when fraudulently done, it must be so charged. Duff v. Com., 92 Va. 769, 23 S. E. Rep. 643.

D. EXCEPTIONS AND PROVISOS.—It is laid down in 1 Chitty Cr. Law 283, that when a statute contains provisos and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. 1 Sid. 330; 2 Hale 171; 1 Lev. 26; Poph. 93-4; 1 Burr. R. 148; 2 Burr. R. 137; Com. v. Hill, 5 Gratt. 691. Nor is it even necessary to allege that he is not within the benefit of the provisos (Hendricks v. Com., 75 Va. 943), though the purview should expressly notice them; as by saying that none shall do the act prohibited except in cases thereinafter excepted. Poph. 93-6; Hakw. p. 2, ch. 25, § 113. For all these are matters of defence, which the prosecutor need not anticipate, but which are more properly to come from the prisoner. But where exceptions are in the enacting part of a law, it must be charged that the defendant is not in any of them. Com. v. Hill, 5 Gratt. 688; State v. Baltimore, etc., R. Co., 15 W. Va. 390.

An indictment under the third section of the act of 1839-40, Sess. Acts, ch. 2, p. 5, is good, though it does not negative the exceptions and provisos contained in the 4th section. Com. v. Hill, 5 Gratt. 682.

X. DESCRIPTION OF PERSON.

A. DEFENDANT.

In General.—An indictment or information must name the defendant whom it is intended to charge with the offence therein alleged, and an omission in this regard will make the indictment bad. Commonwealth v. Snider, 2 Leigh 744.

Misnomer May Be Corrected.—An indictment was against John Neale Thompson and concludes: "The said John Neale not being then and there a druggist, against the peace and dignity of the state." The attorney for the state moved the court to allow him to amend the indictment by inserting the name "Thompson" instead of "Neale," where it occurred in the latter part of the indictment. To the making of this amendment the defendant excepted. The court held that the change made in the indictment by inserting the name "Thompson" instead of "Neale" was immaterial and did not prejudice the defendant. And being the mere correction of a misnomer was authorized by the statute, contained in § 10, ch. 158 of W. Va. Code, in force in 1885. State v. Thompson, 26 W. Va. 151.

The plaintiffs in error were jointly indicted under sec. 3805 of the Code 1887, for a disturbance of religious worship. A summons to answer the indictment was duly issued, and served upon them, but there was no appearance on the part of either of them. The indictment contained a misnomer, in this: That Scott Shiflett was called Scott Crawford, by which last name he was commonly known but his name was Scott Shiflett. The court ordered the indictment to be amended by striking out the name "Scott Crawford," and in its place and stead ordered to be inserted the name "Scott Shiflett alias Scott Crawford." This action on the part of the court was objected to on the ground that it was done in the absence of the defendants. The court held the objection to be without merit, in view of the statute which provides that no indictment shall be abated for any misnomer of the accused, "but the court may, in case of a misnomer appearing before or in the course of the trial, forthwith cause the indictment or accusation to be amended according to the fact," Code, § 3999, that the statute does not say the amendment shall be made when in the presence of the accused. Shiflett v. Com., 90 Va. 386, 18 S. E. Rep. 838.

Wrong Name—Correction Not Allowed.—By mistake a wrong name is inserted in an indictment for a misdemeanor; though the record of the court and the endorsement on the indictment shows the correct name. The indictment cannot be amended by striking out the wrong name and inserting the name of the person intended. Com. v. Buzzard, 5 Gratt. 694.

Description of Corporation.—In declarations in civil suits, where a corporate body is plaintiff, and in indictments where the thing stolen is alleged to be the property of a corporate body by name, it is not necessary to aver the political existence of the corporation. Its existence is matter of evidence, and, after verdict, it is inferred from its corporate name. Lithgow v. Com., 2 Va. Cas. 297.

Common Law.—A corporation cannot be impleaded *criminaliter* by its artificial name, at common law. Com. v. Swift, etc., Co., 2 Va. Cas. 362.

B. PERSONS OTHER THAN THE DEFENDANT.—In many offences the names of third persons necessarily enter for the identification as well as material description of the offence, and under the rule in criminal pleading requiring such certainty as will notify the defendant of the nature of the charge against him, the names of such third persons should be alleged, and the defendant cannot be convicted if the names are so erroneously stated as to fail to identify the offence, though certainty to a common intent is generally sufficient. Morganstern v. Com., 27 Gratt. 1021. And if such person is equally well

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known by several names, either of such names is sufficient. Taylor v. Com., 20 Gratt. 825.

Person Shot Not Named.—Upon an indictment under the act concerning malicious and unlawful shooting, stabbing, etc. (Code of 1860, ch. 171, § 9), which charges that the prisoner did unlawfully shoot, etc., with set purpose and malice aforethought to kill and murder, etc., the jury find the prisoner guilty of malicious shooting, without saying whom he shot, and fix the term of his imprisonment in the penitentiary at five years. No judgment can be entered on the verdict. The indictment and the verdict being fatally defective, the judgment may be reversed by the appellate court, though no motion in arrest of judgment was made in the court below. Randall v. Com., 24 Gratt. 644.

Idem Sonans.—An indictment alleged the larceny of a watch belonging to "Edmond Bolden," while the evidence showed that the party whose property was stolen was named "Ed Bolen." The accused objected to this variance, but the court held the variance immaterial, inasmuch as the names may be sounded alike without doing violence to the power of the letters found in the variant orthography. Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351.

Generally a Question for the Jury.—"Whether or not two or more names are *idem sonans* may be determined by the court upon a mere comparison, where the issue is free from doubt; but the modern and approved practice is to submit the question to a jury whenever there is opportunity to do so, and where the correct sound appears at all doubtful or dependent upon particular circumstances." 16 Am. & Eng. Enc. Law, p. 126, quoted with approval in Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351. See also, Taylor v. Com., 20 Gratt. 829.

Misdescription of Ownership.—An indictment for advising slaves to escape from their masters, charged that they were the property of E. L. Proof that they were the property of an estate of which E. L. was executrix will sustain the indictment. Cole v. Com., 5 Gratt. 696.

Name of Person Must Be Proved as Laid.—If a person be indicted for shooting S. W. and acquitted thereof, and then indicted for shooting J. W., plea of *autre fois acquit* will not be supported although the same act of shooting is charged in each indictment. Vaughan v. Com., 2 Va. Cas. 273.

Initials.—An indictment for murder which designates the person murdered by the initials of his name is sufficient. Brown v. Com., 86 Va. 467, 10 S. E. Rep. 745; Whart. Crim. Pl. & Pr. (8th Ed.) § 117.

C. NAME UNKNOWN—OF THIRD PERSONS.—If the name of the party injured be unknown he should be described as "a person to the jurors aforesaid unknown." Morgenstern v. Com., 27 Gratt. 1021.

Name in Fact Known.—It is a well-settled rule of criminal law that, where the act constituting the offence is an injury to the person, the name of the injured party must be stated, if known. If the name of the party injured be unknown he should be described as "a person to the jurors aforesaid unknown." But this is a material allegation, and if it turns out in the trial that the name of the person so described in the indictment was known to the grand jury, the variance will be fatal, and the accused must be discharged from that indictment and tried upon another charging the name of the person injured. Morgenstern v. Com., 27 Gratt. 1021.

XI. LAYING TIME.

Time must be attached to every material fact averred, but the time of committing an offence (except when time enters into the nature of the offence) may be laid on any day previous to the finding of the bill of indictment during the period within which it may be prosecuted. Rhodes v. Com., 78 Va. 696.

A. VIRGINIA STATUTE.—It is provided in Virginia by statute that "no indictment or other accusation shall be quashed or deemed invalid for omitting * * * to state, or stating imperfectly the time at which an offence was committed, when time is not the essence of the offence. Code, § 3999; Savage's Case, 84 Va. 619, 5 S. E. Rep. 565; Arrington v. Com., 87 Va. 96, 12 S. E. Rep. 224.

The time of the commission of an offence laid in the indictment is not material, as a general rule, and does not confine the proofs within the limits of that period; the indictment will be satisfied by proof of the offence on any day anterior to the finding. Rhodes v. Com., 78 Va. 696.

B. TIME—MATTER OF RECORD.—But when any time stated in an indictment is to be proved by a matter of record, a variance will be fatal, and in an indictment for perjury the day on which the perjury was committed must be truly laid. 2 Wharton Crim. Law 599; Rhodes v. Com., 78 Va. 696.

C. STATUTE OF LIMITATIONS.—When the time within which an offence may be prosecuted is limited by statute, the time as averred in the indictment should appear to be within the limit; but it is not necessary to aver that it occurred within that period. 1 Chit. Crim. Law 223; Whart. Crim. Pl. & Pr. sec. 385; State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 645.

If an indictment for an offence, the prosecution of which is by statute limited to a certain period after the offence was committed, show upon its face that at the time the indictment was found the prosecution of the offence was barred by such statute, it is fatally defective, and the defendant may take advantage of such defect by motion to quash the indictment or by demurrer thereto, or by motion in arrest of judgment. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 645.

Therefore an indictment found on the eighth day of April 1884, for adultery and fornication, which charged the defendant with committing the offence on the tenth day of March, 1883, upon general demurrer thereto is fatally defective. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 645.

Sec. 10, ch. 158 of W. Va. Code, in force in 1885, providing that no indictment shall be quashed or deemed invalid for omitting to state the time at which the offence was committed, where time is not of the essence of the offence, does not make valid an indictment which fails to aver any date, or that the offence charged was committed at a time within the statutory bar, when the offence is one which the statute declares shall not be prosecuted after a prescribed limitation. State v. Bruce, 26 W. Va. 157.

An indictment for a misdemeanor was found against B. on June 3d, 1879, and the evidence proved that the offence charged was committed on June 3d, 1878, the prosecution is not barred by sec. 10, ch. 152, of the W. Va. Code, in force in 1883, which provided, that "a prosecution for a misdemeanor shall be commenced within one year next after there was cause therefor," etc. State v. Beasley, 21 W. Va. 777

The indictment was found in September 1881, and it charged the offence to have been committed on the — day of ——, 1881. This was held to show on its face, that the offence was charged to have been

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committed within the year before the finding of the indictment. State v. Thompson, 26 W. Va. 151.

Date Changed—Presumption as to When Changed.—Where an original indictment is brought before the appellate court, and it appears upon inspection thereof that the date of the year in which the offence is charged to have been committed has been changed, the appellate court, in the absence of anything in the record to show when the change was made, will presume that the same was made before the finding of the indictment. State v. Ball, 30 W. Va. 332, 4 S. E. Rep. 646.

Indictment Found on Same Day Offence is Alleged to Have Been Committed.—An indictment found on the 6th of May charged an offence to have been committed on the same day the grand jury found the indictment. To this indictment a special plea was put in. The theory of the special plea was that where an indictment is found on the same day the offence is alleged to have been committed, it is fatally defective notwithstanding the indictment shows it was filed subsequently to the commission of the offence. *Held*, it is an unreasonable proposition to hold that where murder is committed in the morning and the indictment found in the evening of the same day it is bad. If the indictment charge a past offence, it is sufficient. Moreover under our statute (Code 1891, ch. 158, § 10), the omission to state, or an imperfect statement of time, does not hurt an indictment. One day can be stated and another proved. State v. Emblem, 44 W. Va. 521, 29 S. E. Rep. 1031.

No Mode of Stating Time in an Indictment Can Vitiate It.—Since the act, Code of 1860, ch. 207, sec. 11, no mode of stating the time of an offence in an indictment or presentment can vitiate it. Sledd v. Com., 19 Gratt. 813.

D. EXPRESSION OF DATE IN FIGURES.—Using figures instead of words, in setting out the dates of an indictment is not a fatal defect under sec. 11, p. 770 of Va. Code of 1849, which declares that an indictment or other accusation shall be quashed or deemed invalid for omitting to state, or stating imperfectly the time at which the offence was committed, when time is not the essence of the offence. Lazier v. Com., 10 Gratt. 713; Cady v. Com., 10 Gratt. 779.

XII. LAYING VENUE.

A. GENERAL SUFFICIENCY.—No indictment can be good without expressly showing some place wherein the offence was committed, which must appear to have been within the jurisdiction of the court in which the indictment is taken; and it is also necessary to prove that it was done in the county where the indictment is found, and the trial had. State v. Hobbs, 37 W. Va. 812, 17 S. E. Rep. 381.

It is necessary to aver and to prove the place where the crime with which the accused stands charged was committed. It is not sufficient to aver that the offence was committed "within the jurisdiction of the court" which is a conclusion of law. Early v. Com., 93 Va. 767, 24 S. E. Rep. 986.

Name of County in Body Sufficient.—Though the name of the county be left blank in the margin of an indictment for misdemeanor, it is enough if the county be stated in the body of the indictment. Tefft v. Com., 8 Leigh 721.

Sufficient Averment of Place.—An indictment, which in express terms avers that an offence was committed "at the said city of Richmond and within the jurisdiction of the said hustings court of the city of Richmond" is sufficient; and it is not necessary to state the place in the city where the assault was made. Baccigalupo v. Com., 33 Gratt. 807.

Hiring Out Convicts—Where Indictable for Crime.—A convict who has been sentenced to a term of imprisonment in the penitentiary is, in contemplation of law, still in the penitentiary, although he may have been hired out, in accordance with statutory provisions. Hence he may be indicted and tried in the county in which the penitentiary is located for an offence, *e. g.*, the murder of his guard committed in another county. Ruffin v. Com., 21 Gratt. 790.

Venue of Accessorial Act.—An indictment which fails to lay the venue of the accessorial act of counseling, advising, abetting, hiring, etc., according to the fact is bad on demurrer for uncertainty. State v. Ellison (W. Va.), 38 S. E. Rep. 574.

Proof That the Offence Was Laid in the County of Venue.—An indictment cannot be sustained without proof that the offence was committed within the county or corporation where the venue is laid. But a strong presumption raised thereof by the evidence is sufficient. Richardson's Case, 80 Va. 124; Butler v. Com., 81 Va. 159.

Two Places Previously Mentioned.—Where the indictment in the caption names one county and in the body of it speaks of the defendant as of another county, the charging the offence to have been committed in the county aforesaid, is error, it not being alleged with sufficient certainty that the offence was committed in the county in which the indictment was found. Bell v. Com., 8 Gratt. 600.

XIII. SURPLUSAGE AND REPUGNANCY.

The objection made to the first count of an indictment that it is insensible, or contradictory and repugnant, in speaking of the "aforesaid 14th day of December" when no other day than the 9th of December is before mentioned, is not a fatal defect under sec. 11, p. 770, of Va. Code of 1849, which declares that no indictment or other accusations shall be quashed or deemed invalid for omitting to state or stating imperfectly the time, etc., or for the omission or insertion of words of mere form or surplusage. The word "aforesaid" before "the 14th of December" is mere surplusage. Lazier v. Com., 10 Gratt. 713.

Indictment.—An indictment cannot be quashed because it alleges the weapon in the alternative, as a "pistol or revolver," the expression "or revolver" was mere surplusage, and could be rejected, and therefore need not be proved. State v. Newsom, 13 W. Va. 859.

XIV. DUPLICITY.

A. THE GENERAL RULE FORBIDDING DUPLICITY.—Duplicity, or double pleading, consists in alleging for one single purpose or object, two or more distinct grounds of complaint, when one of them would be as effectual in law as both or all. A defendant cannot be charged in one and the same court with two or more independent offences, as such, subject to different penalties. Sprouse v. Com., 81 Va. 374.

This is a fault in all pleading, because it produces useless prolixity, and tends to confusion and to the multiplication of issues. Sprouse v. Com., 81 Va. 376.

Where opening (1) a barroom, and (2) selling intoxicating liquors therein, are charged in the same indictment, in the language of the statute, and as being done at the same time and place, they

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constitute together only one offence, and there can be but one punishment, and the indictment so charging is not bad for duplicity. Morganstern v. Com., 94 Va. 787, 26 S. E. Rep. 403.

An indictment which charges that defendant knowingly and willfully removed a fence from the lands of P. and did injure and expose the growing crop of P, then on said land, charges but one offence: and is valid. Ratcliffe v. Com., 5 Gratt. 657.

B. MULTIFARIOUSNESS.—"The rule is well settled that no matters, however multifarious, will operate to make an indictment double, provided, that all taken together constitute but one connected charge, or one transaction." LEWIS, P., in Early v. Com., 86 Va. 921, 11 S. E. Rep. 795; Sprouse v. Com., 81 Va. 374.

It is well supported by authority that where several articles of property are stolen at the same time and place, though the stolen goods belong to different persons, the stealing is regarded as one transaction, and, therefore, as one offence, which may be charged in a single count. Alexander v. Com., 90 Va. 810, 20 S. E. Rep. 782.

C. DISTINCT OFFENCES AS STAGES OF ONE CRIME.—Where several distinct acts are connected with the same general offence though they are subject to the same penalties and might be distinct crimes, if committed by different persons, or at different times, when they are committed by the same person, at the same time, they may be considered as representing stages of the same offence, and may be joined in the same count of an indictment as constituting a single violation of the law. Alexander v. Com., 90 Va. 809, 20 S. E. Rep. 782; Early v. Com., 86 Va. 922, 11 S. E. Rep. 795; Sprouse v. Com., 81 Va. 376.

D. GREATER INCLUDING LESSER OFFENCE.—When the offence charged includes or embraces another or smaller constituent offence, the charge of such other offence will not render an indictment double. Hardy v. Com., 17 Gratt. 592; Miller v. Com. (Va.), 21 S. E. Rep. 500. Thus where an indictment containing one count charged both an attempt to kill and murder and a felonious assault, the court held that the charge of felonious assault was an ingredient of the felony which the accused was indicted for attempting to commit, and was embraced in the substantive offence, so that there was in reality only one offence charged. Miller v. Com. (Va.), 21 S. E. Rep. 500.

E. CONJUNCTIVE AND DISJUNCTIVE AVERMENTS.

1. CONJUNCTIVE AVERMENTS.—Where a statute enumerates several acts in the alternative, the doing of any of which is subjected to the same punishment, all of such acts may be charged cumulatively as one offence. Morganstern v. Com., 94 Va. 787, 26 S. E. Rep. 402.

2. DISJUNCTIVE AVERMENTS.—It is not an error to use the word "or" instead of the word "and" in describing the various kinds of spirituous liquors and drinks charged to have been sold in the indictment. Morgan v. Com., 7 Gratt. 592; Cunningham v. State, 5 W. Va. 508.

XV. COUNTS.

A. GENERAL INCIDENTS.

1. COUNT—EACH COUNT A SEPARATE INDICTMENT.—Each count in an indictment is considered to all intents and purposes a separate indictment. Linkous v. Com., 9 Leigh 608; State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413; State v. Smith, 24 W. Va. 814; Dowdy v. Com., 9 Gratt. 727; Kirk v. Com., 9 Leigh 627.

Same—Venue in Second Count.—The *venue* of the second count of an indictment is laid by the words "in the said county." The caption of the indictment is "Virginia, Roanoke Co., to wit." It is objected that had the first count been quashed, the other count would have no caption, and no *venue* would have been laid. The court held that the caption of the indictment applies to the whole indictment and to each count in it. Wright v. Com., 82 Va. 185.

Same—Count Pursuing Language of Statute.—An indictment which charges a prisoner with the offences of falsely making, forging and counterfeiting; of causing and procuring to be falsely made, forged and counterfeited, and of willingly acting and assisting in the said false making, forging and counterfeiting, is a good indictment, though all these charges are contained in a single count: the words of the statute being pursued, and there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct. Rasnick v. Com., 2 Va. Cas. 356.

2. CONVICTION OF LESSER OFFENCE—EFFECT.—Where there is but one count in an indictment, upon which the accused may be convicted of one of several offences which are covered by the indictment, the verdict of the jury finding the accused guilty of one of the said offences is a verdict of acquittal of all the others of a higher grade: as on an indictment for murder, a verdict finding the accused guilty of manslaughter, is a verdict of acquittal as to the murder. *Quære:* If this rule applies where on an indictment for murder the jury find the prisoner guilty of murder in the second degree. While the practice had always been, in this state, to frame indictments for murder with a single count, it was otherwise until recently with respect to indictments for malicious assaults. Under the Code of 1819, the course uniformly pursued was to insert two counts—one for malicious and the other for an unlawful assault. At the revisal of 1849 a change was introduced, so that the commonwealth may now proceed upon a single count for malicious shooting, stabbing or cutting with intent to kill, and under it may convict the accused of the offence charged or unlawful doing such acts, or, indeed, of any other offence, felony or misdemeanor which is substantially charged in the indictment. Canada's Case, 22 Gratt. 905. It can hardly be supposed it was the design of the legislature, even if it were competent to do so, to deprive the accused of any important right which appertained to an indictment framed under the old law. If, upon an indictment containing two counts, the defendant, being convicted of the lesser offence, could not again be tried for the greater, he ought not to be deprived of that privilege, because, as a matter of convenience the commonwealth may now proceed upon a single count in an indictment. Therefore on an indictment for malicious stabbing with intent to kill, a verdict finding the accused guilty of unlawfully stabbing with intent to kill is an acquittal of malicious stabbing and on a new trial the accused can be tried for unlawful stabbing only. Stuart v. Com., 28 Gratt. 964; State v. Cross, 44 W. Va. 315, 29 S. E. Rep. 527. See also, Canada v. Com., 22 Gratt. 899.

Accused on Second Trial Cannot Be Tried for a Higher Offence.—When an accused is convicted of an offence and applies for and obtains a new trial, he thereby

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waives his former jeopardy and subjects himself to further trial. And where more than one offence is distinctly or substantially charged in one count of an indictment, and there has been a verdict thereon, which has been set aside, and a new trial awarded, on such trial the accused shall remain liable to be convicted of any offence charged in the indictment for which there is no severer penalty than for the offence of which he was convicted. Benton v. Com., 91 Va. 782, 21 S. E. Rep. 495.

3. COUNT DEFECTIVE FOR UNCERTAINTY.—An indictment contained two counts, the second of which was as follows: "And the jurors aforesaid, on their oaths aforesaid, do further present, that the said John C. Richards, Benjamin F. Fry, and Addison Buchanan Fauver, on a certain day, to wit: on the 18th day of October, in the year 1881, in the nighttime of that day, in the county aforesaid, a certain other building then and there of great value, to wit: of the value of $1,000, being the property of," etc. A motion to quash was addressed to the second count. The court held the second count defective for uncertainty, and said as follows: "There must be certainty in every indictment touching the thing wherein or of which the offence is committed. This certainty consists in the special description of the persons, places and things mentioned in the indictment, with their respective names, situation, extent, nature, quantity, number, value and ownership." The count was also held bad as charging no offence under sec. 5, ch. 3 (Acts 1877-8, p. 287; Amended Acts 1881-2, p. 401) of Criminal Code. Richards v. Com., 81 Va. 110.

4. CONCLUSION OF COUNTS.—In Virginia each count in an indictment must conclude "against the peace and dignity of the commonwealth;" and the count which omits it, is fatally defective. Thompson v. Com., 20 Gratt. 724; Carney's Case, 4 Gratt. 546; Early v. Com., 86 Va. 921, 11 S. E. Rep. 795. And in West Virginia each count must have the conclusion "against the peace and dignity of the estate" else it is fatally defective. Lemons' Case, 4 W. Va. 755; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654. And it was held in the latter case that advantage of this defect might be taken for the first time in the appellate court.

B. JOINDER OF COUNTS AND OFFENCES.

1. IN GENERAL.—In all cases where there are two or more counts in the indictment, whether there is actually one offence or several, each count is regarded as a separate indictment, and is supposed to represent a distinct offence. Linkous v. Com., 9 Leigh 608; State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413; State v. Smith, 24 W. Va. 814; Dowdy v. Com., 9 Gratt. 727; Kirk v. Com., 9 Leigh 627.

Counts Connected by Words of Reference.—"The general rule is, that each count in an indictment must be sufficient in itself to make a complete indictment, and averments in one count cannot aid defects in another. To some extent the pleader may avoid repetitions by referring from one count to another. But the reference must be so full and distinct, as in effect to corporate the matter going before with that in the count in which it is made." Per SNYDER, J., in State v. Bruce, 26 W. Va. 155.

2. GREATER INCLUDING LESSER OFFENCE—GENERAL RULE.—The charge of an offence of a lower grade may be embraced in the charge of a higher offence, when the higher involves the commission of the lower, and when the indictment contains all the substantial allegations necessary to let in evidence of the lower grade. Wright v. Com., 82 Va. 189; Stuart v. Com., 28 Gratt. 964; State v. Cross, 44 W. Va. 315, 29 S. E. Rep. 527.

Felonies and Misdemeanors.—The Code of 1860, ch. 208, sec. 27, p. 838, declared that "if the person indicted for felony by the jury be acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged, whether it be felony or misdemeanor." Hardy and Curry v. Com., 17 Gratt. 592; Canada's Case, 22 Gratt. 902; Stuart v. Com., 28 Gratt. 964.

3. JOINDER OF COUETS CHARGING ONE OFFENCE.—It is not error for an indictment to contain more than one count charging the commission of the same offence with such varied description of the person or property which is the subject of the offence, or of the title of the ownership of the property, or of the means, instruments, and agencies by which the offence was committed as will meet the various aspects in which the evidence may present itself upon the trial. State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413; State v. Smith, 24 W. Va. 814; Speers v. Com., 17 Gratt. 570; Dowdy v. Com., 9 Gratt. 731.

And where the charges are of the same general nature and the counts are manifestly inserted to meet different phases of the evidence, the indictment will not be quashed; neither will the prosecutor be required to elect on which count he will proceed to trial. State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413; State v. Smith, 24 W. Va. 814; State v. Halida, 28 W. Va. 502.

4. JOINDER OF COUNTS FOR DISTINCT OFFENCES AND ELECTION.

a. Joinder in General.—If an indictment contain different counts which are in fact for separate and distinct offences the prisoner can neither demur nor move in arrest of judgment. Mowbray v. Com., 11 Leigh 649. As the only mode of objection to them before plea is "by an application of the court to quash the indictment lest they might confound the prisoner in his defence, or prejudice him in his challenge of the jury" in such case, if the defect is discovered after the jury are sworn and before the verdict is found the court may require the prosecutor to make his election on which charge he will proceed. Dowdy v. Com., 9 Gratt. 731; Lazier v. Com., 10 Gratt. 712; State v. Smith, 24 W. Va. 814; State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413; Mowbray v. Com., 11 Leigh 649. But the court will only listen to such request when they see that the charges are actually distinct, and may confound the prisoner, or distract the attention of the jury. Mowbray v. Com., 11 Leigh 649. If a prosecutor in any case be put to his election he should be required to make such election before the prisoner opens to the jury his defence. State v. Smith, 24 W. Va. 814.

b. Offences of Same Kind.—Where offences of the same character, differing only in degree, are united in the same indictment, the prisoner may and ought to be tried on both charges at the same time. Dowdy v. Com., 9 Gratt. 732; Mowbray v. Com., 11 Leigh 650.

c. Joinder of Felonies.—In cases of felony, where two or more distinct and separate offences are contained in the same indictment, the court, in its discretion, may quash the indictment or compel the prosecutor to elect upon which he will proceed; but in point of law, it is no objection that two or more offences of the same nature and upon which the same or similar judgment may be given, are contained in different counts of the same indict-

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ment. Dowdy v. Com., 9 Gratt. 731. JUDGE HARRISON, in Mitchell v. Com., 93 Va. 775, 20 S. E. Rep. 892, said, in speaking of the joinder of felonies in different counts of an indictment, that, "if the court sees that the charges are so distinct that to try them together would confound the prisoner, or distract the attention of the jury, it will require the commonwealth's attorney to elect which count he will try first." There are some cases of felony in which, even though the charges are distinct the prisoner will not be confounded or the attention of the jury distracted; and in which, therefore, the charge may probably be included in the same indictment and tried together: as, for example, the case of forging and uttering the same indictment, which are distinct offences and yet are often charged in the different counts of the same indictment. Com. v. Ervin, 2 Va. Cas. 337; Huffman's Case, 6 Rand. 685; Page's Case, 9 Leigh 683; Mowbray's Case, 11 Leigh 643; Dowdy v. Com., 9 Gratt. 731.

d. Joinder of Misdemeanor.—In point of law it is no objection that several misdemeanors of the same nature, and upon which the same, and a similar judgment may be given, are contained in different counts of the same indictment. This has been long the general and well-settled rule of the common law, and cannot now be disturbed. 1 Chitty Cr. Law 249; Dowdy v. Com., 9 Gratt. 727; Scott's Case, 14 Gratt. 687; 1 Bishop's Cr. Pro. sec. 452; Mitchell v. Com., 93 Va. 776, 20 S. E. Rep. 892. In the case, however, of mere misdemeanors, which are only punished by fine and imprisonment, the prosecutor is permitted to join and try several distinct offences in the same indictment, and without being required to elect on which charge he will proceed. 1 Chitty Cr. Law 249; Dowdy v. Com., 9 Gratt. 727; Mitchell v. Com., 93 Va. 775, 20 S. E. Rep. 892.

e. Joinder of Felonies and Misdemeanors.—The general rule of the common-law practice is to allow several felonies or several misdemeanors to be charged in several counts in one indictment, but not to allow the joinder of a felony with a misdemeanor and it appears that this rule is still in force in Virginia, although in several other states the common-law doctrine has been extended so as to admit of the joinder of felonies and misdemeanors, where the misdemeanor is a constituent of the felony. Scott v. Com., 14 Gratt. 687; Hardy v. Com., 17 Gratt. 594.

f. Motion to Elect—Discretion of Court.—In cases of felony where two or more separate and distinct offences are charged in the same indictment, the court in its discretion may quash the indictment, or compel the prosecutor to elect upon which charge he will proceed. State v. Smith, 24 W. Va. 819.

An indictment contained several counts, one for larceny, others for receiving stolen goods, knowing them to have been stolen; and others for aiding another person to conceal stolen goods knowing them to have been stolen. The charges in all the counts, however, relate to the same goods, which in different counts are laid to be goods of different persons, or of a person unknown. On the trial of the case under this indictment, before the jury was sworn and before they were charged, the prisoner moved the court to compel the attorney for the commonwealth to elect under which count or counts of the indictment he would prosecute the prisoner; but the court overruled the motion, and permitted the said attorney to prosecute under the whole indictment. To this ruling the prisoner excepted. The appellate court held that while, in case of felony, where two or more distinct offences are contained in the same indictment, the court, in its discretion, may quash the indictment or compel the prosecutor to elect upon which charge he will proceed, it knew of no case in which the several counts of the indictment were all for the same offence, and were in themselves good counts, where the indictment or any of the counts had been quashed, or the prosecutor compelled to elect on which of them he would proceed. Dowdy v. Com., 9 Gratt. 731, 733, 60 Am. Dec. 314.

"But I have been unable to find in Virginia or in this state any case in which more than one criminal transaction was embraced in a single indictment for felony, although in many cases where the offences are of the same character, differing only in degree, the indictments have contained two or more counts, in which the same transaction in the form of distinct and separate felonies, are represented. But as in every such case the separate counts are regarded as separate indictments for distinct offences, it will in most cases be impossible for the court from an inspection of an indictment to determine, whether the various counts represent the same transaction under different forms, or whether they in fact represent wholly different and distinct offences. If all, or any of such counts are perfect upon their face, a demurrer to or motion to quash the indictment for the supposed misjoinder of counts must be overruled, although some of these counts may in fact represent separate and distinct offences, for the reason that this fact can only be made to appear from the evidence introduced on the trial. 'If, however, it appear before the defendant has pleaded, or the jury are sworn, that he is to be tried for separate offences, it has been the disposition of the judges to quash the indictment lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury, for he might object to a juryman trying one of the offences, though he might have no reason to do so in the other.' Young v. The King, 3 T. R. 106, and Dowdy v. Com., 9 Gratt. 729. And if the judge who tries the cause does not discover the defect in time to quash the indictment, he may put the prosecutor to make his election on which charge he will proceed, but if the case has gone to the length of a verdict, it is no objection in arrest of judgment." Per WOODS, J., in State v. Smith, 24 W. Va. 818.

Distinct Felonies.—While the foregoing rules apply to offences generally, it will be seen upon an inspection of the cases cited that many of the transactions involved felonies; and distinct questions have been raised upon the joinder of separate felonies in the same indictment; and while it has been held that the court in the exercise of its discretion may compel an election when separate felonies are charged in the same indictment and such a course is necessary to prevent prejudice or embarrassment to defendant in his defence. State v. Smith, 24 W. Va. 814; Dowdy v. Com., 9 Gratt. 727.

Different Misdemeanors.—When different misdemeanors of the same nature are joined in separate counts of an indictment, the defendant has no right to compel an election as a general rule. Mitchell v. Com., 93 Va. 775, 20 S. E. Rep. 892.

Misjoinder of Counts and Offences—How Taken Advantage of.—"It is no objection either upon demurrer or in arrest of judgment that separate offences of the same nature are joined against the same defendant, and the only mode of objection to a joinder of such offences in cases of felony, is a motion to quash

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or to compel the prosecutor to elect on which charge he will proceed, which motion the court should grant if the charges grew out of different transactions, or are not only distinct but may confound the prisoner, or distract the attention of the jury. But if the charges are merely distinct, without such prejudice, or relate to the same transaction, and describe it in different and even inconsistent ways, so as to meet the evidence as it may transpire, the motion should be denied. And in misdemeanor cases, even greater freedom is allowed, for the court will not quash or compel election even though several separate and distinct misdemeanors, arising out of different transactions, be joined against a single defendant; yet, if against several defendants, the court should quash the indictment. Dowdy v. Com., 9 Gratt. 727, 730-33. See Mowbray v. Com., 11 Leigh 643, 649." Hurst's Criminal Digest, 351-2.

C. CONVICTION UNDER ONE COUNT—EFFECT. --"It is well-settled law in this state," said STAPLES, J., in Stuart v. Com., 28 Gratt. 953, "that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice, and the court should enter a judgment accordingly. Lithgow v. Com., 2 Va. Cas. 297; Page v. Com., 9 Leigh 683; Canada's Case, 22 Gratt. 899; Page's Case, 26 Gratt. 943"; Commonwealth v. Bennet, 2 Va. Cas. 235; Kirk v. Com., 9 Leigh 627; Hawley v. Com., 75 Va. 847; Gibson v. Com., 2 Va. Cas. 111.

Accused Cannot Be Tried a Second Time on the Counts on Which He Was Acquitted.—Where there are several counts in an indictment and the jury finds the accused guilty upon one of the counts and acquits him on the others, if the accused applies for and obtains a new trial he does not thereby waive the advantage of the acquittal thus obtained. But he must be tried, and can only be tried again on the count on which he was convicted, and not on the count of which he had been before acquitted. The reason is, that the accused having been rightfully acquitted of one or more of several offences which have been joined in the said indictment, he cannot again be brought into jeopardy for these alleged offences, because having been wrongfully convicted on another, he seeks and obtains redress against the wrong done him. Stuart v. Com., 28 Gratt. 954; State v. Cross, 44 W. Va. 315, 29 S. E. Rep. 527; Lithgow v. Com., 2 Va. Cas. 298.

Where a prisoner was indicted for malicious assault and acquitted, found guilty and convicted of unlawful assault he cannot object to being tried under another indictment for the same offence of which he was convicted. For having moved for a new trial he is conclusively presumed to waive any objection to being put the second time in jeopardy for that offence. In such a case the accused may be tried on either the old or a new indictment but cannot be tried on both. The better practice is to withdraw the first and proceed to trial on the second. Stuart v. Com., 28 Gratt. 966.

Conviction under Bad Count in an Indictment.—An indictment contained two counts. The prisoner was tried thereon and a general verdict of guilty found against him. The punishment fixed by the verdict was not such as could be ascertained under the first count. The second count was defective. The court decided that the finding of the jury was under the second count, and was an acquittal upon the first count and as the second count was defective the verdict should be set aside and a new trial awarded. Richards v. Com., 81 Va. 115.

Defect of Some of Counts—Effect.—The defect of some of the counts in an indictment does not affect the validity of the rest, and if any count is good, judgment may be given against the accused. Kirk v. Com., 9 Leigh 627.

General Verdict—Bad Counts.—The rule of practice in criminal cases, that if an indictment contain several counts, some good and others faulty, and a general verdict of guilty be found, the bad counts will not affect the validity of the good, and judgment will be given on those which are good, is not applicable to cases of penitentiary crimes in Virginia, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict. Mowbray v. Com., 11 Leigh 643; Clere v Com., 3 Gratt. 615. A statute was passed on this subject in Virginia, March 14, 1848. The 43rd section of ch. 21, of which with some slight change in phraseology, was carried into the Code of 1849 and formed the 34th section of ch. 209, p. 778. One of the manifest designs of this statute was to furnish a prisoner arraigned on an indictment containing various counts, some of which were faulty, a means of protecting himself against any prejudice or injury that might arise from such faulty counts, to wit, by a motion, on his trial, to the court, to instruct the jury to disregard them; and that if the court should refuse, to the prejudice of the prisoner, to give such instruction, it would be an error which he would have a right to have redressed by appeal. Rand v. Com., 9 Gratt. 738.

A prisoner being arraigned on an indictment containing three counts, moved and obtained the quashal of the second. Having obtained a change of venue, he was put on trial on the whole indictment and pleaded not guilty thereto, without taking any notice of the quashing of the second count by the court in which he was first arraigned.

A general verdict of guilty was found against him and judgment rendered thereon. *Held*, that even if it be conceded that the prisoner did not in effect waive the benefit of the order quashing the second count, and that it was an error to arraign and try him on the whole indictment after that count had been quashed, still it was not an error to his prejudice, and therefore not a good ground for a reversal of the judgment. Shiffiet v. Com., 14 Gratt. 652.

XVI. NOLLE PROSEQUI.

A. BY WHOM ENTERED.—The commonwealth's attorney has not a right to enter a *nolle prosequi*, in any case without the consent of the court first had. Hurst's Crim. Dig. 613.

It was decided in a case marked "Anonymous" reported in 1 Va. Cas. 139, that the attorney for the district court of Fredericksburg has not a right to enter a *nolle prosequi* in any case without the consent of the court first had. See also, Randall v. Com., 24 Gratt. 644.

The dismissal of a presentment by the court, at the instance of the attorney for the commonwealth, is not an acquittal. It is an informal *nolle prosequi*. There are only three ways by which even a felon can be acquitted. They are: the judgment of the examining court, the verdict of the jury, or the failure to indict after three terms of the superior court have passed. Wortham v. Com., 5 Rand. 669.

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May Be Entered after Reversal upon Appeal.—A *nolle prosequi* may be entered after verdict and judgment against the prisoner has been reversed, upon an appeal taken; and a new indictment may then be found against him. In this case the indictment charged the ownership of the property, which was stolen, to be in a married woman, which charge was held insufficient. Hughes v. Com., 17 Gratt. 565.

B. EFFECT.—An indictment for felony did not charge the offence to have been done "feloniously." It was held by the court that the prisoner could not be convicted of felony on the indictment; but in order to his being tried for the felony, a *nolle prosequi* may be entered by attorney for the commonwealth with the consent that the court on the said indictment and a new and proper indictment may be exhibited and found against the accused for the felony; on which new and proper indictment he may be tried, notwithstanding the proceedings had upon the old and defective indictment. 2 Rob. Pr. (old ed.) 127.; 2 Va. Cas. 70-111; Randall v. Com., 24 Gratt. 644.

On a trial of a prisoner on an indictment upon a plea of not guilty, the evidence for the commonwealth disclosed that the denomination of certain notes were in fact known to the grand jurors, while the indictment charged that they were "to the jurors unknown." *Held*, it would certainly at this stage of the proceedings, have been competent for the attorney of the commonwealth to have entered a *nolle prosequi*, under this indictment, and preferred another indictment, by the same or other grand jury, against the prisoner leaving out the words "the denomination of which said notes are to the jurors unknown"; and certainly to the second indictment it could not be pleaded in bar that the prisoner had once before been tried for the same offence, or, in other words, was put twice in jeopardy. Robinson v. Com., 32 Gratt. 870.

To an indictment against him for stealing, the prisoner pleaded *autre fois acquit*. The court held that a *nolle prosequi* entered by the attorney for the commonwealth, and a consequent discharge from custody, is not an acquittal, or discharge from further prosecution, and therefore does not support the plea of *autre fois acquit*. Lindsay v. Com., 2 Va. Cas. 345.

XVII. OBJECTIONS.

A. HOW MADE GENERALLY.—Where an indictment is so defective that any judgment thereon rendered against the defendant would be erroneous, he may take advantage of such defect by motion to quash the indictment, or by demurrer thereto, or by motion in arrest of judgment. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 646.

Errors Cured by Statute of Jeofails.—In an indictment for malicious and voluntary shooting, the term *willfully* being used for *voluntarily*, is cured by the statute of jeofails. A conclusion against the acts of the general assembly, when there is but one act, is also cured. The omission to state that the grand jury was impanelled in the superior court of the county (the county itself being mentioned), if an error, is also cured. Trimble v. Com., 2 Va. Cas. 143.

Omission of Contra Formam Statuti Cured by Statute of Jeofails.—Indictments for horse stealing need not conclude *contra formam statuti*, and even if it were proper that they should, the omission is cured by the Virginia statute of jeofails. Chiles v. Com., 2 Va. Cas. 260.

Defective Indictment Cured by Statute of Jeofails.—An indictment for grand larceny, charged the goods to have been stolen on the "21st of December, one thousand eight hundred and *twenty-thee*," leaving out the "r" in the last word. *Held*, this is cured by the statute of jeofails. Aldridge v. Com., 2 Va. Cas. 447.

B. MOTION TO QUASH.

1. GENERAL RULES—AS AN EXERCISE OF DISCRETION.—The motion to quash is not a proceeding as of right, but the power is vested in the discretion of the court to refuse to quash and to compel the defendant to resort to his other remedies by demurrer or by motion in arrest of judgment. Richards v. Com., 81 Va. 115; Bell v. Com., 8 Gratt. 603; Commonwealth v. Lodge, 6 Gratt. 699; Commonwealth v. Foggy, 6 Leigh 638; Litton's Case, 6 Gratt. 691; Minor's Syn. Cr. Law 266; Commonwealth v. McCaul, 1 Va. Cas. 272.

2. FOR WHAT DEFECT A COURT WILL QUASH.—In prosecution for felonies and other serious offences, the court will not, on the motion of the prisoner, quash the indictment, unless where the court has no jurisdiction; where no indictable offence is charged; or where there is some other substantial and material defect. In other cases he will be left to his demurrer, motion in arrest of judgment, or writ of error. Bell v. Com. (1851), 8 Gratt. 600; Com. v. Litton (1849), 6 Gratt. 691; Huff v. Com. (1858), 14 Gratt. 648, 651.

And in State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 649, it is said that the court will not quash an indictment except in a very clear case, but in doubtful cases will leave the party to his demurrer or motion in arrest of judgment.

After an indictment for a felony, the indictment will not be quashed, because the clerk of the examining court has not inserted the justice's warrant of commitment of the prisoner in the record. Kemp v. Com., 18 Gratt. 969.

3. SPECIAL INSTANCES OF QUASHING.—A person examined in a county court on a charge of *forging* an order, and committed by that court for trial in circuit superior court for the *forgery* only, cannot be tried there for *uttering* and *publishing* the order. Therefore, if the indictment against the prisoner contains counts for the forgery, and counts for uttering and publishing, the circuit superior court ought to quash these latter counts. Mowbray v. Com., 11 Leigh 643.

Quære, if a person who has been regularly summoned to show cause why an information shall not be filed upon a presentment found against him by the grand jury, and fails to appear, can, after the information has been filed, move the court to quash the presentment. Com. v. Scott, 5 Gratt. 697.

After an indictment for a felony, the indictment will not be quashed, because the clerk of the examining court has not inserted the justice's warrant of commitment of the prisoner in the record. Kemp v. Com., 18 Gratt. 969.

An indictment cannot be quashed on the ground that improper evidence was given before the grand jury. Wadley v. Com., 98 Va. 803, 35 S. E. Rep. 452.

4. SCOPE OF MOTION.—A motion to quash for defects on its face, where the motion is general, will be overruled, if the indictment contains one good count. State v. Cartright, 20 W. Va. 32.

5. ORDER OF MOTION—WHEN RECEIVED.—A motion to quash, not being one of right but of privilege granted by the court to the defendant, will not be received when presented at an unreasonable time.

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If delayed until after plea of not guilty, its reception or rejection is within the trial court's discretion. Richards v. Com., 81 Va. 115.

The proper course is to move to quash before pleading, but the court may, at any time before the trial, permit the plea to be withdrawn, and enter the motion to quash at the instance of the defendant State v. Riffe, 10 W. Va. 794.

After a prisoner has been tried by an examining court and remanded for further trial before the circuit court, and an indictment has been found against him, it is too late to move to quash the indictment, because there were irregularities in his examination before the committing magistrate. Clore's Case, 8 Gratt. 606.

6. EFFECT OF QUASHAL.—A prisoner was indicted and remanded in a county court for murder in November, 1893. He demanded to be tried in the circuit court, whereupon he was remanded for trial in that court. At the next term of the circuit court, the cause was continued upon the motion of the commonwealth. At the following term of the circuit court, the court dismissed the said indictment of its own motion, in the absence of the prisoner, and over his objection upon the ground that it had no jurisdiction to try the case, but without prejudice of the right of the commonwealth to arrest, indict, and try the accused for the offence with which he was charged. After said judgment was entered, and before the accused was actually released from custody, another warrant was issued against him for the same offence, and upon it he was committed to jail to answer an indictment in the county court. At the June term of the said court, he was again indicted for the same offence. He then pleaded "not guilty" and his cause was continued. Whereupon he sued out a writ of *habeas corpus*, alleging that the order of the said circuit court operated as an acquittal of the accused of the offence for which he was in custody. The court held as follows: "The circuit court dismissed the indictment without a trial of the accused, and without prejudice to the commonwealth's right to arrest, indict, and try him for the offence with which he was charged. If the court had jurisdiction of the case, the order of dismissal would have the effect of ending the proceedings commenced in November, 1893, in the same manner as if the indictment had been quashed, or a *nolle prosequi* entered. The accused would be discharged from liability on that indictment, but not acquitted of the offence charged in the indictment. Inasmuch as there is no limitation to prosecutions for murder, a new proceeding upon the part of the commonwealth could be instituted for the same offence at any subsequent time, either by the presentment of a grand jury, or by a complaint before a justice." Dulin v. Lillard, 91 Va. 718, 20 S. E. Rep. 821.

Motion Overruled.—It is not an error to overrule a motion to quash an indictment because the record does not set forth the appointment and oath of the foreman; nor to reject a plea that the names of the witnesses or grand jurors upon whose information the indictment was found are not written at the foot of the indictment as required by law. These errors are cured by sec. 4011 of the Code which provides that, "No exceptions shall be allowed for any defect or want of form in any presentment, indictment, or information mentioned in either of the two preceding sections (sec. 4009, petty offences limited to a fine not exceeding $20; sec. 4010, Gaming Act), but the court shall give judgment thereon according to the very right of the case. Lawrence v. Com., 86 Va. 573, 10 S. E. Rep. 840.

C. DEMURRER.

1. NATURE.—The demurrer admits the facts demurred to, and refers their legal sufficiency to the court. It puts in issue the legality of the whole proceedings, and compels the court to examine the validity of the whole record. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 649.

2. FOR WHAT DEFECTS PROPER.—But a party indicted may also demur to the indictment against him wherever it is defective in form or substance, and upon such demurrer he may take advantage of any error to the same extent as he might by motion in arrest of judgment; and because of the efficiency of the latter remedy the demurrer at common law was seldom resorted to; but since many of the errors which were formerly sufficient to arrest the judgment are no longer available for that purpose, the demurrer in this state is a more efficient remedy than a motion to quash the indictment, or a motion in arrest of judgment. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 649.

Where one count in an indictment fails to state that the offence charged occurred in the county wherein the indictment was found, a demurrer to the indictment and each count thereof should be sustained. Jones v. Com., 86 Va. 951, 12 S. E. Rep. 950.

Rendered More Effectual in West Virginia by Statute.—At common law a demurrer to the indictment was seldom resorted to, for the reason that any objection which would have been fatal on demurrer (with few exceptions) was equally fatal on motion in arrest of judgment. Whart. Crim. Pl. § 759; Archb. Crim. Pl. 115. But the remedy by motion in arrest of judgment is now rendered much less effectual by statutes in many of the states which now require certain objections formerly available on motion in arrest of judgment, to be made before verdict found. By § 11, ch. 158, Code of 1887, it is declared that, "judgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offence be charged therein with sufficient certainty for judgment to be given thereon according to the very right of the case." While the motion in arrest of judgment has by this statutory provision been rendered less effectual than it was at common law, the remedy by demurrer to the indictment remains unimpaired, and may be resorted to in all cases where the defendant would be entitled to move in arrest of judgment. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 648.

3. SCOPE.—Where an indictment contains more than one count, and the demurrer is general, and one count is found good, the demurrer must be overruled. State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654; State v. Cartright, 20 W. Va. 32; Hendricks v. Commonwealth, 75 Va. 934.

4. EFFECT.—Upon a general demurrer to an indictment all defects both as to form and substance, are put in issue. Com. v. Jackson, 2 Va. Cas. 501; Thomas v. Com., 2 Rob. 795.

Effect of Overruling.—Upon a demurrer to an indictment for unlawful gaming being overruled, the defendant cannot have leave to plead not guilty without offering to withdraw his demurrer; the court may, in its discretion, give him leave to withdraw his demurrer, and to plead; but if he does not withdraw his demurrer and obtain leave to plead, judgment should be given for the fine and

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costs, not that the defendant shall answer over. Com. v. Foggy, 6 Leigh 638.

Pleading Over No Waiver of Errors.—Pleading over to an indictment after demurrer overruled does not waive error in the action of the court in overruling a demurrer. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 649.

Three Ways of Acquittal.—There are only three ways by which a felon can be acquitted. They are: the judgment of examining court, the verdict of the jury, or the failure to indict after the three terms of the court have passed. Wortham v. Com., 5 Rand. 669. Therefore where the court had no jurisdiction to try an indictment for felony and discharge the prisoner therefor, he may be again indicted and tried for the same offence. Marshall v. Com., 20 Gratt. 845.

And where a verdict is rendered in favor of the prisoner because of a variance between the allegations and the proof under § 16, ch. 199 of the Va. Code of 1860, such verdict is no bar to a new indictment. Robinson v. Com., 32 Gratt. 866.

FOR SPECIFIC OFFENCES.

XVIII. ARBITRATORS.

The grand jury of Wyoming county, found the following indictment against Boyd E. Lusk: "The jurors of the state of West Virginia in and for the body of the county of Wyoming, and now attending the said court, upon their oath present that on the 28th day of January, in the year 1876, a certain cause in which Boyd E. Lusk was plaintiff and Drury Halsey was defendant, was pending and undetermined in the county court of said county, and that at the January term of said court, on the 28th day of January, 1876, by agreement of parties, the matters in controversy in said cause were submitted to the arbitration and award of Martin G. Clay, Henry Ellis and Smith Trent, selected and chosen by the parties, and duly qualified according to law to act as such arbitrators: and that on the 29th day of January, 1876, while the said matters of controversy in said cause were before the said arbitrators, the said Boyd E. Lusk, in the said county, with the intent to bias the opinion and influence the decision of the said Martin G. Clay, one of the said arbitrators to whom was submitted the matters in controversy in said cause, pending as aforesaid, did then and there unlawfully, willfully and corruptly, promise to give, and offer to pay, to him, the said Martin G. Clay, as such arbitrator as aforesaid, a certain sum of money, to wit, the sum of five dollars, as a pecuniary reward to influence and induce him, the said Martin G. Clay, as such arbitrator as aforesaid, to prostitute and betray the duties devolving on him as such arbitrator as aforesaid, by giving his opinion and deciding the said matters in controversy in said cause then pending before said arbitrators as aforesaid, in favor of the said Boyd E. Lusk, against the peace and dignity of the state. Upon the evidence of Martin G. Clay, sworn in open court to give testimony before the grand jury."

To this indictment various objections were made by counsel for defendant, but without avail, for the court held that, although there was, doubtless, in the description of the offence as well as on the balance of the indictment, a good deal of surplusage yet it and the balance of the indictment seem to have in them a sufficiently clear and explicit allegation of every material fact necessary to constitute the offence charged in sec. 7, ch. 147, p. 688 of W. Va. Code, in force in 1880, on which the indictment was based. State v. Lusk, 16 W. Va. 767.

XIX. ARSON.

Form.—An indictment for arson, according to the form at common law, is sufficient in a case of arson, in the daytime. Curran's Case, 7 Gratt. 619.

Necessary Allegations.—In an indictment for arson under 1 Rev. Code, ch. 160, sec. 4, p. 587, relating to arson, it is not sufficient to use the words "set fire to" the house; but the word "burn" must be used: that being the word employed in that section of the statute defining the offence. Howel v. Com., 5 Gratt. 664. See generally, Earhart v. Com., 9 Leigh 671.

Moreover, an indictment for arson must charge the burning in the night in order to convict of the offence of burning in the nighttime. Curran's Case, 7 Gratt. 619.

Dwelling House—Meaning.—"A dwelling house," in the meaning of § 1, ch. 188, Code of 1873, embraces all its parcels including such an outhouse as is parcel thereof. The burning of such an outhouse is the burning of a dwelling house, in the meaning of this law and may be so described in the indictment; and the proof of the burning of the outhouse, will as much sustain the indictment, as would proof of the burning of the principal part of the dwelling house, or the whole of it including all the parcels. Page v. Com., 26 Gratt. 943.

Description of Building or Other Thing Burned.—The Criminal Code in force in 1885, ch. 3, § 5 (Acts 1877-78, p. 287; Amended Acts 1881-82 p. 401), provided punishment for burning "any building, the burning whereof is not punishable under any other section" of said chapter. An indictment under this section must describe the building with such particularity as will inform accused what building is meant. Richards v. Com., 81 Va. 110.

But in an indictment at common law, it is not necessary to state that the house burned was a dwelling house: for the word "house" imports it: and, if under trial, it appears, that it was not a house upon which arson could be committed, it is the duty of the judges to direct the jury to acquit the prisoner. "Common gaol and county prison in the county of A. B." is also sufficient description. Commonwealth v. Posey, 4 Call 109.

So an indictment for the burning of "a certain store house, not adjoining or occupied with the dwelling house of one S.," sufficiently describes the store house as the property of S. Butler v. Com., 81 Va. 159; Speers' Case, 17 Gratt. 570.

And in Wolf v. Com., 30 Gratt. 833, an indictment charged that the accused "did feloniously and maliciously burn a certain barn and the property therein, said barn and the property therein being the property of one H. H. Dulaney, and situated in the county aforesaid, and which said barn and the property therein was then and there of the value of $1,500." The indictment was held sufficient under Va. Code 1873, ch. 188, § 6.

Charging Offence—Sufficiency.—And a count in an indictment, which charges that the prisoner at night did burn "a certain other house called a barn or stable of one R., there situate, the same being an outhouse not adjoining the dwelling house, nor under the same roof, but some persons usually lodging therein at night, to wit," etc., does not set out an offence for which the punishment is death. Page v. Com., 26 Gratt. 943.

Indictment—Attempt to Commit Arson.—But in the

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case of Uhl v. Com., 6 Gratt. 706, on an indictment for an attempt to burn a barn, it was held that the indictment charging that the defendants, "did, about twelve o'clock of the night of the said day, attempt to set fire to the said barn by then and there carrying live coals of fire in a certain tin cup, then and there held by them, and then and there putting and placing the said live coals of fire, which they, then and there had in their possession, in manner aforesaid, to, at, and against the straw, chaff, and other combustible matter in, about and against said barn, with a wicked intention, by means thereof, unlawfully, willfully and maliciously to burn and consume said barn," was a good indictment under § 3888 of Va. Code 1887.

Surplusage.—In Stevens v. Com., 4 Leigh 683, an indictment for arson described the house burned as "the county jail and prison of the county H. being the house of L. J., the sheriff and jailer of the said county." The court held that the burning of such jail was a felony by the statute 1 Rev. Code, ch. 160, § 4. But whether the jail could be properly alleged to be the house of the sheriff and jailer or not, that part of the description was unnecessary and could be rejected as surplusage.

XX. ASSAULT AND BATTERY.

A. PRESENTMENT.—Upon a presentment of a grand jury for an assault and battery charging the offence with certainty, it is not irregular to summon the defendant to answer the presentment, and to try the case upon the presentment, without filing any information. Com. v. Towles, 5 Leigh 806.

B. INFORMATION.

Information Cannot Be Filed after More Than One Year from Commission of Assault.—Under the act of 25th January, 1805, sec. 2, to amend the penal laws of this commonwealth, an information for an assault cannot be filed after more than one year from the commission of the assault. Com. v. Chichester, 1 Va. Cas. 312.

C. INDICTMENT.

Finding Lesser Offence Than That Charged in the Indictment—Indictment for Robbery.—An indictment may be fatally defective as an indictment for robbery, yet good for an assault. And if such indictment attempts to charge the offence of robbery and is bad for that offence and charges an assault, it is good for the lesser offence, and a motion to quash such indictment is properly overruled. State v. Howes, 26 W. Va. 110.

So in Hardy v. Com., 17 Gratt. 592, an indictment for robbery charged that the prisoners "did make an assault" upon a certain described person, and one gold watch, etc., from the person and against the will of such persons described, etc., "feloniously and violently did steal," etc. The jury acquitted the prisoners of the felony charged but under the indictment found them guilty of "assault and battery." On motion in arrest of judgment, the court held that the finding was valid under Va. Code 1860, § 27.

Joint Indictment—Taxing Attorney's Fee.—And if in an indictment against four persons for an assault, they plead severally, and there is a verdict that they are guilty assessing several fines on each, an attorney's fee is not to be taxed against each, but only one attorney's fee against all the defendants. Com. v. Sprinkles, 4 Leigh 650.

Necessary Averments.—An indictment charging that the prisoner, "at the county and within the jurisdiction of the court, feloniously and maliciously did stab one P. T. with intention to maim, etc., and kill him," will not be quashed, upon objection that it does not allege any assault, striking or wounding, nor that P. T. was within the county or jurisdiction, nor that the intent was felonious or malicious. Com. v. Woodson, 9 Leigh 669.

Malicious Assault—Stating Weapon Unnecessary.—Moreover, in an indictment for malicious assault with intent to kill, it is unnecessary to state the weapon with which the assault was made. Jackson v. Com., 96 Va. 107, 30 S. E. Rep. 452.

Sufficiency.—And an indictment charging that the accused made an assault with a stone, and did feloniously, maliciously and unlawfully beat, wound, ill treat and cause bodily injury, etc., sufficiently conforms to Va. Code 1887, § 3071. Jones v. Com., 87 Va. 63, 12 S. E. Rep. 226.

So where, in an indictment under § 9, ch. 144, W. Va. Code 1891, the word "feloniously" is used in characterizing the assault in the first part of the indictment and is joined by the copulative, and the words, "then and there," to the subsequent clause which charges the shooting or giving the wound, it is sufficient; and it is not essential that the word "feloniously" shall be again repeated before the allegation of the shooting or wounding in order to make it a good indictment for a felony. State v. Yates, 21 W. Va. 761.

Surplusage.—And mere surplusage in an indictment for assault and battery will not vitiate it, and therefore where an indictment alleges facts, which constitute a misdemeanor, it will be good for that offence, although it states other facts, which go to constitute a felony but falls short of stating sufficient facts to constitute that crime. State v. Howes, 26 W. Va. 110.

Variance.—But an indictment charging an assault, is abatable by reason of no addition being made to the name of the defendant, of his estate, degree, or mystery. Sims' Case, 2 Va. Cas. 374.

Inadmissible Evidence under Indictment.—If on the trial of an indictment for an assault, defendant offers evidence, in mitigation of fine, that the prosecutor was on bad terms with him, and had on days previous to the assault, used provoking and abusive language of and to him, such evidence is inadmissible. Rawlings v. Com., 1 Leigh 581.

Moreover, on an indictment for assault and battery on the voluntary information of the person assaulted, the informer and prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted. Gilliam v. Com., 4 Leigh 668.

False Prosecution Presents No Bar to Indictment.—And, it should be observed that if a person charged with an assault and battery be recognized to appear at the next superior court, to answer an indictment to be then and there preferred against him for the said offence, in the meantime fraudulently procure himself to be indicted for the same offence in the county court, and confess his guilt, and a small amercement be thereupon assessed on him, such fraudulent prosecution and conviction, present no bar to the indictment preferred against him in the superior court. Com. v. Jackson, 2 Va. Cas. 501.

XXI. ATTEMPTS.

Elements.—An attempt to commit a crime consists of (1) the intent; (2) a direct ineffectual act towards its commission; and that act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. Hicks v. Com., 86 Va. 223, 9 S. E. Rep. 1024. See gen-

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erally, Uhl v. Com., 6 Gratt. 706; Commonwealth v. Nutter, 8 Gratt. 699.

And an indictment for an attempt to commit an offence, ought to allege some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment. Commonwealth v. Clark, 6 Gratt. 675.

Under an Indictment for a Felony Accused May Be Found Guilty of Attempt to Commit Such Felony.—It is not error for a court to instruct a jury on an indictment for maliciously or unlawfully shooting a person with intent to disfigure, disable and kill, that under section 22, ch. 159, W. Va. Code of 1851, they can acquit of the felony and find him guilty of the attempt to commit such felony. State v. Meadows, 18 W. Va. 658.

Attempt to Burn Barn—Averment.—Thus in Uhl v. Com., 6 Gratt. 706, George Uhl, Robert Hugh and Mary Hugh, his wife, and six other persons, were indicted in the circuit court of Wood county at its May term, 1849, for an attempt to burn the barn of George W. Henderson. The indictment contained four counts. The first count charged that G. U., etc., of the county of Wood being persons of wicked disposition and unlawfully and maliciously devising, contriving and intending to feloniously set fire to, and burn and consume a certain barn belonging to G. W. H., of said county, on the 20th day of August, 1848, at the county aforesaid, unlawfully, wilfully, and maliciously did, about 12 o'clock in the night of the said day, attempt to set fire to the said barn of the said G. W. H., by then and there carrying live coals of fire in a certain tin cup, then and there held by them, the said G. U., etc., and then and there putting and placing the said live coals of fire, which they, the said G. U., etc., then and there had in their possession, in manner aforesaid, to, at, and against the straw, chaff, and other combustible matter in, about and against said barn, with a wicked intention by means thereof, unlawfully, wilfully, and maliciously to burn and consume said barn of him, the said G. W. H., to the great damage, etc. The second and third counts were substantially the same with the first, except that they charged a felonious intent to set fire to the barn and to burn the same. The fourth count charged that G. U., etc., a certain other barn did, on, etc., unlawfully, wickedly and maliciously, attempt then and there, feloniously to set fire to, burn and consume, to the great terror and fear of all the citizens of the commonwealth and to the great damage, etc. The defendants appeared and moved the court to quash the indictment, and each count thereof, for errors apparent upon its face; but the court overruled the motion and held the indictment good. It is to be questioned in this case, whether the fourth count be good under the ruling in Clark's Case, 6 Gratt. 675, where it is held that in an indictment for an attempt to commit an offence, the indictment ought to allege some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment. And furthermore when an indictment does not charge a criminal offence, the court may, upon the motion of the defendant, quash it.

Attempt to Commit Rape—Words Necessary to Constitute Charge.—It seems, that in an indictment for an attempt to commit a rape, the word "ravish," as descriptive of the offence attempted is not necessary, but the words attempting "feloniously carnally to know," are sufficient. Christian v. Com., 23 Gratt. 954.

Alleging Color of Victim.—And in an indictment against a black man, for feloniously attempting to ravish a white woman, the indictment is bad, even after verdict, unless it aver that she is a white woman. Com. v. Mann, 2 Va. Cas. 210.

Attempt to Murder—Sufficiency of Charge Set Forth.—In Commonwealth v. Nutter, 8 Gratt. 699, the prisoner was indicted in the circuit court of Richie county, Virginia (now W. Va.), in 1852, for an attempt to commit a felony. The indictment contained five counts. The first charged that the prisoner on a certain day, in the county aforesaid with malice aforethought, in and upon one D. K., then and there being, feloniously, unlawfully and wilfully did make an assault and with a certain knife which he the said T. N. (the prisoner) in his hand then and there had and held, and had drawn and opened, feloniously, wilfully and unlawfully did attempt to stab, strike at and cut with said knife, with intent in so doing, wilfully and of his malice aforethought to kill and murder the said D. K., contrary to the form of the statute, etc. The second count charged an assault with the knife with intent feloniously, wilfully and unlawfully and of his malice aforethought to kill and murder the said D. K. The third count charged the assault with the club as in the first count; and the fourth count charged the assault with the club as in the second count. The fifth count charged that the said T. N. with malice aforethought in and upon D. K., then and there being, feloniously, wilfully and unlawfully did make an assault, and with a certain knife which he the said T. N. in his left hand then and there had and held, being drawn and opened, feloniously, wilfully and unlawfully did attempt to stab, strike at and cut with said knife, with intent then and there feloniously, and unlawfully to commit the crime of murder upon the body of the said D. K., had he not been prevented and arrested from so doing, contrary to the form of the statute, etc.

The defendant demurred to the whole indictment and each count thereof. The principal question for the consideration of the court at this stage was whether the first and fifth counts, or either of them, set forth such an attempt to murder as to make the attempt of murder set forth in either of them a felony. And again, if either of them did set forth such an attempt to murder as to make the attempt a felony, were the matters therein contained set forth in such legal and orderly manner as that the demurrer for the first and fourth counts ought to be overruled? The court held that the indictment was good, sufficiently setting forth an attempt to commit a felony.

Attempt to Maim and Kill.—And if A is indicted for shooting C with intent to maim, disfigure, disable and kill, and the proof is, that he shot at B and missed him and accidentally hit C he can be convicted on such indictment for shooting C with intent to maim, disfigure and kill him.

However, if A be indicted for an attempt to shoot C with intent to maim, disfigure, disable and kill him, and C is not in fact shot, and the proof is, that the attempt was to shoot B and not C, he cannot be convicted of an attempt to shoot C. State v. Meadows, 18 W. Va. 658.

XXII. BURGLARY AND HOUSEBREAKING.

A. IN GENERAL.

Joinder of Counts—Surplusage.—Two counts, one for "breaking and entering," and another for "entering without breaking," may be joined in the

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same indictment. State v. Flanagan (W. Va.), 35 S. E. Rep. 862.

And the use of the word "burglariously" in the second count should be regarded as surplusage. State v. Flanagan (W. Va.), 35 S. E. Rep. 862.

Variance in Counts—Demurrer Properly Overruled.—In State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654, a demurrer to an indictment containing two counts, the first one of which charged a burglary and larceny and the second larceny, was held properly overruled, if either count was correctly alleged.

Larceny Twice Charged.—And on an indictment charging in the first count both burglary and larceny, and in the second count larceny, a verdict of guilty on each count was pronounced, and sentence passed in conformity therewith. It was objected that the prisoner was twice sentenced for the same offence, that of larceny. *Held*, that the objection was not well taken. Speers v. Com., 17 Gratt. 573.

Several Burglaries—Relating to Same Offence.—So where an indictment contained two counts, one for burglary in the dwelling house of S and a second charging the same in the store house of S, both charging offences of the same general character, and so put in order to meet different phases of the evidence, the joinder was held good. State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413.

No Election Necessary.—And where two burglaries relating to the same offence are joined in the same indictment, the prosecutor need not elect on which to proceed. State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413.

Variance between Endorsement on Indictment, and Charge within—Effect.—On an indictment for breaking into a house in the daytime and stealing money therefrom, the grand jury endorsed upon it: "An indictment for larceny. A true bill." The prisoner was tried upon it, and there was a general verdict of guilty; whereupon, he moved the court in arrest of judgment, on the ground that the grand jury only found an indictment against him for larceny; whilst the indictment charged him with housebreaking and larceny. *Held*, no error. Hall's Case, 3 Gratt. 593.

Waiver of Jeopardy—Subsequent Trial under Whole Indictment.—In Benton v. Com., 91 Va. 782, 21 S. E. Rep. 495, there was a verdict for housebreaking with intent to commit larceny only, and, in effect, an acquittal of the charge of larceny; and, consequently, that the prisoner had been acquitted of both the felonies charged, and was not liable to be again put upon trial for either of the said offences, although at no time had a verdict of "not guilty" been rendered in his favor, but he had been convicted at separate times, and by different juries of each of said offences. The court held as follows: "In the revision of the civil and criminal laws made by the Code of 1887, the rule prescribed by the act of 1877-78, was modified, and this provision, 'if the verdict be set aside, and a new trial granted the accused, he shall not be tried for any higher offence than that of which he was convicted on the last trial,' was enacted in its stead." As a general rule, what is a "higher offence" within the meaning of section 4040 of the Code is to be determined by the maximum of the penalty affixed to the offence. Applying this rule to the case at bar, housebreaking in the nighttime with intent to commit larceny, and grand larceny are of equal degree, and a conviction of either, when set aside at the instance of the accused, is a waiver of his jeopardy as to both, and upon a new trial he may be put upon trial upon the whole indictment in which both are tried.

Conviction for Part of the Offence—Housebreaking.—And it is to be noted that under an indictment for burglary a conviction for housebreaking is proper. Taliaferro v. Com., 77 Va. 411. In this connection there was a count in an indictment for burglary which was defective for want of the word "burglariously," and the accused was found guilty and sentenced for housebreaking. The indictment contained a good count charging housebreaking. It was held, however, that a person found guilty by the verdict of a jury, under a bad count for burglary, cannot be sentenced for housebreaking, although the indictment contain a good count, charging the latter offence, for the jury having found their verdict on such bad count, the judgment should be arrested and the count quashed, for the reason that there is no punishment prescribed by the statute for the offence charged. State v. Meadows, 22 W. Va. 766; State v. Cottrell, 45 W. Va. 837, 32 S. E. Rep. 162.

Conviction of Grand and Petit Larceny.—And where an indictment charged, "that Joseph Reece on December 21, 1883, in said county, a certain store house not adjoining to or occupied with the dwelling house of one Robert Buster, there situate in the nighttime, did feloniously break and enter with intent the goods and chattels of the said Robert Buster, in the store house then and there being, feloniously to steal, take and carry away, and one overcoat," etc. (specifying various articles of goods and stating their aggregate value at $70), "of the goods and chattels of the said Robert Buster, in said store house then and there found, then and there feloniously did steal, take and carry away, against," etc., it was held that, the indictment failed to state the ownership of the store house so broken and entered, and was fatally defective so far as it attempted to charge an offence under §§ 12, 13, of ch. 145, of the W. Va. Code, in force in 1886, as amended by ch. 148, Acts of 1882. But treating that part of the indictment as surplusage, it was a good and sufficient indictment for grand larceny under the fourteenth section of said chapter. State v. Reece, 27 W. Va. 375.

And it was held in State v. Hupp, 31 W. Va. 355, 6 S. E. Rep. 919, that an allegation in an indictment that "the prisoner a certain outhouse and cellar not adjoining to nor occupied with the dwelling house of J. W. Hale, there situated, in the nighttime feloniously did break and enter," etc., did not allege the ownership of the outhouse and cellar to be in any one, and the indictment, as an indictment for "housebreaking," was fatally defective. But as the indictment alleged that the prisoner did break and enter the cellar "and one keg of wine of the value of $15, of the goods and chattels of J. W. Hale in the said house and cellar then and there being found, then and there feloniously did steal," etc., it was good as an indictment for petit larceny.

When Charge Sufficient to Constitute the Crime.—And an indictment which charged that, "Lewis Wright, on the first day of September, 1885, in the said county, in the nighttime of that day, feloniously and burglariously did break and enter into the dwelling house of one Andrew Johnson, situated in said county, with intent the goods and chattels of him, the said Andrew Johnson, in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take, and

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carry away, and certain tickets (commonly called 'labor tickets') of the value, to wit: six of the value of ninety cents each, one of the value of fifteen cents, one of the value of fifty cents, and one of the value of seventy-five cents—the whole of the value of six dollars and eighty-five cents of the goods and chattels of the said Andrew Johnson, in the said dwelling house, in the county aforesaid, then and there being found," etc., was held a good indictment for burglary. Wright v. Com., 82 Va. 183.

Concluding Clause.—In State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654, an indictment contained two counts, the first one of which charged burglary and larceny, and the second larceny. The first was defective in that it did not conclude "against the peace and dignity of the state." The verdict found the prisoner guilty of burglary. It was held that the second count could not support the finding, as it was not good for burglary, and, though otherwise good for burglary, the first count could not support it, because it was bad for want of a proper conclusion. Thus neither count was good for burglary and therefore the judgment was reversed.

Conviction of Both Offences.—If the burglary and larceny relate to the same transaction, there may be a conviction of both offences on a general verdict of guilty, and a sentence for both. Speers v. Com., 17 Gratt. 573; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654.

Burglary and Larceny on Same Count, Joinder Permissible.—And the joinder of burglary and larceny in the same count of an indictment is commonly employed, and is permissible. Speers v. Com., 17 Gratt. 570; Vaughan v. Com., 17 Gratt. 576; Clarke v. Com., 25 Gratt. 920; Wright v. Com., 82 Va. 183; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654; State v. Flanagan (W. Va.), 35 S. E. Rep. 862.

For Larceny.—Under such an indictment, however, a conviction for the larceny alone, with an acquittal of the burglary is permitted. Speers v. Com., 17 Gratt. 570; Clarke v. Com., 25 Gratt. 920.

Conviction for Both Offences.—But there cannot be a conviction for both offences, when joined in same count. State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 655; State v. Williams, 40 W. Va. 268, 21 S. E. Rep. 721. But if joined in separate counts it seems that there may be a conviction of both offences. State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 655; Speers' Case, 17 Gratt. 570.

General Verdict—Sentence for Burglary Only.—But on a general verdict of guilty, a sentence can be for the burglary or housebreaking only, and not for both burglary and larceny, where there is a joinder of the offences in separate counts. Speers v. Com., 17 Gratt. 574; Vaughan v. Com., 17 Gratt. 578; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654; State v. Williams, 40 W. Va. 268, 21 S. E. Rep. 721.

But in State v. Hupp, 31 W. Va. 355, 6 S. E. Rep. 919, the court held that, on an indictment for burglary and larceny in the same count, a sentence for petit larceny on a verdict of "guilty," as charged in the indictment, was proper. And in State v. Reece, 27 W. Va. 375, a sentence for grand larceny was held correct and sustained.

B. NECESSARY AVERMENTS.

1. IN GENERAL.

Defect Not Fatal.—Any defect of uncertainty or vagueness in the averment of larceny is not fatal, it being only in aid of the allegation of intent. Vaughan v. Com., 17 Gratt. 576; Wright v. Com., 82 Va. 183; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654.

No Conviction if Defectively Averred.—But if the larceny is defectively averred there can be no conviction therefor. Vaughan v. Com., 17 Gratt. 576; Wright v. Com., 82 Va. 183; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654.

Construction of Phrase Relating to Time of Night.—However, where an indictment alleges that a burglary was committed "on the 10th of November, 1891, about the hour of 12 o'clock in the night of that day," this clearly means in the night after sundown of that day. Shelton v. Com., 89 Va. 450, 16 S. E. Rep. 365.

When Burglary Sufficiently Charged.—And an indictment which alleges that the prisoner did "on the 2d of October, 1832, between the hours of twelve and four in the night of that day, feloniously and burglariously break and enter the dwelling house, etc., and certain articles of property then and there found of the value of $30, did feloniously steal, take and carry away therefrom," charges a burglary, in most technical form. Mark's Case, 4 Leigh 660.

Jurisdiction as an Essential Allegation.—But an indictment laying the offence as committed in the county of N., in the parish of H., without the words, "within the jurisdiction of this court," or, "within the county, or the district composed of the counties for which the court is held," was bad, after verdict, until the act of January 24th, 1804. Com. v. Richards, 1 Va. Cas. 1.

Averment of Intent to Commit Larceny.—Yet an indictment charging the statutory offence of housebreaking, with averment of intent to steal is sufficient under §§ 12, 13, of ch. 192, of Code 1860. Speers v. Com., 17 Gratt. 570. And the allegation of the actual larceny in such indictment is only in aid of the allegation of intent, and the effect of a general verdict of guilty upon such counts is to convict a prisoner of the crime of breaking and entering with intent to commit larceny and not the crime of larceny also. Speers v. Com., 17 Gratt. 570; Vaughan v. Com., 17 Gratt. 576; Butler v. Com., 81 Va. 159; Wright v. Com., 82 Va. 185.

Averment of Time—Nighttime.—But in burglary the offence must be committed in the nighttime, and in every indictment for burglary, it must distinctly and plainly appear, that the offence was committed in the nighttime. Moreover, if the allegation that it was committed in the nighttime be omitted, it will still be defective though it was indeed charged that the offence was burglariously committed. Mark's Case, 4 Leigh 660.

Date.—And an indictment found in 1895, charging defendant with breaking and entering a "mill house" with intent to commit larceny, but not specifying the "date" of said act, was held bad, since the offence was not a felony if committed subsequent to act of February 12, 1894, which amended the Code, §§ 3705, 3706, and made it a crime to break and enter "any office, shop, storehouse, warehouse, or other house," with intent to commit larceny, by omitting the words "or other house." Cool v. Com., 94 Va. 799, 26 S. E. Rep. 411.

Averment of Breaking and Entering.—And it is important to notice that an indictment for common-law burglary must charge the breaking and entering to have been done "feloniously and burglariously." State v. McDonald, 9 W. Va. 456; State v. Vest, 21 W. Va. 796; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 655. So in State v. Meadows, 22 W. Va. 766, an indictment for burglary must charge that the offence was "burglariously" committed. See also, State v. Cottrell, 45 W. Va. 837, 32 S. E. Rep. 162. And a verdict does not cure this defect. Ran-

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dall's Case, 24 Gratt. 644; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654.

In this connection, the West Virginia statutes, relating to burglary, housebreaking and larceny, came before the court for construction in State v. McDonald, 9 W. Va. 456, the West Virginia Code 1868, ch. 145, § 11, providing that "if a person break and enter the house of another in the nighttime with intent to commit larceny he shall be deemed guilty of burglary," and shall be confined in the penitentiary not less than five nor more than ten years. Section 12 provided that "if a person shall in the nighttime enter without breaking, or shall in the daytime break and enter, a dwelling house * * * or shall in the nighttime enter without breaking, or break and enter either in the daytime or nighttime any office, shop * * * or other house * * * with intent to commit murder, rape or robbery, he shall be confined in the penitentiary" between five and ten years; while section 13 provided "if any person do any of the acts mentioned in the preceding section with intent to commit larceny or any felony other than murder, rape, or robbery he shall be confined in the penitentiary" between two and ten years. The indictment charged that "McDonald," and two others, on the first day of January, 1874, in said county, a certain dwelling house of John T. Reynolds there situate in the nighttime, feloniously, did break and enter," with intent to commit larceny. *Held*, that the words "or other house" as used in section 12, include a dwelling house; therefore the indictment was good under section 12, as punishable under section 13, and not demurrable, as an indictment under section 11, for failure to charge that the breaking was "feloniously and burglariously" done.

Ownership—Averment of Ownership of Building—How Alleged.—But an indictment for breaking and entering a store house not adjoining a dwelling house with intent to commit larceny, which fails to state the ownership of the store house so broken and entered is fatally defective. State v. Reece, 27 W. Va. 377; State v. Hupp, 31 W. Va. 355, 6 S. E. Rep. 919.

The usual averment of ownership of the property alleged to have been intended to be stolen is that "of one B," but it is not necessary to lay the ownership with the same formality as in an indictment for the larceny itself. Vaughan v. Com., 17 Gratt. 576; Wright v. Com., 82 Va. 188.

And an indictment which charges that a prisoner on a certain day, etc., "a certain mill-house not adjoining to or occupied with the dwelling house of F., etc., did break and enter, etc.," sufficiently alleges the ownership of the mill-house to be in F., and is sufficient in law. Webster v. Com., 80 Va. 598. See also, Butler's Case, 81 Va. 162.

Bad Punctuation.—So the ownership of a store house was sufficiently alleged as "a certain store house adjoined or occupied with a dwelling house of one David A. Studds," although there was no comma after "dwelling house." Butler v. Com., 81 Va. 162.

But in State v. Hupp, 31 W. Va. 355, 6 S. E. Rep. 919, it was held that an allegation in an indictment that "the prisoner a certain outhouse and cellar not adjoining to nor occupied with the dwelling house of J. W. Hale, there situated, in the nighttime feloniously did break and enter, with intent," etc., did not allege the ownership of the outhouse and cellar to be in any one, and the indictment was fatally defective. And in State v. Reece, 27 W. Va. 375, an indictment stated "that Joseph Reece on December 21, 1823, in said county, a certain store house, not adjoining to or occupied with the dwelling house of one Robert Buster, there situate, in the nighttime, did feloniously break and enter with intent the goods and chattels of the said Robert Buster, in the store house then and there being, feloniously to steal, take and carry away, etc., of the goods and chattels of the said Robert Buster, in the said store house then and there found, then and there did feloniously steal take and carry away," etc. The court was of opinion that such statement of the ownership of the store house though broken and entered, was fatally defective.

Landlord and Tenant.—And the tenant is the proper person to be averred as owner in the indictment, where he is in exclusive possession, without any interference on the part of the proper owner. State v. Betsall, 11 W. Va. 729.

Common Entrance.—But where the owner and the tenant use a common entrance or outer door, the ownership of the building should be laid in the former. State v. Betsall, 11 W. Va. 729.

Both Having Keys.—So where A, the lessee of the premises, hired to B the privilege of keeping his horse and feed in the stable, for which he paid him, both using a common outer door and carrying keys thereto, the ownership was held properly laid in A. State v. Betsall, 11 W. Va. 729.

Ownership Must Be Proved as Alleged.—An indictment charged that the accused did break and enter into a sealed box railroad freight car, the property of the *Pittsburg, Cincinnati, Chicago* and *St. Louis* Railroad Company in the custody of the Baltimore and Ohio Company, and stole a hog therefrom. The evidence showed that the car was marked "P., C., C. & St. L.," in the custody of the Baltimore and Ohio Railroad Company, and one of the witnesses stated that he understood that the letters stood for the Pittsburg, Cleveland, Chicago, and St. Louis Railroad Company. Another witness stated that the car was marked "C., C. & St. L." No witness testified, as alleged in the indictment, that the car was the property of the Pittsburg, Cincinnati, Chicago and St. Louis Railroad Company. The court held as follows: "The car being in the special custody of the Baltimore & Ohio Railroad Company, it was not necessary to allege its general ownership, but an allegation of special ownership would have been sufficient; but, having alleged the ownership, it must be proven accordingly, for the protection of the prisoner; otherwise, he could be again indicted for the same offence proven, as being a different offence from that alleged. The Baltimore & Ohio Railroad Company may have in its care and custody at the same time many cars of various roads. An indictment for the breaking into the house of one person cannot be sustained by proof of breaking into the house of another. And an indictment for breaking into the car of a given railroad company cannot be sustained by proof of breaking into the car of another company." State v. Hill (W. Va.), 35 S. E. Rep. 831.

Variance in Averment of Ownership.—And where two counts in an indictment, in each of which the ownership of the house entered was described to be in different persons and in each of them the accused was charged with having broken and entered the said house, not only with intent to commit a larceny therein, but with also having actually committed such larceny, to wit: of one trunk and its contents of certain specific value respectively set out, and all of the aggregate value of $85.85 of the goods

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and chattels of the said Joseph Dabney, in the said dwelling house then and there being found, it was held that the person could be acquitted of the felonious and burglarious breaking and entering in of the dwelling house, but convicted of the larceny as charged in the indictment. Clarke v. Com., 25 Gratt. 919.

XXIII. CHEATS.

The false passing as a true note, a false, and forged note, purporting to be a note of a bank (which bank never existed), and procuring goods by means thereof, is not such an offence as comes within the act to prevent the deceitfully obtaining goods, etc., by privy tokens or counterfeit letters; but it is a public cheat indictable at common law, if the defendant knew that it was such a false note. And it is necessary in such case to aver the scienter in the indictment. Com. v. Speer, 2 Va. Cas. 65.

XXIV. CONSPIRACY.

Boycotting.—The first count of an indictment for boycotting charged, directly that the defendant and others "did unlawfully and maliciously, wickedly and corruptly, knowingly, and intentionally, combine, conspire, and confederate together, to injure, ruin, break up and destroy Baughman Brothers in their business as printers and stationers"; that they did this by unlawfully, wickedly maliciously, knowingly, intentionally and corruptly making threats to a great number of persons mentioned, and others unknown to the grand jurors, all of whom had been, and were at the time, regular customers and patrons of the said Baughman Brothers; and that they did, then and there, by their said unlawful, malicious, wicked and corrupt threats, by their said unlawful acts as therein set forth, do a serious injury to the business of the said Baughman Brothers, and a still greater injury to the peace, dignity and good name of the commonwealth of Virginia—to the evil example of all of her people. The above count was demurred to on the ground that it did not charge a conspiracy to do any unlawful act, and did not in particular state the means to be used by the conspirators to break up and destroy the business of Baughman Brothers, nor show that the means to be used were unlawful. The court held that the objection could not be sustained. It was wholly groundless and gratuitous; that the count specifically and exactly charged a criminal conspiracy unprovoked, wanton and unlawful, both as to the end aimed at and the means used to accomplish it; that it charged a combination of the defendant and his co-conspirators to ruin, break up, and destroy the business of Baughman Brothers, and it charged the means used, and the success of the unlawful endeavor operated upon the peaceful and honest industries of the customers and patrons of Baughman Brothers; that the particular means employed need not be alleged, for the offence does not consist in doing the acts by which the mischief is affected but in conspiring with a view to effect the intended mischief by any means. Crump v. Com., 84 Va. 927, 6 S. E. Rep. 620.

XXV. COUPONS.

Selling Tax-Receivable Coupons without License.—A person indicted for doing business as a stock-broker without a license in violation of sections 58 and 60 of Acts 1883-84, cannot be convicted upon proof of his having sold tax-receivable coupons only. The two classes of offences are widely different. Com. v. Lucas, 84 Va. 306, 4 S. E. Rep. 695.

Moreover, the offence of selling tax-receivable coupons under section 65 is not charged by an indictment alleging that defendant "did deal in certificates of debt commonly called 'Virginia coupons' * * * * without license under sections 58 and 60 of the act of assembly * * * for the years 1883 and 1884, page 588," as the court must take cognizance that there are Virginia coupons outstanding that are not tax receivable. Commonwealth v. Lucas, 84 Va. 303, 4 S. E. Rep. 695.

XXVI. CORPORATIONS.

A corporation cannot be impleaded *criminaliter* by its artificial name, at common law. Thus, in Commonwealth v. Swift Run Gap Turnpike Co., 2 Va. Cas. 362, an information charged the corporation in its corporate name, with a nuisance in obstructing a common public highway and road, by digging it up, and placing therein large quantities of stone and dirt, whereby the citizens of the commonwealth were hindered from passing and traveling on the same to their great damage and common nuisance, etc. It was a proceeding at common law. The court was unanimously of the opinion, that a corporation, such as the president, directors, and company of the description given, could not be impleaded by its artificial name, for the criminal offence stated in the information.

XXVII. DUELLING.

An indictment at common law charging that the defendant did fight a duel with pistols, is bad on demurrer. Com. v. Lambert, 9 Leigh 603. See Va. Code 1887, §§ 3683-92; W. Va. Code 1899, ch. 144, §§ 19-27.

But an indictment for sending a challenge, in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. Brown v. Com., 2 Va. Cas. 516.

Moreover, in Dudley v. Com., 6 Leigh 613, an indictment for aiding and abetting in fighting a duel, not charging with clearness and certainty that a duel was fought, was for that reason, held bad on general demurrer.

XXVIII. FALSE PRETENSES.

A. IN GENERAL.

Form of Indictment.—Virginia Code of 1887, § 3721, provides that "if any person obtain, by any false pretense or token, from any person, with intent to defraud money or other property, which may be the subject of larceny, he shall be deemed guilty of the larceny thereof; or if he obtain by any false pretense or token, with such intent, the signature of any person to a writing, the making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years." The offence, therefore, of false pretense is by this statute made larceny, and an indictment for the offence may be, either in the form of an indictment for larceny at common law, or by charging the specific facts which the act declares shall be deemed larceny. Leftwich v. Com., 20 Gratt. 716.

When Indictment for Not Barred.—And an acquittal of the felony of forging an order, and of uttering as true a forged order, is no bar to an indictment and prosecution for the misdemeanor of fraudulently obtaining goods by means of a false privy token, a counterfeit letter, the said privy token being the same order, of the forgery and uttering, of which the prisoner had been acquitted. Com. v. Quann, 2 Va. Cas. 89.

Description of Property Obtained.—But in an indictment for obtaining money by false pretenses the

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same particularity is required in describing the property obtained, as in an indictment for larceny. State v. Hurst, 11 W. Va. 54.

Thus in an indictment under the Virginia Code 1887, § 3721, for obtaining money upon a false pretense, it is not sufficient to describe it as "$90 in United States currency"; but it should show what kind of United States currency was obtained. Leftwich v. Com., 20 Gratt. 716.

B. ALLEGATIONS.—And in an indictment for obtaining money by false pretenses it is necessary to prove that the prosecutor was induced to part with his money by relying on the false pretenses of the prisoner; but the allegation in the indictment that the prisoner, by means of specified false pretenses, obtained such money is a sufficient allegation of these facts so required to be proven. Or such knowledge is sufficiently alleged in the indictment by saying that the prisoner knowingly, designedly, falsely and feloniously pretended these matters of fact, constituting the false pretenses specifying them. State v. Hurst, 11 W. Va. 54.

When Defective, and Properly Quashed for Insufficiency in Allegation.—But in State v. Baller, 26 W. Va. 90, an indictment alleged that C. B., unlawfully furnished one A. R., for the use of P. E., money to unlawfully induce P. E., to absent himself from the circuit court of the county at a certain time, to which he, P. E., had been summoned as a witness against C. B., in a trial on an indictment against C. B., then pending in said court, whereby the said C. B., attempted to obstruct and impede the administration of justice. The court held that, the indictment was fatally defective in not alleging that A. R. paid or offered to pay the sum of money to the witness P. E., to induce him to absent himself as such witness at said time from the circuit court. Without this the act done by the defendant is not of such a nature as to constitute an attempt to commit the offence mentioned in the indictment, therefore on motion of the defendant the court ought to have quashed this indictment.

XXIX. FELONIOUS HOMICIDES.

On an indictment for felonious homicide, the jury may find the accused not guilty of the felony, but guilty of involuntary manslaughter. Va. Code 1887, § 4042; Canada v. Com., 22 Gratt. 899; Hoback v. Com., 28 Gratt. 922; Hardy v. Com., 17 Gratt. 592.

XXX. PENCES.

An indictment which charges that defendant knowingly and wilfully removed a fence from the lands of P. and did injure and expose the growing crop of P. then on said land, charges but one offence; and is valid. Ratcliffe v. Com., 5 Gratt. 657.

XXXI. FORGERY AND COUNTERFEITING.

A. IN GENERAL.

When Indictable.—Upon an indictment for passing a counterfeit check or order of a president of a branch of the bank of the United States, on the cashier of the bank, payable to T. R., or order, and indorsed by T. R., to bearer, the court held that, whether the charter of the bank of the United States be constitutional or not, and whether the charter authorized the issue of such checks or orders or not, the counterfeiting or passing counterfeits for such checks or orders, is felony by the statute, 1 Rev. Code ch. 154, § 4. Hendricks' Case, 5 Leigh 707. It is therefore indictable. Moreover, an indictment for passing a counterfeit bank note to a slave with intent to defraud a bank, is good. Brown v. Com., 2 Leigh 769.

Indictable in State and Federal Courts.—And though the offender be indictable in the courts of the United States, for an offence against the laws of the United States, he is also indictable in the courts of Virginia for an offence against the laws of the state. Hendricks' Case, 5 Leigh 707.

Form.—The form of an indictment for forgery and uttering forged instruments, found in Mayo's Guide (Ed. 1860), p. 537, is good as to both counts. Neither in an indictment for uttering or attempting to employ as true a forged instrument, nor one for forgery, is it necessary to name the person intended to be defrauded, as sec. 8, ch. 158, Code 1887, dispenses with that in both such cases. It is not necessary in such indictment to allege that the act was to the prejudice of another's right, but it must appear from the description of the writing in the indictment that it is such as might prejudice his right. State v. Tingler, 32 W. Va. 546, 9 S. E. Rep. 935.

What a Good Indictment for Forgery.—The description of the writing in the indictment, as the indorsement of the person whose name is forged, will not vitiate the indictment, though the simulated liability might not be that of technical endorser, but of a different character. Powell v. Com., 11 Gratt. 822.

And under sec. 6, of ch. 158, of the W. Va. Code in force in 1886, an indictment for uttering, and attempting to employ as true, a forged writing, need not set out the whole writing, but it is sufficient to give its purport an effect. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

And in Perkins v. Com., 7 Gratt. 651, an indictment for forgery charged the forgery of a negotiable note, and set it out *in haec verba*, without setting out the endorsements upon the back of it. On the trial when the note was offered in evidence, it was objected to on the ground of variance. *Held*, it was not necessary to set out in the indictment the endorsements upon the note, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instrument.

Examination—When Sufficient to Warrant Indictment.—A prisoner committed for examination, is examined, and remanded by the examining court for trial for felony in forging and uttering a promissory note purporting to be drawn by A. D. (no intention to defraud A. D. or any other person being charged). The court held that the examination was sufficient and would warrant an indictment for forging and uttering the note with intentions to defraud A. D. Bogart v. Com., 10 Leigh 693.

Same—Variance between Finding on Examination and Indictment.—But if a prisoner is examined for forgery and having twenty-four pieces of silver, and sent on to the circuit court for further trial, he cannot be indicted for feloniously having in his possession ten or more pieces of coin with intent to alter and employ the same as true. Scott v. Com., 14 Gratt. 687.

Two Counts—Conviction of Forgery Thereunder.—An indictment (described in the record of the finding, and in the entry of the arraignment, as an indictment for forgery) contains: 1. A count for forging and counterfeiting a note, and 2. A count for feloniously using and employing as true a counterfeit note. Verdict finds the prisoner guilty of forgery, as alleged in the indictment. *Held*, an acquittal must be entered on the second count. Page v. Com., 9 Leigh 683.

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Accessories—Indictment of Same.—If the procurers or aiders are not present at the time, they must be indicted specifically as accessories, nor could they be convicted under a form of indictment charging them as principals. But if they are aiders and abettors of the act, the indictment will not be liable to this objection, viz., uniting accessory guilt with the guilt of the principal. Law makes the aiders and procurers equally guilty with the actual offender, and where they are charged with the words of an indictment, they are to be taken as principals in the second degree, *i. e.*, as present at the time, and in this case no objection can be perceived to uniting in one count such an offence with the offence of principal in the first degree. Rasnick v. Com., 2 Va. Cas. 356.

Joinder of Counts.—If an indictment against a prisoner contains counts for the forgery, and counts for uttering and publishing, the superior court ought to quash the latter counts. Mowbray v. Com., 11 Leigh 643.

Joinder of Felony and Misdemeanor—Effect.—So in Scott v. Com., 14 Gratt. 687, there were counts in an indictment for forging and counterfeiting coin; also a count for feloniously having in his possession twenty pieces of forged coin, not saying, "at the same time." The prisoner having moved the court to quash the last count, which was overruled, there was a verdict and judgment against him, and he obtained a writ of error. The appellate court holding that the count was bad as an indictment for a felony, would not permit it to stand as a count for misdemeanor, but reversed the judgment and quashed the count. The further question was suggested in this case, but was not decided, therefore left open, as to whether in an indictment counts for a felony and for a misdemeanor could be joined. The inclination was indicated to negative the joining of such counts.

Duplicity.—But a joinder of two or more offences in one count is not permitted. However, if the whole transaction be only parts of one fact of endeavor, all the parts may be stated together as one offence. Thus, an indictment charging in one count forgery of a check and of an endorsement thereon, is not liable to the objection of duplicity or misjoinder. Sprouse v. Com., 81 Va. 374.

Multifariousness.—An indictment which charges a prisoner with the offences of falsely making, forging and counterfeiting; of causing and procuring to be falsely made, forged and counterfeited, and of willingly aiding and assisting in the said false making, forging and counterfeiting, is a good indictment though all of these charges are contained in a single count: the words of the statute being pursued, and there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct. Rasnick v. Com., 2 Va. Cas. 356.

Rule of Practice When Some Counts Are Faulty, Others Good.—The rule of practice in criminal cases, that if an indictment contain several counts, some good and others faulty, and a general verdict of guilty be found, the bad counts will not affect the validity of the good, and judgment will be given on those which are good,—is not applicable to cases of penitentiary crimes in Virginia, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by verdict. Mowbray v. Com., 11 Leigh 643.

Variance.

Immaterial—Variance between Certificate and Indictment.—The only variance between a forged order as set out in a certificate, and as set out in an indictment consisted of the following: that "Thos." in the latter was written "Thomas" in the former; "23c" in the latter was written "twenty-three cents" in the former; "Resp't'y" in the latter was written "Respectively" in the former. Such variances as these are immaterial, and are not such as require the accused to be sent back to a justice for examination. Burress v. Com., 27 Gratt. 934.

Same—Account—Acc't.—So the difference between "account" as set out in the indictment and "acc't" as written in the order is not a material variance, which will exclude the order as evidence. Burress v. Com., 27 Gratt. 934.

Same—Forged Indorsement.—And in State v. Duffield (W. Va.), 38 S. E. Rep. 577, there was an indictment for forged endorsements on the notes which were set out *in haec verba*, which note as it appeared in the indictment, purporting to be signed, "J. F. C. Duffield," as maker. But a similar note signed by J. F. C. Duffield as maker was offered in evidence in support of the indictment. The court held that such a variance as this is immaterial.

Material Variance.—But when the alleged forged note is set out *in haec verba*, and in the body thereof are the words "with 6 per cent. int. from date," and the note offered in evidence contains no such words, this is a variance, both in substance and legal effect, fatal to the introduction of such last-mentioned note as evidence in support of the allegations of the indictment. State v. Fleshman, 40 W. Va. 726, 22 S. E. Rep. 309.

B. DESCRIPTION, AND NECESSARY AVERMENTS.

Forged Instrument—How Described.—In a prosecution for forging, or attempting to employ as true any forged instrument, it is sufficient to describe the same in the indictment in such manner as would sustain an indictment for the larceny of such instrument. State v. Duffield (W. Va.), 38 S. E. Rep. 577.

And it is not necessary to set forth in the count, the persons whom the prisoner procured to forge the instrument, or with whom he acted and assisted in the forgery. A general description, in the words of the statute, is sufficient. Huffman v. Com., 6 Rand. 685.

And, if in an indictment for a forgery, the document alleged to have been forged is described in such manner as would sustain an indictment for stealing it supposing it to be the subject of larceny, the indictment is sufficient. Coleman v. Com., 25 Gratt. 865.

However, the words "to the prejudice of another's right," in the Code, ch. 193, sec. 5, p. 733, in relation to forgeries, are descriptive not of the offence, but of the writings of which forgery may be committed; and it is not therefore necessary that they shall be inserted in the indictment in describing the offence charged. Powell v. Com., 11 Gratt. 822.

Averring Extrinsic Circumstances.—Forgery is the making of the false writing which, if genuine, would be apparently of legal efficacy. Writings, invalid on their face, are not subject to forgery. If extrinsic circumstances are essential to the efficacy of the instruments, they must be averred in the indictment. Terry v. Com., 87 Va. 672, 13 S. E. Rep. 104.

Alleging Possession and Time.—And an indictment under the statute, Va. Code 1849, ch. 193, § 6, p. 733, for feloniously having in his possession more than ten

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pieces of forged or base coin, must allege that the prisoner had them in his possession at the same time; and the charge that on a certain day he had them in his possession, is not sufficient. Scott v. Com., 14 Gratt. 687.

Indictment for Attempting to Employ as True a Forged Instrument—Not Necessary to Name Person Defrauded.—But under § 8, ch. 158, Code of 1887, which provided that "where intent to injure, defraud, or cheat is required to constitute an offence, it shall be sufficient, in an indictment or accusation therefor, to allege generally an intent to injure, defraud, or cheat, without naming the person intended to be injured, defrauded or cheated." It is not necessary in an indictment for attempting to pass as true a forged instrument, to name the person intended to be defrauded. State v. Tingler, 32 W. Va. 546, 9 S. E. Rep. 935.

Instrument Need Not Be Set Out.—And while in an indictment for forgery it is unnecessary to set forth a copy or facsimile of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury. State v. Fleshman, 40 W. Va. 726, 22 S. E. Rep. 309.

Specifying Particular Part of Note.—However, it is not necessary in an indictment for forgery to specify the particular part of the note forged. A forged note, being false in one material part or signature, is false *in toto*, and must be so regarded as to the person against whom the fraud is aimed. State v. Fleshman, 40 W. Va. 726, 22 S. E. Rep. 309.

Alleging Act to Be "To the Prejudice of Another's Rights."—Moreover, it is not necessary in an indictment for forgery to allege in the indictment that the act was to the prejudice of any one's right. For the words "to the prejudice of another's right" found in the statute against forgery, are descriptive, not of the offence, but of the instrument. State v. Tingler, 32 W. Va. 546, 9 S. E. Rep. 935; Powell's Case, 11 Gratt. 822.

Sufficiency—The Act Charged Must Be to the Prejudice of Another.— The Virginia Code 1887, § 3737, predicates the offence of forgery only of such writings as are, or may be, to the prejudice of another. If it be not so, the indictment does not charge the offence. Terry v. Com., 87 Va. 672, 13 S. E. Rep. 104.

However, in Murry v. Com., 5 Leigh 720, upon an indictment for passing a counterfeit note of the bank of Louisville, without alleging that the bank was a chartered bank, or that there was no such bank, and without alleging that the note was passed "to the prejudice of another's right," or "for the prisoner's own benefit, or for the benefit of another," the court held, that the offence so charged was a felony within the meaning of the statute, 1 Rev. Code, ch. 154, § 4, and that the indictment was good and sufficient.

Same—Description of the Die or Other Instrument.—And an indictment under the statute of 1834, § 35, ch. 66, charging that the prisoner did knowingly have in his custody, without lawful authority or excuse, "one die or instrument" for the purpose of producing and impressing the stamp and similitude to the current silver coin called a half dollar (no further description of the die or instrument being given), is insufficient. Commonwealth v. Scott, 1 Rob. 695 (1842).

Same—Procuring Act to Be Done.—But an indictment for causing and procuring a counterfeit bank note to be offered to be passed, without stating by whom or how the accused caused and procured it to be done, is sufficiently certain and good. Brown v. Com., 2 Leigh 769.

Same—Time and Place.—An indictment for passing a counterfeit note charged that "John Buckland, late of Monroe county, on the 14th day of September, 1836, at the said county of Monroe and within the jurisdiction of the circuit court, being possessed of a certain false, forged and counterfeited bank note, purporting to be a bank note of the bank of the United States, of the denomination of 20 dollars, which said false, forged and counterfeited bank note is in the words and figures following, that is to say," (setting out a note *in haec verba*) "on which said note was the following endorsement: 'Pay the bearer, M. Robinson.'—feloniously did pass to one William Adair the said false, forged and counterfeited note, purporting, etc., with intention to injure and defraud the said William Adair, he the said John Buckland well knowing the said note to be false, forged and counterfeited, at the time he passed the same to the said William Adair, against the form of section 1, ch. 154, 1 Rev. Code." *Held*, the time and place of passing the note and of the scienter are set forth with sufficient certainty. Buckland v. Com., 8 Leigh 732.

Moreover, in a prosecution for uttering or attempting to employ as true a forged note purporting to be on the Bank of Delaware in Pennsylvania, a banking company authorized by the laws of Pennsylvania, the existence of such a bank may be proved by parol evidence. The averment that it was authorized by the laws of Pennsylvania is surplusage, and need not be proved. Moreover, the time when the offence is alleged in the indictment to have been committed, being stated in figures is no error. Cady v. Com., 10 Gratt. 776.

Same—Note—Specifying Amount, Date, Maker, and Place Payable.—And if an indictment charges the forgery of an endorsement on a negotiable note, which is described as to the amount, the date, to whom payable and when due, but does not state who is the maker of the note or where it is payable, the indictment nevertheless will be held good. Cocke v. Com., 13 Gratt. 750.

Same—Misnomer.—In Com. v. Kearns, 1 Va. Cas. 109, the jury rendered a special verdict finding the prisoner guilty of transferring a certificate of the commonwealth, purporting to be signed by two auditors of public accounts knowing it to be forged. This verdict was rendered subject to the ruling of the court on the two following propositions, viz.: first, the sufficiency of parol proof to establish an official appointment of the auditors; secondly, the immateriality of an error in misspelling the Christian name of one of the auditors in the indictment. However the law was found to be for the defendant.

C. PROCEDURE.

Evidence Admissible in Support of Indictment.—A forged paper is passed by a prisoner bearing date in 1828: immediately after, with the knowledge of the holder, the prisoner alters the date to 1827. The indictment sets forth its tenor, and describes it as dated in 1827. The paper is proper evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828, when passed. Huffman v. Com., 6 Rand. 685.

And on a trial of an indictment for the passing of a counterfeit bank note or check, after evidence that the prisoner passed the note, and that it was counterfeit, evidence that the prisoner had in his

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possession and attempted to pass other counterfeit notes of the same kind to other persons, the day after he passed those in the indictment mentioned, is admissible to prove the scienter. Hendricks' Case, 5 Leigh 707.

Moreover, upon the trial of an indictment for passing counterfeit bank notes, proof that prisoner had, about the same time, passed another note of that kind, which was thought to be a counterfeit and which he took back, though this note is not produced at the trial, it is admissible evidence to prove the scienter. And upon the trial of an indictment against M for passing counterfeit bank notes, if the prisoner 'appears clearly to have been confederated with one L in passing counterfeit notes, and present when L passed such notes, the notes so passed by L can be produced in evidence against the prisoner, as they are proper evidence. Martin v. Com., 2 Leigh 745.

Let it be observed, in this connection, that it is necessary to the support of an allegation in an indictment that the bank notes purport on their faces to be notes of certain banks, that the notes produced in evidence correspond therewith. Pomeroy v. Com., 2 Va. Cas. 342.

Defects Cured by Verdict.—A charge that a forgery of bank notes was committed, with intent to injure "divers good citizens of the commonwealth and others, to the jurors unknown," without setting out an intent to injure the president, directors, and company of those banks, or of any particular person, or body politic, by name, is good after verdict. So, to charge that the prisoners willingly acted and assisted in falsely making and forging, without setting out in particular any person who was assisted. So, to charge them with causing and procuring the forged notes to be passed, without setting out the person whom the prisoners caused and procured to pass them, nor to whom. So, to charge them with passing them to W. S., with intent to defraud the said W. S. and others. So, also, to charge them with causing and procuring them to be passed or exchanged: are all good after verdict. Com. v. Ervin, 2 Va. Cas. 337. Moreover, in an indictment for the forgery of bank notes, instead of setting out the tenor of the forged notes, the attorney "for greater certainty as to their identity," referred to them as "being annexed" hereto, and actually did annex them. The prisoner did not move to quash the indictment, nor did he plead in abatement, but pleaded the general issue, and a verdict was rendered against him. Although this is a careless and irregular mode of counting, yet after verdict the irregularity is cured by the act of jeofails. Com. v. Ervin, 2 Va. Cas. 337.

When Verdict Too Uncertain under Indictment with Two Counts.—In Cocke v. Com., 13 Gratt. 750, an indictment charged in one count forgery of a note, and in another count forgery of an indorsement upon a note. The jury nevertheless found the prisoner not guilty on the first count; and then said, "on the second count, namely, that of uttering a negotiable note knowing it to be forged, we find the prisoner guilty, and affix the term of his imprisonment for the term of two years." The verdict upon the second count is too uncertain to authorize any judgment upon it; and a *venire facias de novo* on that count should be awarded.

XXXII. FORNICATION.

See *post*, "Lewd and Lascivious Cohabitation and Conduct."

The offence of fornication cannot be punished by information as a common-law offence, unless accompanied with other circumstances which, *per se*, constitute a misdemeanor, such as the public commission of the act. Isaacs v. Com., 5 Rand. 634. Those guilty of fornication are liable to indictment for lewd and lascivious cohabitation. See Lafferty v. Com., 6 Gratt. 672; also, Va. Code 1887, § 3787, and Anderson v. Com., 5 Rand. 627.

XXXIII. GAMING.

A. IN GENERAL.

Plea of Misnomer.—A misnomer cannot be pleaded to a presentment, indictment, or information, for unlawful gaming under the 20th and 21st sections of the act against gaming, in force in 1826. Com. v. Adkinson, 2 Va. Cas. 513.

License of Tavern Keeper as Condition Precedent to Condition.—Moreover, if a party indicted for suffering an unlawful game to be played in his tavern, was keeper of the tavern at the time of such playing, his having a license at the time is not necessary to his conviction. Com. v. Price, 8 Leigh 757.

Description of Offence.—An omission to charge any offence against the statute is not cured by a general allegation that the act was unlawful. The offence must be so charged as to appear to be unlawful; otherwise, the allegation that an act was unlawful, would dispense with all averments showing it was unlawful. Huff v. Com., 14 Gratt. 648.

Description of Device—Statutory Name.—Where the statute makes the exhibition of any of the gaming tables therein enumerated a penal offence, it is sufficient to mention the same by name without further description. Huff v. Com., 14 Gratt. 648.

Offence Not Specifically Mentioned in Statute.—Where the offence charged is not specifically mentioned in the statute, there must be some averment showing it to be one of the unequal games belonging to the same class with those mentioned. Huff v. Com., 14 Gratt. 648.

Person with Whom the Gambling Was Done Must Be Named.—The person with whom the bet was made must be stated. Bish. St. Cr. § 944; State v. Griggs, 34 W. Va. 78, 11 S. E. Rep. 740; State v. Snider, 34 W. Va. 83, 11 S. E. Rep. 742.

Statutory Penalty Not Recoverable by Information.—The penalty of $150 imposed by the act of 1797 on tavern keepers suffering the game of faro in their houses could not be recovered by information for the use of the commonwealth; the penalty being given to the person suing for the same, and it being no offence at common law. Commonwealth v. Richards, 1 Va. Cas. 133.

B. PRESENTMENT FOR GAMING.

Character of Place at the Time.—It was held in Bishop v. Com., 13 Gratt. 785, that a presentment for playing cards must charge that the place at which it occurred was a public place at the time of such playing, where the name of the place did not of itself import that it was at the time a public place.

Thus, as held in Roberts v. Com., 10 Leigh 686, a presentment "for unlawfully playing cards at the grocery of D and C" is defective in substance for not alleging the grocery to be a public place, or a place of public resort.

And in Hord v. Com., 4 Leigh 674, a presentment for gaming charged the def- laying at an unlawful game "at the h , in the county of P. William." *H* t was fatally defective in not c use where, etc., was an ordi ce.

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Uncertainty of Place.—Moreover, a presentment for playing cards, "at or near" a place, is objectionable for uncertainty. Bishop v. Com., 13 Gratt. 785.

Information Not Necessary for Trial.—But where a tavern keeper is presented for suffering faro and loo to be played at his house, he may be tried on the presentment alone, without any information: and if he refuses to answer to the presentment, judgment by default may be rendered against him. Com. v. Maddox, 2 Va. Cas. 19.

Right to Trial by Jury.—However, a defendant presented for unlawful gaming is entitled to trial by jury. Com. v. Horton, 1 Va. Cas. 335; Com. v. McGuire, 1 Va. Cas. 119.

Sufficient Record.—If the record says "A persentment for unlawful gaming against J. T.," it is sufficient. Com. v. Tiernan, 4 Gratt. 545.

Variance—Between Presentment and Proof.—On a presentment for gaming, the defendant was charged with the offence committed at the booth of Price Skinner. The proof was of gaming at the booth of Clarke, the said Skinner having no right, interest, or agency in the booth; this proof is insufficient to support the charge. Com. v. Butts, 2 Va. Cas. 18.

Duplicity.—A presentment for unlawful gaming by playing at cards, and betting on the sides and hands of those that then and there did play, is not objectionable for duplicity. Com. v. Tiernan, 4 Gratt. 545.

De Facto Clerk—Effect.—If upon a presentment for gaming, the defendant pleads in abatement, that the clerk *de facto*, who administered the oath to the grand jury that made the presentment, is not clerk *de jure* at the time, the plea is naught. Hord v. Com., 4 Leigh 674.

C. INDICTMENT FOR GAMING.

1. IN GENERAL.

Mere Formal Defects.—Under § 4011 of the Va. Code of 1887, which provides that no exception shall be allowed for any defect or want of form in an indictment under the gaming act, but the court shall give judgment thereon according to the very right of the case, objections that the record did not set forth the appointment and oath of the foreman, and that the names of the witnesses upon whose evidence the indictment was found, were not written at the foot of the indictment, were held properly overruled. Lawrence v. Com., 86 Va. 575, 10 S. E. Rep. 840.

Following Language of Statute.—An indictment which follows the language of the statute is sufficient in most cases, and such rule may be laid down as specially applicable to the subject under discussion. Leath v. Com., 32 Gratt. 873.

Indictment Charging Several Acts.—An indictment under the statute, Code of 1873, ch. 194, § 1, for gaming pursues the language of the statute, except that it uses the word "and" in place of "or," thus charging the accused with exhibiting all the games mentioned in said statute. This is correct. It charges but one offence, and is supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and on conviction there would be but one fine, and one term of imprisonment. Leath v. Com., 32 Gratt. 873.

Joint Indictment.—Two or more persons may be jointly indicted for gaming. State v. Snider, 34 W. Va. 83, 11 S. E. Rep. 742.

So where an indictment was against two defendants jointly, and alleged that they "did unlawfully wager and bet $50 in money" on an election for presidential electors, yet did not allege that they bet with another person, and name that person: nor did it say that they bet with each other, nevertheless the court held, that in common speech and understanding, when we say that A and B bet on an election and other things we mean that they bet with each other, the one against the other, and that the plain import of the charge in the indictment was that they bet with each other; that it would be very technical to overrule the indictment on this ground. State v. Griggs, 34 W. Va. 78, 11 S. E. Rep. 740.

And where an indictment was for three different offences against different persons, viz.: one for exhibiting a faro bank by one of the accused; one for playing at such bank by the other two accused, and one for knowingly suffering such conduct in his house by another accused, it was held good and sufficient in law. Com. v. McGuire, 1 Va. Cas. 119.

2. NECESSARY ALLEGATIONS AND SUFFICIENCY OF SAME.

As to Jurisdiction.—An indictment for gaming under the statute, Va. Code of 1873, ch. 194, § 1, charged the offence to have been committed in the city of Richmond and within the jurisdiction of the court. Such allegation is sufficiently certain. This is not a case in which place enters into the offence: it is an offence without regard to the particular house, building, or other particular locality where it is committed. Leath v. Com., 32 Gratt. 873.

Alleging Place.—Where the element of the offence consists in playing cards at a public place, the indictment should show that the place at which the game was carried on was a public place or partook of such nature. Hord v. Com., 4 Leigh 674; Roberts v. Com., 10 Leigh 686; Bishop v. Com., 13 Gratt. 785.

Public Resort Alleged.—But if the indictment charges that unlawful gaming is carried on at a house of public resort, it is good. Wortham v. Com., 5 Rand. 669.

And an indictment charging that the defendant "on the 10th day of February, 1827, unlawfully did game by playing a game called faro, a game played with cards, at a house of public resort called the Chocolate House, on 12th street in the said city of Richmond," is good. Wortham v. Com., 5 Rand. 669.

"House of Entertainment."—So an indictment charging the defendant with unlawful gaming at the house of J. N., the same being a house of entertainment, is sufficient. Linkous v. Com., 9 Leigh 608.

Needless Allegations—Purpose of Gaming.—It was objected to an indictment for gaming that the indictment did not charge that the games or tables were exhibited for gain. The court said: "It is a sufficient answer, that the indictment follows the language of the statute, and further charges that the accused did unlawfully keep and exhibit," etc. Leath v. Com., 32 Gratt. 873.

3. PROCEDURE.

Proof Necessary to Support Indictment.—An indictment against a tavern keeper, for suffering the game of loo to be played in his tavern by certain persons named, will be supported by proof of his having suffered that game to be played therein, though by other persons than those named in the indictment. Com. v. Price, 8 Leigh 757.

And an indictment for playing at cards at a public place, may be sustained by proof that the party bet at faro at the time and place stated in the indictment. Gibboney v. Com., 14 Gratt. 582.

However, if an indictment for gaming charges defendant with unlawful playing with cards, to wit, at the game of all fours, of loo, and of whist, at a public place, to wit, at the store house of G. H. & Co.; in order to convict the defendant, it is incum-

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bent on the prosecutor to prove, that he played at some one of the games specified in the indictment. Windsor v. Com., 4 Leigh 680.

When Judgment for Revocation of License Proper.—And on conviction of a tavern keeper upon an indictment for permitting unlawful gaming in his tavern, judgment cannot be rendered for revocation of defendant's license, acquired since the commission of the offence. Com. v. Price, 8 Leigh 757.

Rule When Demurrer to Indictment is Overruled.—Upon a demurrer to an indictment for unlawful gaming being overruled, the defendant cannot have leave to plead not guilty without offering to withdraw his demurrer; the court may, in its discretion, give him leave to withdraw his demurrer and to plead; but if he does not withdraw his demurrer and obtain leave to plead, judgment should be given for the fine and costs, not that the defendant shall answer over. Com. v. Foggy, 6 Leigh 638.

XXXIV. HOUSE OF ILL-FAME.

The first count on an indictment, under sec. 10, ch. 149, Code 1891, charged that the defendant, on the 6th day of May 1895, in the city of Wheeling, did unlawfully, willfully and knowingly let a certain house there situated, describing it by street, number, etc., to a certain person, giving the name, with the intent that the said person keep the same as a common bawdy house and house of ill-fame, and that the said Georgia Frank afterwards used and kept the said house as a house of ill-fame, etc. *Held*, every material fact necessary to be proved to support a conviction seemed to be plainly alleged, with due specifications of time, place, persons, etc., so that the demurrer was properly overruled. State v. Emblem, 44 W. Va. 521, 29 S. E. Rep. 1031.

XXXV. INCEST.

Statutory Crime—Indictment Follows Statute.—The crime of incest being statutory, in drafting indictments therefor, it is both sufficient and necessary to follow the language of the statute. State v. Pennington, 41 W. Va. 599, 23 S. E. Rep. 918.

Averment of Intermarriage.—In the case of Hutchins v. Com., 2 Va. Cas. 331, William Tankersly and Nancy Hutchins were jointly indicted, the indictment charging that the said "William unlawfully, willingly and incestuously did intermarry with, and take to wife a certain Nancy Hutchins, the niece of said William, and that the said William and Nancy then and there from, etc., to etc., did willingly, unlawfully and incestuously continue to cohabit and live together as man and wife, against," etc. Both were convicted, and upon a writ of error, it was objected that the indictment was bad, because it did not in terms allege that she had intermarried with said William; the court held the indictment good, "because it was impossible for him to intermarry with her unless she also intermarried with him, and that as the said indictment was in the very words of the statute, it was therefore sufficiently certain," and affirmed the judgment.

Averring Knowledge of Relationship.—In an indictment for incest under section 22, ch. 149 of W. Va. Code of 1891, it is not necessary to allege that the accused knew the relationship of the woman to him. State v. Pennington, 41 W. Va. 599, 23 S. E. Rep. 918.

Imperfect Statement of Date Cured by Statute of Jeofails.—Likewise, under § 10, ch. 158, W. Va. Code of 1891, which provides that no indictment shall be held invalid for omitting to state or stating imperfectly the time at which the offence was committed when time is not the essence of the offence, a statement in an indictment for incest that the offence was committed "on the 18th day of August, July, 1894," was held not to invalidate the indictment. State v. Pennington, 41 W. Va. 599, 23 S. E. Rep. 918.

Name of Particeps.—It was objected to an indictment for incest that while it alleged that the woman was the daughter of the defendant's brother, the name of that brother was not specified. But the court held the objection not to be a good one, because the indictment was sufficiently certain and definite in pointing out the particular person with whom the offence was committed, and that while she might be a person of that name, and daughter of one not a brother; if such be the case, the defendant could prove that as a defence. State v. Pennington, 41 W. Va. 599, 23 S. E. Rep. 918.

XXXVI. INTOXICATING LIQUORS.

A. IN GENERAL.

Caption.—Though the name of the county be left blank in the margin of an indictment for misdemeanor, it is enough if the county be stated in the body of the indictment. Tefft v. Com., 8 Leigh 721.

Liability under General Revenue Laws.—In the county where the "local option law" (Va. Code 1887, ch. 25), has been adopted, the sale of liquor without license is none the less liable to prosecution as a violation of the general revenue laws. Webster v. Com., 89 Va. 154, 15 S. E. Rep. 513.

Selling Liquor without a License—Averment.—An information under the 3d section of the act of March 3d, 1840, must contain an averment that the person selling had not a license and certificate to sell spirituous liquors. Likewise as to an indictment under the 17th section of the act. Com. v. Hampton, 3 Gratt. 590.

Misdescription of Defendant.—A presentment for selling ardent spirits by retail to be drank at the place where sold, without having first obtained a license to keep an ordinary, described the defendant as a free negro. For this offence, white persons, Indians, and free negroes were prosecuted and punished in the same manner. *Held*, a plea that defendant is an Indian and not a free negro, is an immaterial plea, and was properly excluded. Commonwealth v. Scott, 10 Gratt. 749.

And such a plea if good, would be too late after pleading to issue. Commonwealth v. Scott, 10 Gratt. 749.

Record Entry of Indictment.—The record entry of the finding of the indictment is as follows: "The grand jury returned into court having found the following indictment:

"The State (No. 1) v. Michael Gilmore. } Indictment for selling intoxicating liquors to a minor.

"A True Bill.

"P. S. MINSHALL, Foreman."

Held, that the record entry of the finding of the indictment was sufficient. State v. Gilmore, 9 W. Va. 641.

And when, in an indictment it is alleged that a person without having a state license therefor, sold, and offered and exposed for sale, at retail, spirituous liquors and other drinks, and it appears by the record that an indictment for unlawfully retailing was presented, the record of the finding is sufficient. State v. Fitzpatrick, 8 W. Va. 707. See also, State v. Chapman, 25 W. Va. 408; Crookham v. The State, 5 W. Va. 510; Tefft v. Com., 8 Leigh 721; Thompson's Case, 20 Gratt. 724; State v. Gilmore, 9 W. Va. 641.

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Venue—Act Must Be Done Where Laid.—No conviction can be had upon an indictment for the sale of liquor without license where the evidence fails to show that the offence was committed in the county and magisterial district wherein the indictment laid the venue. Richardson's Case, 80 Va. 124; Savage v. Com., 84 Va. 584, 5 S. E. Rep. 563.

Charging Sale to Two Persons.—An indictment for selling ardent spirits without a license, may charge the sale to two persons. Peer's Case, 5 Gratt. 674. And the retailing to two distinct persons, at the same time and place, constitutes two separate and distinct offences, and not one offence only. Com. v. Dove, 2 Va. Cas. 26.

However, it is not necessary in an information for retailing spirituous liquors without a license, to name the persons to whom the liquors were sold. Com. v. Dove, 2 Va. Cas. 26.

Charge in Disjunctive or Conjunctive.—And it is not error to charge the offence of selling spirituous liquors, wines, etc., without a license, in the disjunctive instead of the conjunctive, by using the word "or" in lieu of "and," in describing the various kinds of liquors and drinks charged in the indictment to have been sold without a license. Cunningham v. State, 5 W. Va. 508; Morgan v. Com., 7 Gratt. 592; Thomas v. Com., 90 Va. 92, 17 S. E. Rep. 788.

Indictment for Selling Spirituous Liquors Vlam.—A man, dealing in spirituous liquors in Wood county, went over into Taylor county and solicited orders there. The whiskey to fill these orders was shipped in jugs by the Baltimore and Ohio Railroad, being delivered by the seller in Wood county, to an express agent for transportation to the purchasers in Taylor county. They received the whiskey in Taylor county and paid the express charges. Subsequently the seller while on a visit to said county of Taylor, collected of these parties the price, which had been agreed upon for his whiskey. It was held that the seller could not be indicted in Taylor county for selling spirituous liquors without license, as on this state of facts the sales were made in Wood county, when the jugs of whiskey were delivered to the express agent. Until then there was only an executory contract for the sale of the whiskey. State v. Hughes, 22 W. Va. 743.

Duplicity.—An indictment charging that defendant, on a certain date between 12 o'clock Saturday night and sunrise of the succeeding Monday morning, permitted his barroom to be open, and then and there sold intoxicating liquors, charges but a single offence under Va. Code 1887, § 3804, declaring that within such hours no barroom should be opened, and that no intoxicating liquors should be sold in any barroom, but it is enough to prove either an opening or the selling. Morganstern v. Com., 94 Va. 787, 26 S. E. Rep. 402.

However, where an indictment charged that the defendant on a certain day, and without having first secured the proper authority according to law, did "at his store house and dwelling house, in Pennsboro, in said county" sell and offer to sell by retail, spirituous liquors, etc., it was held, on motion to quash, that it was not intended to charge two distinct sales at different places, but rather to describe the store and dwelling house as constituting one building and one and the same place: and, therefore, there were not two distinct offences charged in the same count. Conley v. State, 5 W. Va. 522. But under Va. Code 1887, a single sale of liquor without a license is a violation, as the law is not limited to persons engaged in carrying on the traffic; and if an indictment under this section should contain ten counts each charging a sale to a different person, which constitutes separate and distinct offences, a demurrer to the same will be overruled and properly so. Lewis v. Com., 90 Va. 843, 20 S. E. Rep. 777.

Immaterial Statement.—In Com. v. Scott, 10 Gratt. 749, the presentment described the defendant as a free negro; the prosecution being for selling ardent spirits under the Va. Acts of 1852, ch. 66, § 23; as for this offence, white persons, Indians and free negroes are to be prosecuted and punished in the same manner, and a plea that the defendant is an Indian and not a free negro is an immaterial plea, and was properly excluded.

Uncertainty in Charge.—And an indictment for selling without license intoxicating liquors to be drank where sold, uses the language of the 1st section of chapter 99, of W. Va. Acts, 1872-73, creating the offence, charging that the defendant, at a given place in the county, on a given day, did sell to a certain person, naming him, intoxicating liquors to be drank in, upon or about the building or premises where sold, without first obtaining a state license therefor according to law. Upon demurrer this indictment was held to be fatally defective, for uncertainty, in charging that the liquor was to be drank either in the building or upon the premises. State v. Charlton, 11 W. Va. 332.

Variance—What Not Deemed a Variance.—Where an indictment describes a prescription as stating that the liquor is absolutely necessary as a medicine, whereas the prescription states that the physician believes it to be so necessary, there is no variance between the indictment and evidence because of the word "believe" in the prescription. State v. Berkeley, 41 W. Va. 455, 23 S. E. Rep. 608.

When Not Material.—And at the trial of an indictment for retailing ardent spirits without license, "to persons to the jurors unknown," the defendant offered proof that the persons to whom he sold the same were known to the grand jury at the time the indictment was found. The court held that this was not a material variance between the proof and the charge in the indictment; for it is not necessary in indictments for such offence to name the persons to whom the liquor was sold, and so the words "to persons to the jurors unknown" are surplusage. Hulstead v. Com., 5 Leigh 724.

When Judgment Will Not Be Reversed for Variance—Waiver.—If one be presented "for retailing spirituous liquors without license," and an information be thereafter filed against him for a breach of another law, viz.: for selling by retail divers articles of merchandise of foreign growth, and manufacture," to which information the defendant pleaded "not guilty": and a trial was had, and a verdict and judgment; he having failed to take advantage of the variance in due time, cannot have the judgment reversed by the appellate court. Wells v. Com., 2 Va. Cas. 333.

Surplusage.—The words "knowing the said Michael Toole to be a minor," in an indictment for selling ardent spirits contrary to the statute, may and should be regarded as immaterial, and as surplusage, at the trial. State v. Cain, 9 W. Va. 559.

However, where a defendant is indicted under the statute of March 7th, 1834 (Acts of 1833-34, ch. 3), for retailing ardent spirits without license, the charge that the spirits were to be drank at the place where sold, shows that the indictment is upon the 17th, not the 3d section of that statute, and such charge can-

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not be rejected as surplusage, but must be proved. Com. v. Coe, 9 Leigh 620.

Joint Indictment.—And two persons may be jointly indicted or proceeded against, by information, for retailing ardent spirits without a license. But upon conviction there should be a separate fine against each of $30. Com. v. Harris, 7 Gratt. 600.

Joinder of Offences.—A count under the 17th section of the act of March 7th, 1834 (Acts 1833-34, p. 7), and a count under the 3d section of the same act may be joined in the same indictment. And the omission in the counts of the words "and certificate" does not make them defective. Peer's Case, 5 Gratt. 674.

Charge of Sale to Two Persons.—An indictment for selling ardent spirits without a license, may charge the sale to two persons. Peer's Case, 5 Gratt. 674.

When Indictment Defective for Not Following Statute.—An indictment under the 3d section of the act of 1839-40, ch. 2, p. 5, is good, though it does not negative the exceptions and provisos contained in the 4th section. But it is not necessary to allege, in an indictment, that the defendant is not within the benefit of the provisos of the statute, though the purview should expressly notice them. Com. v. Hill, 5 Gratt. 682.

However, in an indictment under section 18, ch. 38, of the Va. Code 1849, p. 209, the words, "without having a license therefor according to law," are not equivalent to the words, "without paying such tax and obtaining such certificate as is prescribed by the 14th section," which are the words used in the statute; and the indictment is defective. But in an indictment under § 18, ch. 38 of the Va. Code 1849, p. 209, for retailing ardent spirits, the words, "not to be drank where sold," not being in the statute, need not be in the indictment. Com. v. Young, 15 Gratt. 664.

Sufficiency of Charge.—An indictment, for that H, late of, etc., without having a license therefor according to law, did, on, etc., at, etc., in said county, sell by retail, wine, etc., not to be drank where sold, against the statute, etc., and against the peace and dignity of the commonwealth, is a good indictment. Com. v. Hatcher, 6 Gratt. 667.

So the offence of retailing ardent spirits without license is sufficiently charged in an indictment alleging that the defendant sold by retail, without license, whiskey, brandy, and other liquors to the jurors unknown, to be drank at the place where sold. Tefft v. Com., 8 Leigh 721.

And it is sufficient where the record of the finding of an indictment for retailing ardent spirits without license, states that the grand jury presented an indictment against W. T., for retailing liquors, a true bill. Tefft v. Com., 8 Leigh 721.

Moreover, in an indictment for selling ardent spirits to slaves, it is not necessary to state the names of the owners of the slaves to whom the liquor was sold. Com. v. Smith, 1 Gratt. 553.

So where an indictment founded upon the 3d section of chapter 99, of the acts of the legislature of 1872-3, charging that C on the first day of December, A. D. 1873, in Wood county, unlawfully did sell intoxicating liquors to one Michael Toole, a minor under the age of twenty-one years, he, the said C, knowing the said Michael Toole to be a minor, and not having the written order of his parents, guardians or family physician therefor, contrary to the form of the statute in such case, made and provided, and against the peace and dignity of the state, the indictment was held good after verdict, upon a motion in arrest of judgment. State v. Cain, 9 W. Va. 559.

Same—Opening Barroom.—An indictment for a violation of sec. 3804 of Va. Code 1887, contained a single count which charged (1) opening of a barroom and (2) selling intoxicating liquors therein. This indictment was demurred to on the ground that a charge in the same count contained two separate and distinct offences. The opinion of the court was as follows: "The objection made to the indictment is not tenable. The count follows the language of the statute, and charges that the opening of the barroom and the sale of the liquors were done at the same time and place. Opening a barroom or other place where intoxicating liquors are sold during the time it is prohibited by the statute is in itself a criminal offence, and so is the sale of intoxicating liquors. If they are separately done on different occasions, they constitute separate and distinct offences; but when they are charged, as in this indictment, in the language of the statute, and as being done at the same time and place, they constitute together only one offence, and there can be but one punishment." Morganstern v. Com., 94 Va. 787, 26 S. E. Rep. 402.

Where the legislature, for the purpose of suppressing a vice or preventing a wrong, has, by statute, made the vice or wrong a criminal offence, and, in defining the offence, has specified a series of acts, either of which separately or all together may constitute an offence, and has prescribed, as here, the same penalty for the commission of one or all of the acts, it is well settled that the commission of any two or more of them may be alleged in the same count of an indictment, if conjunctively charged. Although each act by itself may constitute an offence under the statute, yet, if they are all committed by the same person at the same place, they are to be considered as parts of the same transaction, and collectively constitute a single offence. The reports abound with decisions sustaining indictments of this character. Leath's Case, 32 Gratt. 873; Tiernan's Case, 4 Gratt. 545; Rasnick v. Com., 2 Va. Cas. 356; Angel v. Com., 2 Va. Cas. 231; Morganstern v. Com., 94 Va. 787, 26 S. E. Rep. 402.

B. ALLEGATIONS.

Discrimination between Offence under a General Prohibitory Act and One Making the Offence an Injury to a Certain Person.—But it is not necessary in an information for retailing spirituous liquors without license, to name persons to whom liquors were sold. Commonwealth v. Dove, 2 Va. Cas. 26; Hulstead v. Com., 5 Leigh 724.

In the latter case it was decided that on a trial of an indictment for retailing spirits without license, charging that the sale was made "to persons to the jury unknown," proof that the persons were actually known to the jury, when it found the indictment, does not constitute a variance between the proof and the allegations of indictment, so as to defeat the prosecution. The offence of selling ardent spirits without license, is not an offence against a third person, but an offence against the revenue laws, and may be against the social order and public morals. It matters not to whom and to what person it is sold, therefore, the name of the person is immaterial to be stated. Morganstern v. Com., 27 Gratt. 1024.

But quite a different case is presented when the offence of retailing spirits constitutes an injury to a third person. Thus, in a prosecution for a violation of the statute making it a penal offence, if any

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person shall sell or barter or cause to be sold or bartered, or being a merchant or tradesman, or keeper of an eating-house or ordinary, shall directly or indirectly, give or furnish or dispose of, or shall permit to be sold or bartered or given or disposed of, by his clerk or agent or salesman, to any minor knowing him to be a minor, without the consent of his parents or guardian, any wine or ardent spirits or mixture thereof, etc., the indictment is for an offence which is injurious to a third person. Therefore if the indictment is for selling to a minor whose name is "unknown to the grand jury," and it appears from the evidence that in fact the name of the minor to whom the liquor was sold, was known to the grand jury, this would be a fatal variance. In order that an indictment under a statute of this nature may be sustained it is necessary that the name of the party to whom the sale was made should be set forth in the indictment. Jackson v. Com., 27 Gratt. 1018; Morganstern v. Com., 27 Gratt. 1018. See also, Va. Code 1887, § 3828, Pollard's Supp. (1900), § 3828.

Unnecessary to Allege That the District Voted against License.—Under Acts 1885-86, p. 259, § 5, it is not necessary that an indictment shall allege that the magisterial district, wherein the sale of ardent spirits occurs, voted against license—as the court takes judicial notice of such vote; nor that the liquor sold was the subject of license before the vote was taken; nor the time when the sale was made—as the time of sale is not of the essence of the offence. See Acts 1887-88, p. 325, §§ 11, 12; Savage v. Com., 84 Va. 582, 5 S. E. Rep. 563.

Not Necessary to State Facts Concerning Compensation.—And an indictment which charges that the defendant, on a day and time specified, kept an ordinary without obtaining a license to do so, is sufficient, without setting out the facts of his furnishing for compensation, lodging or diet, etc. Burner v. Com., 13 Gratt. 778.

When Necessary to Allege Sale by "Retail."—But an indictment for selling ardent spirits, to be drank where sold, must allege that the selling was by "retail." Boyle's Case, 14 Gratt. 674.

What It Is Necessary to State in an Indictment for Selling Liquor to Slaves.—However, in an indictment for selling ardent spirits to slaves, it is not necessary to state the names of the owners of the slaves to whom the liquor was sold. Commonwealth v. Smith & Burwell, 1 Gratt. 554.

Indictment under Moffett Liquor Law Not Stating Defendant Was "Licensed" Is Fatally Defective.—Nevertheless § 5, ch. 59, Acts 1878-79, requires a licensed retail or barroom liquor dealer to perform certain duties therein mentioned: and in the 10th section of the said act it is enacted that "any licensed retail or barroom liquor dealer, as well as his agent, servant, or bar keeper, for every failure to perform any of the duties required of such dealer in the provisions of the 5th section of the said act, shall be deemed guilty of a misdemeanor." In a prosecution under sec. 5 and 10 of the said act the indictment alleged that the principal was a "barroom keeper," and a "barroom-liquor dealer" but did not allege that he was "licensed" as such. On motion in arrest of judgment the indictment was held fatally defective, the court saying as follows: "No doubt the offence intended to be charged against the accused in this case was a misdemeanor defined by the tenth section of the said Moffett Liquor Law (ch. 59, Acts 1878-79). But by the express terms of the act such offence could only be committed by a 'licensed retail or barroom-liquor dealer,' or 'his agent, servant or barkeeper.' To bring the case, therefore, within the said terms, it ought to have been averred in the indictment, that the accused, when he committed the act with which he is charged, was a 'licensed retail or barroom-liquor dealer.' He may have committed that act without being guilty of any legal offence. To authorize a valid conviction of an offence, it must be sufficiently charged in the indictment or information." Glass v. Com., 33 Gratt. 827.

Moreover, if in a prosecution under §§ 5 and 10 of the "Moffett Liquor Law," the indictment alleges that the principal was a "barroom-keeper," and a "barroom-liquor dealer," but does not allege that he was "licensed" as such, the indictment will be held fatally defective. Glass v. Com., 33 Gratt. 827.

And in an indictment under Va. Code 1887, § 587, for a violation of the local option law reciting that the defendant at a certain time and place, "did unlawfully sell wine, spirituous liquors, malt liquors and mixtures thereof," is not bad because it fails to allege that the sale was without a license; or because it is not stated whether the sale was by wholesale or retail; or because it fails to state that the magisterial district had voted against the sale of liquors therein. Hargrave v. Com. (Va. 1895), 22 S. E. Rep. 314.

So an indictment under Acts 1889-90, p. 242, § 1, for selling liquor without license must definitely state the place where sold, but the exact time of the sale need not be stated nor need it be stated that the sale was "by sample, representation, or otherwise." Arrington v. Com., 87 Va. 96, 12 S. E. Rep. 224.

Unnecessary to Allege to Whom a Druggist Sells.—So, in an indictment against a druggist under the W. Va. Code 1888, chapter 32, section 5, as amended by the act of 1887, chapter 29, it is unnecessary to insert the name of the person to whom the liquor was sold. State v. Ferrell, 30 W. Va. 683, 5 S. E. Rep. 155; State v. Pendergast, 20 W. Va. 672.

Allegation as to Time, Place, and Kind of Liquor Sold.—In Savage v. Com., 84 Va. 582, 5 S. E. Rep. 563, an indictment charged that the defendant "on the ——— day of March, 1887, in the magisterial district of Lee, in the said county, did unlawfully sell intoxicating liquors to one John Johnson, against the peace and dignity of the commonwealth." It was contended for the plaintiff in error that the indictment was defective—first, because it did not charge that the offence was committed in a magisterial district which had voted against license: secondly, because it did not charge that the liquor sold was as such the subject of license under the statute before the vote on the question of license was taken; and thirdly, because it did not state the time certain at which the liquor was sold. On appeal the court said: "We are of opinion that these grounds of objection are untenable. It was not necessary to allege in the indictment that the magisterial district therein mentioned had voted against license, for that was a fact of which the court would take judicial notice. Nor was it necessary to allege that the liquor charged to have been sold was anything than merely intoxicating. The language of the statute is, that 'any person who shall sell intoxicating liquors within the limits of any magisterial district voting against license,' shall be punished, etc. Acts 1885-86, p. 259, § 5. The indictment follows the language of the statute, and no further averment on that point was necessary. Commonwealth v. Bennett, 108 Mass. 27. And the third and last objection is met by the provisions of

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the statute, which enacts, that 'no indictment or other accusation shall be quashed or deemed invalid for omitting * * to state, or stating imperfectly, the time at which the offence was committed, when time is not the essence of the offence.'" Acts 1887-88, p. 335, §§ 11, 12. But in Morgan v. Com., 90 Va. 80, 21 S. E. Rep. 826, an indictment for the unlawful sale of ardent spirits, charged that the offence was committed in a certain district where, under the local option law, "no license" prevailed. The evidence was that the defendant sold ardent spirits to witness in the county, but did not designate the district. The jury found the defendant "guilty as charged in the indictment." The defendant moved to set aside the verdict on the ground that the evidence did not show that the sale took place in the district designated, but at a place within a certain county, whether in the designated district or not does not appear. The appellate court held that the motion should have been allowed.

Allegation as to Place.—An indictment under section 16, chapter 32 of the W. Va. Code 1887, against a person having a license to sell spirituous liquors, for a sale to a minor, need not specify the particular place where the sale was made, or allege that the place where the sale was made was the place designated in the license as the place at which the license was to be exercised. State v. Boggess, 36 W. Va. 713, 15 S. E. Rep. 423; State v. Cottrill, 31 W. Va. 162, 6 S. E. Rep. 428.

However, as held in Virginia, an indictment for selling by retail, without license, ardent spirits, to be drank where sold, must set out the place in the county where the sale is made. It is not sufficient to state the place in the county. Com. v. Head, 11 Gratt. 819.

And, furthermore, an indictment under Acts 1889-90, p. 242, § 1, for selling liquor without license must definitely state the place where sold. Arrington v. Com., 87 Va. 96, 12 S. E. Rep. 224.

Facts Constituting One a Qualified Voter.—Under W. Va. Code 1891, chapter 5, section 10, relating to giving away or distributing liquors on election day, it was held in State v. Pearis, 35 W. Va. 320, 13 S. E. Rep. 1006, that if an indictment is based on this section of the statute, it being charged that the person to whom intoxicating drinks were given, was a legally qualified voter, it is not necessary to state the facts constituting such person a qualified voter.

Name of Purchaser.—And an indictment for selling spirituous liquors in violation of section 1, chapter 32, W. Va. Code 1891, is good, though it does not name the purchaser. State v. Chisnell, 36 W. Va. 659, 15 S. E. Rep. 412.

Necessity of Alleging Former Statutory Provisions.—An indictment founded upon a provision of the 3d section of ch. 99, of the W. Va. Acts 1872-73, is good, though it contain no allegations touching any of the provisions of the first and second sections of the chapter. State v. Cain, 9 W. Va. 559.

Alleging Scienter.—Nor is it necessary to allege a special criminal intent, but the scienter, or general criminal intent, that is, that the accused knowingly and willfully did the unlawful act, is sufficient. State v. Pearis, 35 W. Va. 320, 13 S. E. Rep. 1006.

C. PROCEDURE.

Evidence Admissible—Sufficiency of Proof.—Upon an indictment for retailing ardent spirits, specifying the precise quantity and the kind, to be drank where sold, without license, proof of retailing any quantity of any kind of ardent spirits to be drank where sold, is sufficient. Brock v. Com., 6 Leigh 634. See generally, Com. v. Nutter, 8 Gratt. 699.

Moreover, under an indictment for selling spirituous liquors without a license, the commonwealth may prove any offence against a statute by the defendant, within the prescribed time; and is not confined to proof of the particular offence which was brought to the notice of the grand jury, and upon proof of which they found the indictment. Loftus v. Com., 3 Gratt. 631.

And by introducing evidence to show a sale under an indictment of one count, the state does not make such a final election to rely on that sale as will preclude it from proving another to sustain its indictment; and it is not error for the court, in its discretion, to allow evidence of another sale. State v. Chisnell, 36 W. Va. 659, 15 S. E. Rep. 412.

Demurrer Sustained—Violation of Bond.—It is not error to sustain a demurrer to an indictment for the violation of the conditions of a bond required in order to obtain a license to sell spirituous liquors, when the indictment does not allege that the violation occurred at the place the liquors were to be sold under the license. State v. Church, 4 W. Va. 745.

XXXVII. JAILOR.

When Indictable.—An indictment against a jailor, for permitting a prisoner in his custody to have an instrument in his room with which he might break the jail and escape; and for failing carefully to examine at short intervals the condition of the jail, and what the prisoner was engaged at in said jail, in consequence of which the prisoner escaped, does not state an indictable offence. Com. v. Connell, 3 Gratt. 587.

But an indictment lies against a jailor, for negligently permitting a prisoner committed to his custody to escape. Commonwealth v. Connell, 3 Gratt. 588.

XXXVIII. LARCENY.

A. IN GENERAL.

When Stolen Goods Carried into Another County Indictment May Be in Either.—"All the writers on common law lay it down, that, if goods be stolen in one county, and carried into another, the offender may be indicted in either, because the offence is complete in both. If the original taking be felonious by the common law, the felon can acquire no color of right thereby, and every act of possession constitutes a felony. No principle in respect to larceny seems to be more clearly settled than this; and it has been repeatedly sanctioned in this state." Per MAY, J., in Com. v. Cousins, 2 Leigh 769 [709]. See also, Strouther v. Com., 92 Va. 789, 22 S. E. Rep. 852.

Stolen Goods Carried into Another Country.—This rule of the common law, however, was never extended further than to counties. It seems to be a question somewhat mooted, whether a thief who has stolen goods in one country and brought them into another, can in the latter country be punished for the theft of the goods, in the absence of statute. The preponderance of authority, however, holds that the offence is not punishable in the country in which the criminal seeks refuge and is found. Thus, an accused was indicted in Virginia for larceny of a horse in the county of Berkley, West Virginia. The charge was that the plaintiff on a certain day in the county of Berkley, in the state of West Virginia, did then and there feloniously, etc., carry away from the county of Berkley, etc., in the state of West Virginia, etc., and bring into the city

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of Winchester, etc., one iron gray horse, against the peace and dignity of the commonwealth of Virginia. The court held that: "Where goods were stolen in one country and brought by the thief to another country, the latter country, by the English common law, had no jurisdiction to try the offence." Strouther's Case, 92 Va. 789, 22 S. E. Rep. 852. The court cited as authority for this proposition, Whart. Cr. Law (9th Ed.) § 291; Stanley v. State, 24 Ohio St. 166; Com. v. Uprichard, 2 Gray (Mass.) 434.

In this connection it will not be improper to observe § 3890, of the Va. Code 1887, which provides that: "Prosecution for offences committed wholly or in part without, and made punishable within, this state, may be in any county or corporation in which the offender is found, or to which he is sent by any judge, justice or court." At first glance this statute may seem to give jurisdiction to Virginia courts to try an offender against the laws of another state, if found in this state, provided the act done would have constituted an offence against the laws of Virginia had it been committed within her borders. This construction is probably not such as to give the statute its true meaning, consequently not a correct interpretation of the legislative intent. The true construction would seem to be, that the statute includes within its purview only such acts as constitute, when committed, a crime against the sovereignty of the state, either because the common law pronounces it such, or else, for the reason that it has so been declared by statute. Consequently, the mere fact that the laws of separate and independent jurisdictions, by chance, coincide in declaring that similar acts shall constitute a certain offence, with like results, if committed within the bounds of the state enacting or enforcing such law, would not, it is believed, bring such acts within the purview of a statute of like import as the one above quoted (Va. Code 1887, § 3890). So far as ascertained the Virginia court has not directly construed the above statute in reference to the particular point under discussion, although in the Strouther Case, 92 Va. 789, 22 S. E. Rep. 852, support is indirectly given to the construction contended for. The facts in this case, which have elsewhere been more fully given, furnish an excellent illustration for the application of this principle, and will be in part repeated. Strouther was charged with larceny of a horse in West Virginia, and upon being found with the property in the city of Winchester, Virginia, was arrested, indicted and tried for the offence in the corporation court of the city of Winchester. On appeal it was held that, Virginia had no jurisdiction to try the prisoner. Section 3890 was in force when the Strouther case was decided, but it was neither passed upon nor referred to in the opinion, nor, as it appears, was it relied upon by counsel, which was entirely proper if the construction contended for, is the true one. The offence was at common law punishable either in the county where the act was committed, or in the county where the prisoner was found, provided both counties were in the same state or sovereignty,—this for the reason that both counties were under a common jurisdiction.—the sovereign state of which they formed a part. But as between different sovereign states, the jurisdiction was clear cut and defined, and the crime of larceny committed in one, was not deemed an offence against the sovereign within whose bounds the thief sought refuge. Such is the status of most other common-law offences. This rule is changeable at the will of the legislature, which body may abrogate it wholly, or in part, as it has done in some instances, viz: § 3067, punishing one who strikes or poisons another in this state, by reason of which such stricken or poisoned person dies within another state; or §§ 3683-4, punishing those who by agreement leave this state and go into another state and engage in a duel. In the absence of these and other statutory or constitutional provisions, making acts done without the state, crimes against this sovereignty, which were not such at common law, acts done in another jurisdiction are not, it would seem, properly cognizable in Virginia under the Va. Code 1887, § 3890.

Articles Belonging to Different Owners.—Where several articles are stolen at one time and place, the stealing is regarded as one transaction and may be charged in a single count, though the articles belong to different persons. Alexander v. Commonwealth, 90 Va. 809, 20 S. E. Rep. 782.

Conviction of Larceny on Indictment for Housebreaking.—Housebreaking with intent to commit larceny, and grand larceny, are different offences and to each is affixed its own penalty, but they may be, and often are, one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either or both offences, but there can be only one penalty imposed. If it is desired to punish for both offences, in a case of this kind, a separate count for larceny must be inserted in the indictment. If there is a conviction generally, or of the grand larceny only, and it is submitted to, in either case, this is a bar to further prosecution. Benton v. Com., 91 Va. 782, 21 S. E. Rep. 495.

Former Conviction or Second Offence.—An indictment for petit larceny, which proceeds to charge that the person indicted had been previously indicted, tried and sentenced for another petit larceny, is an indictment for a felony. Rider v. Com., 16 Gratt. 499; Pryor v. Com. (Va.), 26 S. E. Rep. 864.

Triable in County Court.—An indictment for petit larceny alleging that the prisoner has been twice before convicted of a like offence is triable in the county court. Pryor v. Com. (Va.), 26 S. E. Rep. 864; Rider v. Com., 16 Gratt. 499.

And this is true of an indictment containing two substantially similar counts, one of which, because of formal defects, charges only a misdemeanor. Pryor v. Com. (Va.), 26 S. E. Rep. 864.

B. THE INDICTMENT.

1. IN GENERAL.

Statutory and Common-Law Offences.—Where, under statute, larceny may be committed in several ways, some of which would not constitute the offence at common law, it is not necessary that the indictment should inform the accused in which of the ways he is charged, and an indictment in common-law form will be good for a statutory larceny not existing at common law. Anable v. Com., 24 Gratt. 563; Dowdy v. Com., 9 Gratt. 727; Leftwich v. Com., 20 Gratt. 716; Price v. Com., 21 Gratt. 846; State v. Halida, 28 W. Va. 503; Fay v. Com., 28 Gratt. 912. In the last-named case it was said that in a prosecution for obtaining money under false pretenses which is mere larceny by statute, where the indictment is for larceny, to sustain the prosecution the commonwealth must prove every fact which would be required to be alleged in an indictment for obtaining money under false pretenses. That in such an indictment it would be a material allegation that the money was obtained by the false pretenses

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alleged, and therefore it is necessary to be proved under the indictment for larceny in order for a conviction.

However, it is absolutely necessary in an indictment for larceny, to state in whom the property is, and the proof must correspond with the allegation. Mabry v. Com., 2 Va. Cas. 396.

And in indictments where the thing stolen is alleged to be the property of a corporate body by name, it is not necessaryto aver the political existence of the corporation. Its existence is a matter of evidence, and, after verdict it is inferred from its corporate name. Thus, where an indictment alleged that the notes and dollars charged to have been stolen, were the property and effects of the "President, Directors and Company of the Farmers of Virginia." After verdict, the court is bound to presume, that on the trial, the capacity of this company to hold property, that is, their corporate existence, was proved to the jury, or admitted by the prisoner: for, it is quite clear,that he might have exacted this proof and if it was not given, he must have been acquitted on the count. Lithgow v. Com., 2 Va. Cas. 297.

If a person be examined for stealing three bags of cotton, "of the goods and chattels of Nathaniel Land," he may be indicted in two counts for stealing three bags of cotton, first of the goods and chattels of N. L.; secondly, of the goods and chattels of a person unknown. And he may be convicted and sentenced on the second count, and acquitted of the first. Lithgow v. Com., 2 Va. Cas. 297.

Charging the Offence—Common-Law Form Not Indispensable.—An indictment under § 49, ch. 192, of Va. Code 1860, contained three counts, in each of which the offence was set out specially, and not in general terms, as in the case of a larceny at common law. The prisoner was convicted and sentenced for three years in the penitentiary under the said indictment. He contended in the appellate court that the counts of the indictment ought to have been quashed, because they were not in form as for larceny at common law, and did not allege the stealing, taking and carrying away of a subject of larceny. It was decided by the court that it certainly would have been competent for the pleader to have counted as for a larceny of the subject in the form of an indictment for larceny at common law, and proof of the special facts set down in the act as constituting the offence, would have sustained the charge. Dowdy v. Com., 9 Gratt. 727, 734. But it is also competent for the pleader, instead of counting for a larceny of the subject in the form of an indictment for larceny at common law, to charge the specific fact which the act declares shall be deemed larceny. The legal conclusion deducible from these facts is drawn by the act itself, and need not, of necessity, be drawn in the indictment. Leftwich v. Com., 20 Gratt. 716.

Larceny Must Be Properly Laid.—In an indictment for larceny, the charge of larceny must be laid in proper form in order to convict of that offence, if the prisoner should be acquitted of the charge of burglary. State v. McClung, 35 W. Va. 283, 13 S. E. Rep. 654.

Proof Which May Sustain Indictment.—Larceny may be sustained by proof that the property was obtained by false pretenses. Thus, in Fay v. Com., 28 Gratt. 912, a person was indicted for the larceny of certain notes of United States currency. The proofs referred to the prisoner obtaining the money from the owner by false pretenses. To sustain the prosecution it was necessary for the commonwealth to prove 'every fact which would be required to be alleged in an indictment for obtaining money on false pretenses. Therefore it would be a material allegation that the money was obtained by the false pretense alleged; consequently, it is necessary to be proved under the indictment for larceny in order to a conviction. This case is cited in Pitsnogle's Case, 91 Va. 811, 22 S. E. Rep. 351, to support the proposition that on an indictment for larceny, proof of embezzlement is sufficient to sustain the charge. See also, Shinn's Case, 32 Gratt. 899, and *note*. In State v. Halida, 28 W. Va. 503, the court says: "Both counts in the indictment are good as counts for simple larceny. It is therefore not important whether or not the first count is also good as an indictment for obtaining the mule under false pretenses, because under the decisions above cited, all the evidence which could be introduced to sustain an indictment for obtaining the mule by false pretenses can also be introduced in support of an indictment for simple larceny, the legal offence as well as the punishment in both cases being precisely the same," citing Fay v. Com., 28 Gratt. 912, and Dull's Case, 25 Gratt. 965. See also, Anable's Case, 24 Gratt. 563; Leftwich's Case, 20 Gratt. 716; Dowdy's Case, 9 Gratt. 727; State v. Reece, 27 W. Va. 375.

Moreover, as held in State v. Halida, 28 W. Va. 499, upon an indictment for simple larceny, the state may convict by proving, either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense.

General and Special Ownership.—"There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a special property in them; and that they may be laid as the goods and chattels of such person in the indictment. A lessee for years, a bailee, a pawnee, a carrier and the like have such special property; and the indictment will be good, if it lay the property of the goods either in the real owners, or in the person having only such special property in them." Russell on Crimes, vol. 2, p. 288, quoted with approval in State v. Heaton, 23 W. Va. 773. See Minor's Syn. Cr. Law 168.

And if a horse is owned by one who dies intestate leaving a widow and infant children, and no administrator has qualified on the estate of the decedent, and the horse remains on the farm of the decedent; and there has been no sale or distribution of the decedent's estate, but the horse as well as the children remain on the farm under the control of the widow, and while so under her control the horse is stolen, it may properly be described in an indictment for such stealing as the property of the widow. State v. Heaton, 23 W. Va. 773.

Owner a Married Woman.—But in an indictment for larceny, the name of the owner of the property charged to have been stolen, must be stated; and if it appears that the person so stated to be the owner was a married woman at the time of larceny, it is error and the prisoner should be acquitted. Hughes v. Com., 17 Gratt. 565.

Equivalent Words.—Va. Code, sec. 3712, makes it larceny to "fraudulently" dispose of or receive goods with intent to defeat a distress or levy made thereon. It is held, that an indictment framed on the language of the statute, which charges that the goods were "unlawfully and injuriously" disposed of, without alleging that it was "fraudulently"

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done, is sufficient. Duff v. Com., 92 Va. 769, 23 S. E. Rep. 643.

Conclusion—An Indictment for Horse Stealing Need Not Conclude Contra Formam Statuti.—Indictments for horse stealing need not conclude *contra formam statuti:* and even if it were proper that they should, the omission would be cured by the statute of jeofails. Chiles v. Com., 2 Va. Cas. 260.

2. SPECIFIC ALLEGATIONS AND DESCRIPTIONS.

Ownership.—In an indictment for larceny, the name of the owner of the property charged to have been stolen, must be stated. Hughes v. Com., 17 Gratt. 565; Alexander v. Com., 90 Va. 811, 20 S. E. Rep. 782.

Want of Owner's Consent.—Nevertheless, an indictment under the statute, 1 Rev. Code ch. 111, sec. 30, for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner and deprive him of his property, is fatally defective, after verdict, for want of an averment, that the slave was so taken and removed *without the consent of the owner*. Com. v. Peas, 2 Gratt. 629.

However, three beehives to the value of five dollars, and three swarms of bees, to the value of three dollars, and forty pounds of honey, to the value of five dollars, with an allegation of ownership, was held to be good after verdict, it being taken by intendment that the bees were reclaimed and that the honey was the property of the alleged owner. Harvey v. Com., 23 Gratt. 941.

Possession.—But in larceny, at common law, the indictment need not charge that the goods were stolen from the possession of the owner, or of any other person. Thompson v. Com., 2 Va. Cas. 135. As was said in Angel v. Com., 2 Va. Cas. 228, in an indictment for the larceny of bank notes under the statute of 1819, it is not necessary that it should charge that the stealing was from the possession of any one.

The Intent—Felonious Intent.—In an indictment for stealing under Act of 1806, it should be charged that the goods were feloniously stolen, although by the act it is not denominated a felony; and this error is not cured by the statute of criminal jeofails. Barker v. Com., 2 Va. Cas. 122.

And it was said in Wolverton v. Com., 75 Va. 911, that a felonious intent is an essential ingredient in the crime of larceny whether grand or petit and distinguishes it from a mere trespass.

Description of Property.—An indictment charged the stealing of "one lot of queen's ware" without further description. It was objected that the prisoner could not, if subsequently indicted for stealing the specific articles comprised in the said "lot of queen's ware" avail himself of the plea of former conviction in the case. The court held that the description of the goods stolen as "a lot of queen's ware" is sufficient after verdict. And that upon a subsequent indictment for stealing the specific articles embraced in the "lot of queen's ware," the prisoner would not lose the benefit of the plea of former conviction because he would have the right to establish the identity of the articles by proof. 3 Greenleaf Evidence, sec. 36; 2 Leading Criminal Cases 500-556; Vaughan v. Com., 17 Gratt. 578.

Value—Rule at Common Law.—At common law no rule of criminal pleadings was better established than that which required that in indictments for larceny the value of the property should be stated. The reason of the rule was to distinguish between grand and petit larceny. This rule applied to every species of property, to bank notes and other money as well as to other property. And before a party could be convicted of grand larceny, it was necessary to charge and prove the value of the thing stolen to be at least of that amount which the law makes grand larceny. But it is competent for the legislature to modify these rules and to declare what shall constitute grand larceny without respect to the value of the thing stolen; and what shall be deemed the value of certain specified property irrespective of its real value. Adams v. Com., 23 Gratt. 949.

Statutory Offence—Value Disregarded, but Not Ownership.—And in an indictment for stealing bank notes, it is sufficient to state that the notes were for a certain sum of money, without stating their value, under the act, Code of 1860, ch. 194, sec. 15-16. Adams v. Com., 23 Gratt. 949.

However, if the indictment for stealing bank notes does not charge that they are the bank notes of, or belong to, some person or persons by name, or of, or to, some person, to the jurors unknown, the defect is fatal, and is not cured by the statute of jeofails. Barker v. Com., 2 Va. Cas. 122.

Price Equivalent to Value.—But an indictment under sec. 14, ch. 145, W. Va. Code 1887, which charges the accused with the larceny of "one gelding horse, of the *price* of $100," instead of one gelding horse of the *value* of $100, according to the words of the statute, is sufficient. The word "price," as used here, is equivalent to the word "value," used in the statute. State v. Sparks, 30 W. Va. 101, 3 S. E. Rep. 40.

Sufficiency of Description—Allegation or Charge, Description—Bees Described as "Goods and Chattels."—Three swarms of bees were described to be of the goods and chattels of one Vincent Shelton; this was held to be, in effect, an averment, that when stolen they were his property and in his possession. Harvey v. Com., 23 Gratt. 943.

Same—Bank Note.—So a description of a bank note which merely states that they were bank notes current within the United States, was held sufficient. Com. v. Moseley, 2 Va. Cas. 154.

Same—Description of Money.—In an indictment under § 49, ch. 192, Va. Code of 1860, for obtaining money upon a false pretense, it is not sufficient to describe it as "ninety dollars in United States currency"; because "United States currency" may be gold, or silver, or treasury notes, or bank notes. Proof that any of these subjects were obtained by the false pretense alleged would be perfectly consistent with the indictment, which, therefore, is too vague. It ought to show what kind of United States currency was obtained. Leftwich v. Com., 20 Gratt. 716.

Same—Writings and Papers.—In an indictment under the statute making writings and papers of value the subject of larceny, a description of the papers by the name and designation by which they are usually known, and which properly avers the value thereof is sufficient. Fredrick v. State, 3 W. Va. 695.

But an indictment charging the prisoner with stealing certain papers of the value of $110, yet not otherwise describing the papers charged to have been stolen, is fatally defective. Robinson v. Com., 32 Gratt. 866.

Same—Check.—In Whalen v. Com., 90 Va. 544, 19 S. E. Rep. 182, an indictment charged the larceny of divers United States treasury and national bank notes, and also "one paper purporting to be a check for the payment of one hundred and twenty-five

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dollars, of the value of one hundred and twenty-five dollars, the goods and chattels of one H. A. Ricketts, then and there being upon the person of the said Ricketts." It was contended that the description of the check was vague and indefinite, and especially because there was no allegation that any part of it remained due and unsatisfied at the time of the alleged larceny. The court held this objection to be untenable, giving as a reason for their position that the offence of stealing the check, or promissory note, or anything of that sort is altogether statutory, being made a crime by section 3708 of the Code of 1887; that it is laid down as a well established rule that where a statute, simple, and in terms not limited, makes indictable the larceny of "any promissory note," it is adequate to say "one promissory note for the payment of, etc., of the value of," etc.: that section 3709 of Code 1887 which provides that in a prosecution like the present the money due on or secured by the writing in question, "and remaining unsatisfied," shall be deemed to be the value of the article stolen, merely prescribes a rule for estimating the value of the paper, and is not a part of the necessary description, although the words "remaining unsatisfied" are usually in the indictment in such cases.

Allegation.

Specific Designation of Owner.—Where the larceny of several articles belonging to different owners was charged in one count of an indictment, and the ownership of each article specifically set forth, the indictment was held good. Alexander v. Com., 90 Va. 811, 20 S. E. Rep. 782.

Bank Notes—Averment as to Property.—So an indictment which charges a larceny of bank notes "of the money, goods and chattels of one G. F. and from the said G. F.," is a sufficient averment of property in the said notes in G. F., the person from whom they were stolen after verdict. Com. v. Moseley, 2 Va. Cas. 154.

Housebreaking—Theft.—And in an indictment charging the prisoner with breaking and entering in the nighttime the shop of Hugh F. Lyle, "then and there being found," and with stealing certain articles "then and there being found," it was objected that the articles alleged to be stolen were not described as the property of any person. It was held that the allegation that the prisoner broke and entered the shop with intent to steal the goods of Lyle "then and there being found" and that he "then and there stole the goods described," is a sufficient averment after verdict that the goods stolen were the property of Lyle. Vaughan v. Com., 17 Gratt. 578.

Slave—Larceny—From Whose Possession Stolen.—However, in an indictment for larceny of a slave, *the goods and chattels of one A, and out of the possession of the said A*, is bad, if the slave was hired for the year to B and was in B's actual possession at the time of the larceny. Com. v. Williams, 1 Va. Cas. 14.

Moreover, an indictment under sec. 3712, Va. Code of 1887, making it larceny to "fraudulently remove, destroy, receive or secrete goods and chattels that have been distrained or levied on, with intent to defeat such distress or levy," framed in the language of the statute, which charges that they were "unlawfully and injuriously" disposed of, without alleging that it was "fraudulently" done, is insufficient. Duff v. Com., 92 Va. 769, 23 S. E. Rep. 643.

3. THE CHARGE—WHEN NO OFFENCE IS SET FORTH.—An indictment at common law for taking a horse "unlawfully and injuriously,"—the usual form with force and arms being also used,—was held not to describe the act as one that constitutes a breach of the peace. Com. v. Israel, 4 Leigh 675.

Same—Possession Not Proved as Laid.—One count of an indictment charged larceny of a slave "from the possession of A." The other count charged larceny without alleging from the possession of any one, and not concluding *contra formam statuti*. Verdict found the stealing while the slave was a runaway. The appellate court held the first count insufficient, the slave not being stolen "from the possession of A;" the second count insufficient, the offence charged not being an offence at common law. Com. v. Hays, 1 Va. Cas. 121.

Same—In Language of the Statute.—An indictment for grand larceny was objected to because it did not sufficiently charge the offence in the language of the statute on which it was founded. But it was held that an offence is sufficiently charged in the language of the statute, when in an indictment for grand larceny the articles stolen, which are not technically bank notes, but are embraced under the terms, writings and papers of value found in the statute, are described by the name and designation by which they are usually understood and known in the country, and the value properly averred, so that the accused has full notice of the charges against which he is required to defend himself. Fredrick v. State, 3 W. Va. 695.

4. SURPLUSAGE.—Unnecessary and irrelevant matter in an indictment may generally be treated as surplusage if, when stricken out, enough remains to sufficiently charge the larceny. Pomeroy v. Com., 2 Va. Cas. 342; State v. Reece, 27 W. Va. 377.

So when an indictment charges that the prisoner committed a *larceny* of certain bank notes, "purporting on their faces to be, and being bank notes of and issued by bank charter," etc., the latter part of the charge may be rejected as surplusage, because it constitutes an independent allegation of an immaterial fact, and the fact constituting the offence is fully charged without it. It is not, therefore, necessary in such case to give proof of the charters of those banks. Pomeroy v. Com., 2 Va. Cas. 342.

And an indictment under the act approved February 28, 1874, entitled "An act to amend sec. 6, ch. 201, of the Code of 1873," charging a larceny of "divers notes of the national currency of the United States" is precisely the same in meaning and effect as a charge of larceny of the "United States currency" and is sufficient. The addition of the word "national" in the indictment can certainly make no difference. Dull v. Com., 25 Gratt. 973.

5. MISJOINDER.—Where an indictment contains three counts, the first, for a larceny jointly against three persons; the second, a count for larceny against the same parties committed jointly, in accordance with a previous agreement to that end; the third, a count for obtaining goods by false pretenses, fashioned after the manner of the second count, there is no misjoinder of counts, and the indictment of each count thereof is good.

So where an indictment charges joint defendants with conspiracy to commit a larceny, and then charges them with actually committing a larceny in pursuance of the conspiracy, there is no misjoinder. Anthony v. Com., 88 Va. 847, 14 S. E. Rep. 834.

Moreover, larceny and receiving stolen goods knowing them to be stolen may be joined in the same count of an indictment. State v. Halida, 28 W. Va. 499.

6. VARIANCE.—To support the allegation in an indictment, that the bank notes purport on their faces

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to be notes of certain banks, the notes produced in evidence must correspond therewith. Pomeroy v. Com., 2 Va. Cas. 342.

As to what constitutes a variance, it is held that if an indictment allege the larceny of a watch belonging to "Edmond Bolden," while the evidence shows it to be the property of "Ed Bolen," the names are *idem sonans*. and no variance is caused thereby. Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351.

So a variance is not material where the indictment charges the stolen goods to be the property of Robert Buster, if the proof is that the owner of the goods is a certain James Robinson Buster, who is sometimes called Rob, Robin and Bob Buster, and that he accepted and answered to these names. This for the reason that it does not appear that the owner of the goods is another and a different person, therefore the variance is clearly not fatal. State v. Reece, 27 W. Va. 380. Moreover, if the record of an examining court charges the stealing of a dark bay horse, or the stealing of two horses and a halter, chain and collar, of the value of $150, and the indictment charges the stealing of a dark bay gelding, or the stealing of two horses of the value of $75 each, these variances are not sufficient to quash the indictment. Halkem v. Com., 2 Va. Cas. 4. As to the effect of a variance, the question arose in Robinson v. Com., 32 Gratt. 866. The prisoner was on trial for stealing certain bank notes, "the numbers and denomination of which were unknown to the jurors;" the evidence of the commonwealth showed that the number and the denomination of the notes were known to the jurors, and for this variance between the indictment and the evidence the court, on the motion of the prisoner excluded the evidence; and then against the objection of the prisoner, discharged the jury. On a second indictment for the same offence, the prisoner put in a special plea of "once in jeopardy." The court held that, if the jury had, on the first trial, rendered a verdict in favor of the prisoner, that verdict could not have been pleaded to the second indictment because the acquittal was effected in consequence of a variance between the allegations and the proof, which under Va. Code 1860, ch. 199, § 16, is no bar to a new indictment.

C. TRIAL AND PROCEDURE.

1. IN GENERAL.

Charge of Clerk.—If on an indictment for larceny, the clerk charges the jury in the usual form, and on the trial it appears that the money charged to have been stolen was obtained by false pretenses, another charge by the clerk is neither necessary nor proper. Dull v. Com., 25 Gratt. 966.

Contradicting Existence of Check—Estoppel.—Upon an indictment against the secretary of a building fund association, for the larceny of a check, whether the building fund association was organized strictly in conformity with the requirements of the statute, is not a proper subject of enquiry, the accused having as secretary of the association, received and wilfully appropriated its funds or property, cannot be heard, upon a criminal prosecution therefor to contradict its legal existence. Shinn v. Com., 32 Gratt. 899.

Election—When Defendant Cannot Compel.—And where an indictment contains two counts each of which is sufficient for simple larceny, the defendant cannot compel the state to elect and try him on one count only, unless it appears that the counts charge separate and distinct offences. State v. Halida, 28 W. Va. 499.

Same—Counts for Larceny and Receiving Stolen Goods.—So if an indictment contains several counts, one for larceny, others for receiving stolen goods knowing them to have been stolen, and others for aiding another person to conceal stolen goods knowing them to have been stolen, but the charges in all the counts, however, relate to the same goods, which in different counts are laid to be the goods of different persons, or of a person unknown, it is not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner shall be tried. Dowdy v. Com., 9 Gratt. 727.

What Conviction May Be Had.

Conviction of Larceny under Charge of Kindred Offence.—Where the indictment or information charges a kindred offence which embraces the essential elements of larceny, there may be a conviction of larceny thereunder. State v. McClung, 35 W. Va. 285, 13 S. E. Rep. 654; Vaughan's Case, 17 Gratt. 576; Butler v. Com., 81 Va. 159.

Moreover, it is well settled that an indictment for burglary is not bad for duplicity because it charges the completion of the larceny. State v. McClung, 35 W. Va. 285, 13 S. E. Rep. 654; Vaughan's Case, 17 Gratt. 576; Butler v. Com., 81 Va. 159.

And in State v. McClung, 35 W. Va. 285, 13 S. E. Rep. 654, it is further laid down, that under an indictment for burglary which also charges the consummation of the theft, a conviction can be had for larceny upon failure of the conviction for burglary. But in other cases the charge of larceny is construed literally as a mere substitute for the charge of an intent to steal, and conviction for larceny cannot be had under such an indictment. Butler v. Com., 81 Va. 159.

Furthermore, if in an indictment for burglary all the elements of burglary are not charged, but those of larceny are charged, the indictment will be good for the latter offence. State v. Hupp, 31 W. Va. 355, 6 S. E. Rep. 919.

Thus, on an indictment, which charged not only the breaking and entering, but also the stealing of a trunk and its contents of stated value, the prisoner though acquitted of the burglary, may be found guilty of the larceny. Clarke v. Com., 25 Gratt. 908.

And in State v. Reece, 27 W. Va. 377, it was held that if an indictment for burglary is defective as such, it may, if it contains sufficient averments, be a good indictment for grand larceny. The charges in regard to the breaking and entering the store house may be treated as surplusage.

Conviction of but One Offence.—But if two offences are charged in separate counts there can be no conviction of both. State v. McClung, 35 W. Va. 284, 13 S. E. Rep. 654; Speers v. Com., 17 Gratt. 570.

Joinder of Offences in Same Count—Conviction of Lesser Offence.—Still, under a charge of grand larceny a conviction can be had for petit larceny. State v. McClung, 35 W. Va. 285, 13 S. E. Rep. 654.

Charge of Larceny from Building.—And under an insufficient charge of larceny from a building, a conviction for simple larceny may be had, if the indictment is sufficient in other respects. Vaughan v. Com., 17 Gratt. 576.

Prosecution or Conviction for One of Several Articles Charged.—And it is held that, if any one of several articles charged in an indictment is not the subject of larceny a conviction may be had for the larceny of the others. Harvey v. Com., 28 Gratt. 941.

2. SUFFICIENCY OF PROOF.

Connecting Ownership with Name in Indictment.—But in a trial for larceny, to convict the prisoner,

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there must be satisfactory proof that the property stolen was the property of the person stated in the indictment. Jones v. Com., 17 Gratt. 563.

However, it is sufficient to prove that at the time the offence was committed, the actual or constructive possession of the property stolen was in the person alleged in the indictment to be the owner thereof. State v. Chambers, 22 W. Va. 779.

Indictment for Larceny Sustained by Proof of Embezzlement.—And upon an indictment simply charging larceny the commonwealth may show that the subject of larceny was embezzled. Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351; Code Va. 1887, sec. 3716.

Indictment for Larceny Sustained by Proof That Goods Were Stolen by Another and Received by Accused.—And if a person be indicted for the simple larceny of a thing, and the proof be that it was stolen by some other person, and received by the accused knowing it to have been stolen, the proof will sustain the charge; the act making the receiving of a thing stolen, knowing it to have been stolen, larceny. Code (Ed. of 1860), p. 789, sec. 20; Price v. Com., 21 Gratt. 846.

Defeating a Distress.—Under Code, sec. 3712, making it larceny to "fraudulently" dispose of or receive goods with intent to defeat a distress or levy made thereon, proof of the facts constituting the offence is sufficient to sustain an indictment for larceny. Duff v. Com., 92 Va. 769, 23 S. E. Rep. 643.

Gold Watch Alleged—Represented as Such—Conviction.—Where an indictment alleged the larceny of a "gold" watch, evidence of the owner that he gave $30 for it, and that when he purchased it, it was represented to be gold, is sufficient to sustain conviction. Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351.

Production of Stolen Articles.—In an indictment for larceny of bank notes, it is not indispensably necessary to produce the stolen notes upon the trial. Moore v. Com., 2 Leigh 701.

3. ARREST OF JUDGMENT.

What Omissions in Indictment for Second Offence No Ground for Arrest of Judgment.—If an indictment against an accused for the second offence of petit larceny alleges a former conviction and punishment of the accused for a like offence, but does not in terms allege that the court in which the first offence was tried had competent authority to try the same; nor that the former conviction remains in force; nor that such conviction appears by the record; nor that the accused formerly convicted is the same person who is charged with the subsequent offence, and there is a verdict of guilty, none of the omissions aforesaid in the indictment is a ground for arresting the judgment. Stroup v. Com., 1 Rob. 754.

4. WHAT COMMONWEALTH MAY SHOW UNDER INDICTMENT.

Indictment for Larceny Sustained by Proof of Obtaining Goods under False Pretense.—Upon an indictment simply charging larceny, the commonwealth may show either that the subject of larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense. Anable v. Com., 24 Gratt. 563; Leftwich v. Com., 20 Gratt. 716; Dowdy's Case, 9 Gratt. 727; Price v. Com., 21 Gratt. 846; Fay's Case, 28 Gratt. 912; Dull's Case, 25 Gratt. 965; Shinn's Case, 32 Gratt. 899; Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351. A similar rule prevails in West Virginia. See State v. Halida, 28 W. Va. 503.

XXXIX. LEWD AND LASCIVIOUS COHABITATION AND CONDUCT.

A. IN GENERAL.

The Indictment Must Show That the Offence is Not Barred by the Statute of Limitations.—An indictment for an offence, the prosecution for which is by statute limited to a certain time after the offence was committed, showing upon its face that at the time the indictment was found the prosecution of the offence was barred by such statute, is fatally defective, and the defendant may take advantage of such defect, by motion to quash the indictment, or by demurrer thereto, or by motion in arrest of judgment. Therefore, an indictment for adultery and fornication found on the 8th day of April 1864, which charged the defendant with having committed the offence on the 10th day of March 1863, was upon a general demurrer filed thereto held fatally defective. State v. Ball, 30 W. Va. 382, 4 S. E. Rep. 645.

Miscegenation—Existence of Negro Blood in Accused.—In order to sustain an indictment, under sec. 8, ch. 7, Acts 1877-78, making the intermarriage of a negro with a white person, a felony, it must first be established that the accused is a person with one-fourth or more of negro blood in his veins; and the burden of proving this lies on the commonwealth. Jones v. Com., 80 Va. 538.

Establishing Fact of Cohabitation.—To sustain an indictment under the Virginia statute, the evidence must establish that the parties, not being married, lewdly and lasciviously associated and cohabited—that is, lived together in the same house as man and wife. Jones v. Com., 80 Va. 18. The indictment may be either joint or several. Scott v. Com., 77 Va. 344.

When Act Comes within Operation of Statute.—If in an indictment for lewd and lascivious cohabitation, the offence is charged from a day prior to the day when the statute went into effect, but as continuing to a day after the commencement of the act, the indictment is good. Nichols' and Janes' Case, 7 Gratt. 589.

B. THE INDICTMENT.

Form.—An indictment for lewd and lascivious cohabitation under sec. 7, ch. 192, Va. Code 1873, charging the offences in the language of the statute, is sufficient. Scott v. Com., 77 Va. 344. See also, Com. v. Isaacs, 5 Rand. 634. So an indictment under sec. 8, of ch. 7 of Acts 1877-78, interdicting the intermarriage of white persons with negroes, in the very language of the statute is sufficient. Jones v. Com., 79 Va. 213. But as held in West Virginia, an indictment under section 7 of ch. 149, of W. Va. Code, in force in 1883, which provides that "If any persons not married to each other, lewdly and lasciviously associate and cohabit together * * * * * * they shall be fined," etc., charging that the defendant "did lewdly and lasciviously associate and cohabit with one S. F.," the said defendant and S. F., not being married to each other, it was held that, it is not essential to use the very words of the statute to describe a statutory offence, if every fact and intent entering into, and constituting the offence is set forth in the indictment. State v. Foster, 21 W. Va. 767.

Those Guilty of Miscegenation Liable to Indictment for Lewd and Lascivious Cohabitation.—Where a negro and white person domiciled in Virginia, go out of the state and are in some other jurisdiction legally married, and after remaining in such jurisdiction, for a while (ten days in one case), return to their home in Virginia, and continue to reside there as husband and wife, they are liable in Vir-

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ginia to indictment for lewd and lascivious cohabitation. Kinney v. Com., 30 Gratt. 858, 32 Am. Rep. 690.

Joinder of Defendants.—And the participants in the crime of lewd and lascivious cohabitation may be either jointly or separately indicted. Scott v. Com., 77 Va. 344; State v. Foster, 21 W. Va. 767.

And where the man and the woman are joined as defendants in one indictment, an allegation that the offences were committed by their joint act is material. State v. Foster, 21 W. Va. 772.

Allegations—As to Time—Date of Statute.—Moreover, if in an indictment for lewd and lascivious cohabitation, the offence is charged from a day prior to the day when the statute went into effect, but as continuing to a day after the commencement of the act, the indictment is nevertheless good. Nichols' and Janes' Case, 7 Gratt. 589.

Same—"Together" or with Each Other.—And where an indictment under sec. 7 of ch. 149 of W. Va. Code, in force April 1883, for "lewd and lascivious association and cohabitation" against one of the parties, alleged that the defendant on a certain day, and from that day to a certain other day in the county, etc., did lewdly and lasciviously associate and cohabit with another person named in said indictment, said defendant and such other person not being married to each other during all that time, it was held that the indictment was fatally defective, because it failed to allege that the said persons so associated and cohabited "together" or "with each other," for in the absence of such words one might be entirely innocent of the "lewd and lascivious" commerce which was the distinctive feature of the statutory offence. One might be insane, or might in good faith believe that there had been a *bona fide* marriage. State v. Foster, 21 W. Va. 767; State v. Foster, 26 W. Va. 272.

Same—"Lewdly and Lasciviously" Cohabit Together.—Where the term "lewdly and lasciviously cohabit together" is employed in the statute defining the offence, an allegation of common purpose and intent, either by the use of these words or words of like import, is necessary. State v. Foster, 21 W. Va. 767.

XL. MAYHEM.

See *post*, "Shooting."

The Virginia Code 1887, § 4042, provides among other things, as follows: "And on any indictment for maliciously shooting, stabbing, cutting, or wounding a person, or by any means causing him bodily injury with intent to kill him, the jury may find the accused not guilty of the offence charged, but guilty of maliciously doing such an act with intent to maim, disfigure, and disable, or of unlawfully doing it with intent to maim, disfigure, disable, or kill such person."

But on an indictment for unlawfully stabbing under this statute, a verdict of "guilty of unlawful stabbing," will not authorize a judgment; however a new trial should be directed by the court. See Va. Code 1887, § 3671; Marshall's Case, 5 Gratt. 668.

And as held in Com. v. Lester, 2 Va. Cas. 198 (1820), if a prisoner be charged with feloniously breaking the jaw-bone of another, *contra formam statuti*, the indictment cannot be sustained as one for mayhem at common law, because the mayhem at common law, with one exception only, is not a felony. But it is otherwise by statute. See Va. Code 1887, § 3671, relative to shooting, stabbing, etc., with intent to maim, kill, etc. And if in an indictment for malicious and voluntary shooting, the term "wilfully" being used for "voluntarily," is cured by the statute of jeofails. So a conclusion against the acts of the general assembly, when there is but one act, is also cured. Trimble v. Com., 2 Va. Cas. 143. However, though an indictment only uses the word "malicious," the jury can find the prisoner guilty of the "unlawful," cutting, etc., with intent, etc. Canada v. Com., 22 Gratt. 899. But an indictment charging that the prisoner, "at the county and within the jurisdiction of the court, feloniously and maliciously did stab one P. T., with intention to maim and kill him," will not be quashed, upon objection that it does not allege an assault, striking or wounding, nor that P. T. was within the county or jurisdiction, nor that the intent was felonious or malicious. Com. v. Woodson, 9 Leigh 669.

Yet in Hoback v. Com., 28 Gratt. 922, there was an indictment, under Va. Code 1873, ch. 202, sec. 29, of a certain accused, for that he maliciously and of his malice aforethought did shoot a certain described person, and the jury returned their verdict as follows: "We, the jury, find the defendant (described) not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting with the intent to maim, disfigure and kill, and fix his time of confinement in the penitentiary at two years," and it was held that the person shot was sufficiently indicated, as the verdict was to be read in connection with the indictment. But an indictment for malicious shooting ought to charge that it was done feloniously, and this under the act of 1817, which does not in terms declare it a felony, but makes it punishable with confinement in the penitentiary. Trimble v. Com., 2 Va. Cas. 143. And although the statute against unlawful shooting, etc., affixes a penalty when the act is done with intent to maim, disfigure, disable or kill (in the disjunctive), yet the indictment should charge the intents conjunctively, and although all of the intents be laid yet proof of either supports the indictment. Angel v. Com., 2 Va. Cas. 231; Va. Code 1887, § 3671.

And it is held that an indictment for the malicious stabbing of a slave could be supported under the act of January 28th, 1803, which gave three-fourths of the fine to the use of the party aggrieved, although the slaves could not take the fine. Com. v. Chapple, 1 Va. Cas. 184.

XLI. MISCEGENATION.

See *ante*, "Lewd and Lascivious Cohabitation and Conduct."

An indictment in the language of the Acts of 1877-8, ch. 7, sec. 8, interdicting intermarriage between a negro and a white person, is sufficient. Moreover, the parties are liable to indictment for lewd and lascivious cohabitation. Jones v. Com., 79 Va. 213; Kinney v. Com., 30 Gratt. 858.

XLII. MURDER.

A. IN GENERAL.

Jurisdiction—Where Offender Indictable.—In Com. v. Linton, 2 Va. Cas. 205, it is declared that if a person be stabbed in Virginia and die of his wounds in another state, he cannot be tried for the murder in any county of this state, but he can be examined, indicted and tried for feloniously stabbing, in the county where the blow was inflicted. This rule of the common law has, however, been altered by statute, and at the present time the Virginia courts would in such case, have jurisdiction. Thus, Va. Code 1887, § 3667, provides that: "If any person be stricken or poisoned in, and die, by reason thereof,

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out of this state, the offender shall be as guilty, and be prosecuted and punished, as if the death had occurred in the county or corporation in which the stroke or poison was given or administered." Section 3890 provides that: "Prosecution for offences committed, wholly or in part without, and made punishable within, this state, may be in any county or corporation in which the offender is found, or to which he is sent by any judge, justice, or court." See § 3683-85. Also, see in this connection, Strouther's Case, 92 Va. 789, 22 S. E. Rep. 852.

Preliminary Examination.—An indictment in a superior court need not charge, and it need not appear from the record of such court, that the defendant has been examined by an examining court for the offence, for which he is indicted. Com. v. Miller, 1 Va. Cas. 309.

And upon an examining court having acquitted of murder and remanded the prisoner to the superior court to be tried for manslaughter, it is lawful for the superior court to indict for murder, and the prisoner, being so indicted, is not entitled to be bailed on the ground of no indictment being found against him for manslaughter. Bailey's Case, 1 Va. Cas. 258; Sorrell's Case, 1 Va. Cas. 253; Com. v. Myers, 1 Va. Cas. 188.

But if a man be examined by the examining court for feloniously stabbing another, and remanded for trial of that offence, and the party stabbed afterwards die, the accused cannot be indicted for the murder, without an examination, before the justices, of the murder. Com. v. Linton, 2 Va. Cas. 205 (1820). However, a preliminary examination is not now necessary. See Butler v. Com., 81 Va. 159; Jones v. Com., 86 Va. 661, 10 S. E. Rep. 1005.

And if an indictment includes offences for which the prisoner has not been tried, and he is sent on by the examining court for further trial, it is error; and the court should, upon the motion of the prisoner, quash the counts of the indictment which charge these offences. Clere v. Com., 3 Gratt. 615.

Finding by Special Grand Jury.—Under Acts 1889-90, p. 91, an indictment for murder may be found by either a regular or a special grand jury. Lyles v. Com., 88 Va. 396, 13 S. E. Rep. 802.

Indictment for Murder in First Degree.—In West Virginia there is no such thing as indictment for murder in the first or second degree; the indictment is for murder, and it depends upon the proof, whether it is in the first or second degree. State v. Schnelle, 24 W. Va. 767.

And in Virginia it is not proper, or necessary, that an indictment should charge murder in the first degree, or use that description, which, according to the statute, constitutes that degree of the offence. Wicks v. Com., 2 Va. Cas. 387; Lithgow v. Com., 2 Va. Cas. 297. Or as held in Kibler v. Com., 94 Va. 804, 26 S. E. Rep. 858, it is not necessary, in an indictment for murder, to charge specifically the facts which constitute murder in the first degree. The common-law form of indictment of murder is all that is necessary to support a finding of guilty of murder in the first degree under the statute. So in Commonwealth v. Miller, 1 Va. Cas. 309, it is held that an indictment for murder in the first degree, need not charge specifically such facts, as would show an offence to have been murder in the first degree.

Furthermore, it is sufficient if the indictment is in the common-law form for murder. Cluverius v. Com., 81 Va. 787.

Two Counts—Separate Offence Not Set Out.—And if in an indictment for murder there are two counts, in the second of which the offence is not set out as another offence, it is not error, coming within the purview of Va. Code 1849, p. 770, § 11, which dispenses with the necessity of inserting in an indictment any allegation which is unnecessary to be proved. So far from it being necessary to prove that offences as stated in different counts of an indictment are different offences, if they are in fact different and are felonies, the indictment may be quashed, or the prosecutor compelled to elect for which offence he will proceed; though the indictment will not on that ground be demurrable. Lazier v. Com., 10 Gratt. 708.

Surplusage.—An indictment for murder which describes the wound in one place as above the nipple of the left breast, and subsequently, as below the nipple of the left breast, is not void for repugnancy and inconsistency, as the latter recitation is surplusage, and covered by § 3999, Va. Code 1887, which provides that indictments shall not be void for the omission or insertion of "words of mere form and surplusage." Robertson v. Com. (Va. 1894), 20 S. E. Rep. 362.

And in Lazier v. Com., 10 Gratt. 708, an indictment for murder charged the wound to have been inflicted on the 9th of December, of which wound she on the said 14th day of December died. The word, "said" is surplusage, and its insertion is not a fatal defect.

Duplicity.—But if two distinct felonies are charged in one indictment, it may be quashed, or the prosecutor will be compelled to elect for which offence he will proceed. Lazier v. Com., 10 Gratt. 708.

Conclusion.—However, an indictment for murder need not conclude *contra formam statuti*, although a punishment varying from the common-law punishment is prescribed by statute for the second degree of the offence. Vance v. Com., 2 Va. Cas. 162.

Indictment of Principal in Second Degree.—On an indictment of a person as principal in the second degree of murder in the first degree, it is proper for the trial court to define murder in the first degree as it is included in the indictment against the principal of the first degree, and is one of the degrees of homicide with which the defendant is charged as having aided and abetted. Horton v. Com. (Va. 1901), 99 Va. —, 7 Va. Law Reg. 492.

Indictment of Accessory.—An accessory before the fact for a felony cannot be convicted on an indictment against him as principal. Thornton v. Com., 24 Gratt. 657.

However, it is not necessary that the indictment against the accessory should aver the conviction of the principal, for they may be jointly indicted. Com. v. Williamson, 2 Va. Cas. 211. In this connection there was an indictment for murder against T and R containing two counts: the second charged T as principal and R as accessory before the fact; and on the motion of T the second count was struck out. At a subsequent term, on the trial of T, the clerk read both counts and charged the jury on both; and then the prisoner excepted. The court then directed the clerk to read the first count, which was done, and the clerk charged the jury upon it; and then the prisoner excepted to the second reading and charge. The second reading and charge were proper, and cured the error of the first. Thornton v. Com., 24 Gratt. 657. Moreover, the same count may contain a charge of murder against one, and a charge of being an accessory against others. Hawley v. Com., 75 Va. 847.

Omission to Insert Copulative.—A motion to quash a joint indictment against two persons on the ground of omission to insert the copulative conjunction

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"and" between their names, is properly overruled, where a comma is placed after the first name. Hash v. Com., 88 Va. 172, 13 S. E. Rep. 398.

Form.—The form of an indictment for murder, in W. Va. Code 1891, ch. 144, sec. 1, is good for the conviction of murder in the first and second degree or in lower grade for homicide.. State v. Douglass, 41 W. Va. 537, 23 S. E. Rep. 724. And an indictment in the form prescribed in section 1, ch. 118 of the Acts of the Legislature of 1882, is sufficient and does fully and plainly inform the prisoner of the character and cause of the accusation against him. Schnelle v. State, 24 W. Va. 767; Smith v. State, 24 W. Va. 814; State v. Flanagan, 26 W. Va. 118.

In Kibler v. Com., 94 Va. 804, 26 S. E. Rep. 858, an indictment contained three counts. The first count charged that the murder was committed with a gun charged with gunpowder and shot, which it is alleged the plaintiff in error feloniously, willfully, and with malice aforethought did discharge and shoot off against and upon Willis D. Kibler, inflicting a mortal wound, of which he then and there died. The second count charged that the killing was done with an axe, feloniously, willfully, and with malice aforethought. And, the third count, that, it was done with a knife, by cutting the throat of Willis D. Kibler, feloniously, willfully, and with malice aforethought.

The indictment, and each count thereof, was in all respects not only substantially, but technically, correct, and the demurrer was properly overruled.

Variance.—An indictment for murder charging that the prisoner, of his malice aforethought did make the assault; but the striking and wounding, and the killing and murder, are respectively charged to have been done "of his malice aforesaid," is a good indictment for murder. Maile v. Com., 9 Leigh 661 (1839).

And in Allstock's Case, 3 Gratt. 650, an indictment for murder stated that the mortal wound was inflicted on the 7th of November 1845, that the deceased languished until November 8th, in the year aforesaid and then says, "on which said 8th of May, in the year aforesaid, the deceased died." The prisoner pleaded not guilty to the indictment. The insertion of May for November was deemed a mistake; appearing on the face of the indictment, and, is one of form, cured by the statute of jeofails, and will not exclude proof of the death, subsequent to the 7th of November, or be cause for arresting the judgment.

B. ALLEGATIONS AND DESCRIPTION.

1. ALLEGATIONS.

Malice Aforethought.—In Com. v. Gibson, 2 Va. Cas. 70, it is held that in an indictment for murder, it is indispensable that the killing and murder should be charged to be done with "malice aforethought." And if the assault and the stabbing be charged to have been done with "malice aforethought," and the conclusion substitutes for those words the word "maliciously," the indictment is not sufficient.

"Deliberately."—But in an indictment for murder, the omission of the word "deliberately," will not be fatal on general demurrer. Bull v. Com., 14 Gratt. 613; Livingston v. Com., 14 Gratt. 592. Nor the word "premeditate." Weatherman v. Com. (Va. 1894), 19 S. E. Rep. 778.

"Deliberate and Premeditated."—So an indictment for murder, which charges that J. W., the defendant "in and upon M, feloniously, willfully, and of his own motion aforethought, did make an assault, and that J. W., with a certain axe, in his hands then and there held, the said M. * * * then and there feloniously and of his malice aforethought did strike, * * * giving to the said M., * * * two mortal wounds, * * * whereby then and there she died * * *," is not defective because it does not contain the words "deliberate" and premeditated." Weatherman v. Com. (Va. 1894), 19 S. E. Rep. 778.

Dates Set Out in Figures.—So it is not error that dates in an indictment are set out in figures instead of words, the Va. Code of 1849, p. 770, § 11, having dispensed with the necessity of inserting in an indictment any allegation which is unnecessary to be proved. Lazier v. Com., 10 Gratt. 708.

Mode and Manner of Killing.—The Acts of West Virginia Legislature 1882, § 1, ch. 118, declare that, "in an indictment for murder it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased," and the form therein prescribed in accordance with the above declaration is constitutional. Moreover, such an indictment is not in violation of the fourteenth section of the bill of rights which declares, that in trials for crimes and misdemeanors "the accused shall be fully and plainly informed of the character and cause of the accusation," as such an indictment does fully and plainly inform the accused of the character and cause of the accusation. The character and cause of the accusation are essentially different from the mode by, or manner in which, the deceased was killed. The constitution does not require that the accused shall be informed of the "manner in which, or the means by which, the death of the deceased was caused." State v. Schnelle, 24 W. Va. 767. And the allegation that the murder was committed with one weapon at the time held in the hands of two or more defendants will not render the indictment demurrable. Hash v. Com., 88 Va. 172, 13 S. E. Rep. 398. So in an indictment for murder, the words "did strike," are not technical, but when the blow is made with a dirk, the words stab, strike, thrust, are equivalent thereto; but where there is a positive averment of the stab, etc., with a dirk, it sufficiently appears that the mortal wound was given thereby, under the words, "giving one mortal wound," etc. Gibson v. Com., 2 Va. Cas. 110.

But an indictment charging defendant with attempting to poison, with intent to kill, one A by buying the poison and delivering it to one L, and soliciting her to administer it in coffee to A, but which failed to allege that L consented to do so, or that anything else was done, does not charge an offence under the Va. Code 1887, § 3669, declaring it a felony to attempt to administer poison in food, drink, etc., with intent to kill. Hicks v. Com., 86 Va. 223, 9 S. E. Rep. 1024.

Yet where homicide is alleged to have been accomplished by poison, the indictment need not state the quantity used, as the indictment may charge the offence with sufficient certainty in the absence of such statement, under the Va. Code 1873, ch. 201, sec. 12; Puryear v. Com., 83 Va. 51, 1 S. E. Rep. 512. Nor is it necessary to state that the accused knew the substance alleged to have been used in producing death was a deadly poison. Thornton v. Com., 24 Gratt. 657.

Averment of Principal's Conviction on an Indictment against Accessory.—And in an indictment against

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an accessory it is not necessary to aver that the principal was convicted as they may be jointly tried. Com. v. Williamson, 2 Va. Cas. 211.

2. DESCRIPTION.

Of Wound.—In an indictment for murder it is not necessary to set out the length, breadth or depth of the wound. See Va. Code 1849, p. 770, § 10; Lazier v. Com., 10 Gratt. 708.

"But at common law, while an indictment for murder must show with certainty in what part of the body the deceased was wounded, the same strictness is not required as to the evidence necessary to support it. If, for instance, say the authorities, the wound be stated to be on the left side, and proved to be on the right, or alleged to be on one side of the body and proved to be on the other, the variance is immaterial. 2 Hale P. C. 186. In such case the substance of the issue is proved, and that is sufficient. 1 Greenl. Ev., sec. 65. So in Lazier's Case, 10 Gratt. 708, it was held to be no more necessary to prove that the wound was in the same part of the body in which it is alleged to have been than it is to prove the length and depth of the wound as alleged in the indictment. See also, 2 Bish. Crim. Prac. (3d Ed.), sec. 525." Per LEWIS, P., in Curtis v. Com., 87 Va. 589, 13 S. E. Rep. 73.

Name—Initials.—An indictment concluding "against the peace and dignity of the commonwealth of Virginia," and designating the murdered person by the initials of his name, though not signed by the commonwealth's attorney, is sufficient. Brown's Case, 86 Va. 466, 10 S. E. Rep. 745.

C. PROCEDURE.

1. IN GENERAL.

What the State May Prove.—Upon an indictment in the form prescribed by sec. 1, ch. 144, W. Va. Code 1887, for murder, the state may prove any manner of killing, or different manners of killing. State v. Morgan, 35 W. Va. 260, 13 S. E. Rep. 985. But where it is alleged in an indictment that a particular weapon was used, it is not permissible to prove that a weapon entirely different in its character was the cause of the death. Acts of Legislature (Va.) 1882, ch. 118, sec. 1.

However, where the mode of the death or the means causing it are uncertain, the indictment should contain as many counts as may be necessary to set out inconsistent modes of death or the different means supposed to have been used. Lazier v. Com., 10 Gratt. 708. Thus, in Smith v. Com., 21 Gratt. 809, it is held to be, "a well-settled principle of criminal pleading and practice, that several modes of death, inconsistent with each other, may be set out in the same indictment. This grows out of the very necessity of the case. The indictment is but the charge or accusation made by the grand jury with as much certainty and precision as the evidence before them will warrant. In many cases the mode of death is uncertain, while the homicide is beyond question. Every cautious pleader, therefore, will insert as many counts as will be necessary to provide for every possible contingency in the evidence. If the mode of death is uncertain, he may and ought to state it in different counts, in every possible form, to correspond with the evidence at the trial as to the mode of death."

2. NEW TRIAL.

When it May Be Granted.—If a verdict be agreed on and written in the jury room (in the case of felony), and then in open court read as a verdict (after the jury has been commanded to look upon the prisoner, and asked whether they have agreed upon a verdict, to which they reply that they have), and the clerk then, in open court, before the discharge, amend the verdict in an immaterial point, but before the amended verdict be read, one of the jury being sick, retires to the jury room, departing from his fellows and the court, without the knowledge of them, or of the court, to which amended verdict the eleven agree, yet it is a nullity, for the twelve did not consent to it, and the verdict in such case having been set aside as insufficient, a *venire facias de novo* may be awarded, and a new trial had, either on the same indictment or another. Com. v. Gibson, 2 Va. Cas. 70.

3. CONVICTION.—Under a common-law indictment for murder, the prisoner may be found guilty of murder in the first or second degree, or manslaughter. Livingston v. Com., 14 Gratt. 592. Moreover, on an indictment for murder simply, one may be convicted of murder in the commission of, or in the attempt to commit robbery. Robertson v. Com. (Va. 1894), 20 S. E. Rep. 362.

So in West Virginia, it is held that, an indictment for murder in the form prescribed by section 1, ch. 144, of W. Va. Code of 1891, is good for conviction of murder in the first or second degree, or any lower grade of homicide. State v. Douglass, 41 W. Va. 537, 23 S. E. Rep. 724; State v. Baker, 33 W. Va. 319, 10 S. E. Rep. 639; Schnelle's Case, 24 W. Va. 767; Smith's Case, 24 W. Va. 815; Flanagan's Case, 26 W. Va. 116.

And sec. 20, ch. 159, W. Va. Code 1891, enacts that, "on an indictment for felonious homicide, the jury may find the accused not guilty of the felony, but guilty of involuntary manslaughter." *Ex parte* Garrison, 36 W. Va. 686, 15 S. E. Rep. 417.

4. VERDICT.—So an indictment in the common-law form for murder, charging both degrees of murder, and a verdict finding the accused guilty of murder in the first degree, as charged in the indictment, is sufficient. Cluverius v. Com., 81 Va. 787.

Furthermore, an indictment which does not charge specifically the ingredients of murder in the first degree as distinguished from murder in the second degree will support a verdict of murder in the first degree. For, as said in the case of Miller v. Com., 1 Va. Cas. 310, "the indictment is not defective in not charging specifically such facts as would show the offence to have been murder in the first degree." Kibler v. Com., 94 Va. 809, 26 S. E. Rep. 858. To the same effect, see Wicks v. Com., 2 Va. Cas. 387, and Livingstone v. Com., 14 Gratt. 596.

And on an indictment charging one as principal in the second degree of murder in the first degree, a verdict which finds the prisoner "guilty as charged in the indictment," and fixes his punishment, is sufficient. Horton v. Com. (Va. 1901), 99 Va. —, 7 Va. Law Reg. 492.

XLIII. NUISANCES.

An indictment for a nuisance caused by a certain mill and mill dam, the property of the defendant, situated near a common highway, without particular specification or description of the mill, and without expressly alleging that it is in the county wherein the indictment is found, is good and sufficient after verdict. Stephen v. Com., 2 Leigh 759. Moreover, an unauthorized obstruction of the public enjoyment of streets and public places, is an indictable nuisance. Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. Rep. 818. See *post*, "Obstructions."

XLIV. OBSTRUCTIONS.

A. IN GENERAL.

When Indictable.—An unauthorized obstruction of

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the public enjoyment of streets and public places, is an indictable nuisance. Yates v. Town of Warrenton. 84 Va. 337, 4 S. E. Rep. 818.

Thus, in Taylor v. Com., 29 Gratt. 784, the defendants in an indictment for a nuisance by obstructing a street were the joint owners of a house and lot of two acres fronting 264 feet on Porter street in Manchester. The house was ancient, and had been held by the defendants and those under whom they claimed for more than sixty years, according to its present enclosure. The city counsel holding the said enclosure to be within Porter street, directed that they should be removed, and the defendants obtained an injunction to prevent it; and this suit was pending in the same court. When the indictment was called for the trial the defendants moved that the case should be continued until the injunction suit was decided. The court held that the indictment was the appropriate remedy in such a case; and the continuance was properly refused.

So a boom company may be proceeded against by indictment for erecting and maintaining a dam or any other thing in any watercourse which is a public highway, which dam obstructs the navigation or the passage of fish, under sec. 24, ch. 44 of the Code of 1881. State v. Elk Island Boom Co., 41 W. Va. 796, 24 S. E. Rep. 590.

Moreover, an indictment lies against a person for making a fence across a public road. If the obstruction is permitted to continue for so many days as will raise the penalty to the sum of five dollars, the superior court of law has jurisdiction to try the indictment. Justice v. Com., 2 Va. Cas. 171.

When Indictment Not in Proper Form.—In McClintic v. Com., 1 Rob. 727, an indictment was found, charging that a certain McClintic on the 22nd day of November 1839, "built a fence across a portion of the public road in the county aforesaid, leading from, etc., being then and there owner and tenant of the lands through which said public road runs, and did then and there continue the said fence so built as aforesaid across said public road, from the said 22nd day of November 1839, to the 25th day of November 1839, contrary to the form of the statute in such case made," etc. The appellate court held that the indictment was bad and ought to have been so adjudged, and the demurrer which was filed thereto was proper.

Necessary Allegations.—In Bailey v. Com., 78 Va. 19, a party was prosecuted for obstructing a road. It was held that in describing an offence under the statute, the indictment must follow the statute, and any material variance would be fatal. And in a prosecution for the obstruction of a road under chapter 26, section 1, Criminal Procedure, an essential of the offence therein described is the scienter. Therefore, a failure of an indictment to aver the scienter is fatal. Bailey v. Com., 78 Va. 19. But in an indictment against an overseer of a public road for failing to keep it in repair, it is not necessary to allege that the county court had not, by an order entered of record, authorized a less width than thirty feet. Commonwealth v. Howard, 1 Gratt. 555. So in an indictment for obstructing a public road it is not necessary to allege, that the wrongful act was "knowingly and wilfully done"; it will be sufficient to allege that the act was done unlawfully or without lawful authority. And if it alleged that the act was done "knowingly and wilfully," these words "knowingly and wilfully" will be treated as surplusage. State v. C. & O. R. Co., 24 W. Va. 809.

B. PROCEDURE.

Evidence Admissible.—In State v. C. & O. R. Co., 24 W. Va. 809, the Chesapeake and Ohio Railroad Company was indicted for obstructing a public road: and the obstruction was shown to have been caused by raising the track of the railway, at the point where it was crossed by the public road. It was competent and material evidence on behalf of the defendant to show, that at the time the road was obstructed, the said railroad at that point was in possession of and was run by another railroad company.

Verdict.—And if the indictment charges that the obstruction continued a certain number of days, and the jury find the defendant guilty, without ascertaining the number of days, the verdict is sufficient, and the court may enter judgment for the fine, according to the number of days charged in the indictment. Justice v. Com., 2 Va. Cas. 171.

XLV. OFFICIAL OR PUBLIC DUTIES.

Omission of Duties.—A presentment under Va. Code 1860, ch. 194, sec. 6, p. 799, punishing the omitting or delaying to perform any duty pertaining to an office, of one who is authorized to serve legal process, should follow the terms of the statute, or must use terms which show conclusively, or beyond any rational doubt to the contrary, that the accused is guilty of the offence described in the statute; and unless this is done, the addition that "so the accused did receive money for omitting and delaying to perform a duty pertaining to his office of constable," etc., will not cure the defect. Old v. Com., 18 Gratt. 915.

Corruptness in Office.—And in an indictment against the justices of a county court for misbehavior in office, it is necessary that the act imputed as misbehavior, be distinctly charged to have been done with corrupt, partial, malicious or improper motives, and above all with knowledge that it was wrong; though there are no technical words indispensably required, in which the charge of corruption, partiality, etc., shall be made. Jacobs v. Com., 2 Leigh 709.

An indictment in such case not charging the corruption, partiality, etc., distinctly and substantially, and not charging the scienter, is bad even after verdict of conviction, its defects not being charged by the statute. 1 Rev. Code, ch. 169, § 44: Jacobs v. Com., 2 Leigh 709.

Against Owner of Turnpike.—An indictment which charged that P was the owner of a certain turnpike road; that he controlled and supervised the same, and that he kept it in such bad repair and suffered it to remain obstructed to such an extent, that it was impossible for the people of Marshall county to enjoy the same, against the peace and dignity of the state of West Virginia, was held bad, because it did not charge that said turnpike road was a public road, nor that it was in the county of M., nor that P. was under any duty or liability to keep it in repair. Parkinson v. State, 2 W. Va. 589.

XLVI. ORDINARIES—KEEPING SAME WITHOUT LICENSE.

And an indictment which charges that the defendant, on a day and time specified, kept an ordinary without obtaining license to do so, is sufficient, without setting out the facts of his furnishing for compensation, lodging or diet, etc. Burner v. Com., 13 Gratt. 778. Such an indictment, with the addition that he continued to keep the ordinary from the day stated to another subsequent day, is not defective:

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the *continuando* is mere surplusage. Burner v. Com., 13 Gratt. 778.

XLVII. ORDINANCES—VIOLATION OF MUNICIPAL ORDINANCE.

In a proceeding for a violation of a municipal ordinance, the warrant need not allege that the offence was committed in the county in which the municipality is situated. Beasley v. Beckley, 28 W. Va. 81.

XLVIII. OUTLAWRY.

In an indictment against a party who has been proceeded against to outlawry, a question cannot be adjourned to the general court, without his assent appearing on the record. Com. v. Pearce, 6 Gratt. 669.

XLIX. PHYSICIANS—PRACTISING WITHOUT LICENSE.

It is sufficient if words used in the indictment are equivalent to those employed in the statute describing the offence; and to charge a person with "practising medicine" is equivalent, under Acts 1883-4, p. 597. § 92, to charging that he "practised as a physician," without having a license. Whitlock v. Com., 89 Va. 337, 15 S. E. Rep. 893.

L. PERJURY.

A. IN GENERAL.

1. INDICTMENT—VA. STATUTE.—Va. Code 1887, § 3993, relative to indictment for perjury or subornation of perjury, provides as follows: "In an indictment or accusation for perjury or subornation of perjury, it shall be sufficient to state the substance of the offence charged against the accused, in what court or by whom the oath was administered, which is charged to have been falsely taken, and to aver that such court or person had competent authority to administer the same, together with proper averments to falsify the matter wherein the perjury is assigned, without setting forth any part of any record or proceeding at law or equity, or the commission or authority of the court or person before whom the perjury was committed; but nothing herein shall be construed to allow, without the consent of the accused, a part only of any record, proceeding, or writing to be given in evidence on the trial of such indictment or accusation." W. Va. Code 1899, ch. 158, § 4.

Form.—And indictments for perjury in Virginia, must be according to the common law. Com. v. Lodge, 2 Gratt. 579.

What is a Sufficient Indictment for Perjury.—And under sec. 3993, Va. Code of 1887, an indictment for perjury which states the substance of the offence, in what court the oath was administered, which is charged to have been falsely taken, and avers that it had authority to administer the same, contains only averments necessary for the jurisdiction of the court over the case upon the trial of which perjury is alleged to have been committed. In this case Pickering's Case, 8 Gratt. 628, was expressly disapproved. Fitch v. Com., 92 Va. 824, 24 S. E. Rep. 272.

And in West Virginia although it is sufficient in certain cases to charge the offence in the language of the act creating it, yet as the terms of the statute enacting the "attorneys' test oath" are generic and embrace every species of each particular class of offences described in the oath, it is indispensable that the facts and circumstances constituting the offence, such as time (when it is of the essence of the offence), place, manner and occasion of committing it, should be set forth in an indictment for perjury under the statute, with such certainty and particularity as to give the accused reasonable notice of what he is required to meet and defend himself against, and also to enable him in case he should be subsequently proceeded against for the same offence, to plead the former conviction or acquittal in bar of the proceeding. Stofer v. State, 3 W. Va. 689.

When Indictment Lies.—On a trial of a warrant for debt, before a justice, founded on an order given by the defendant, he made oath before the justice that he did not sign his name to the order. Upon an indictment for perjury in taking this oath, the court held that perjury could be committed in taking such oath, and that the court should not quash the indictment, but should put the defendant to his demurrer. Com. v. Litton, 6 Gratt. 691.

Election—Prosecutor Must Select the Oath He Holds to Be False.—It was at one time held that when the same person has by opposite oaths asserted and denied the same fact, he may be convicted on either, for whichsoever of them is given in evidence to disprove the other, the defendant cannot be heard to deny the truth of that evidence, inasmuch as it came to him. But this doctrine has long since been exploded, and it is now held where one is indicted for swearing contradictorily on two occasions, the prosecutor must elect which oath he holds to be perjured, and that oath he must affirmatively prove to be false. If defendant is shown to have sworn contradictory oaths without more, *non constat* which is false. Rhodes v. Com., 78 Va. 692.

Variance.—In a prosecution for perjury if the indictment set forth that "a warrant for debt due by account for rent," was sued out by the defendant, and the warrant given in evidence, shows that the claim was not for rent, but for other things, this is such a variance, that the warrant ought not to be given in evidence. Com. v. Hickman, 2 Va. Cas. 323.

What the Indictment Must Show to Be Valid.

Oath Taken before a Regimental Court.—In an indictment for perjury in taking a false oath before a regimental court of enquiry the indictment ought to set forth, the number of officers of which the said court of enquiry consisted, and what was their respective rank, so as to enable the court to discern whether the court of enquiry was constituted according to law. Moreover, the indictment ought to aver and set forth distinctly and directly, what was the inquiry then and there being made by the court, so as to enable the court of law to know whether the matter deposed by the defendant was material or pertinent to the enquiry. Conner v. Com., 2 Va. Cas. 30.

When Circuit Court's Authority Sufficiently Charged.—Where it is charged in an indictment for perjury that the oath was administered in a circuit court of a certain county holden by a certain judge, and that the court had competent authority to administer the oath, it is sufficiently charged that the court had competent authority to administer it. Stofer v. State, 3 W. Va. 689.

False Oath before Grand Jury—When Averment Sufficient.—If an indictment for perjury in giving false testimony before a grand jury, charges that the defendant, being duly sworn, "did depose and give evidence to the grand jury in substance and to the effect following" (stating the testimony) "which said evidence was wilfully false and corrupt, for in truth," etc. (falsifying the facts deposed

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"and so the defendant did, in manner and form aforesaid, commit wilful and corrupt perjury," there is no sufficient averment that the defendant wilfully or corruptly swore falsely, and the indictment is defective as well at common law as under the statute. Thomas v. Com., 2 Rob. 795.

Proceeding Ex Parte.—If a proceeding be *ex parte*, it is sufficiently charged as material if it be averred that "it then and there became material to him," the defendant, to take oath. Stofer v. State, 3 W. Va. 689.

Oath to Answer in Chancery.—An indictment for perjury in swearing to an answer in chancery, should set out the whole bill and answer. Com. v. Lodge, 2 Gratt. 579.

Evidence Must Be Shown to Be Material.—An indictment for perjury must show that the evidence which the defendant gave was material. And therefore if the evidence which the defendant gave before the grand jury is not shown clearly on the face of the indictment to relate to an offence committed within the county, the indictment is defective. Com. v. Pickering, 8 Gratt. 628; Fitch v. Com., 92 Va. 832, 24 S. E. Rep. 272.

The Day upon Which the Perjury is Committed Must Be Truly Laid.—An indictment for perjury set forth the offence as having been committed on the — day of February in the year 1879. It was insisted that it was essential that the day should be stated. But the court held that while the time of the commission of an offence laid in the indictment is not material, as a general rule, and does not confine the proofs with the limits of that period; yet when any time stated in the indictment is to be proved by matter of record, a variance will be fatal, and in the indictment for perjury the day in which the perjury was committed must be truly laid. And the court further decides that sec. 5, ch. 201, Code 1873, does not dispense with this formality in an indictment for perjury. Rhodes v. Com., 78 Va. 692.

Insolvent Debtor Swearing to Schedule.—And in an indictment against an insolvent debtor for perjury in swearing to a schedule which did not discover certain debts owing to him, if it does not aver that he "well knew and remembered" that the omitted debts were then justly due and owing to him, it would be bad on demurrer. Com. v. Cook, 1 Rob. 729.

Indictment for Perjury Must Charge That the Defendant Swore Falsely.—Moreover, in an indictment for perjury it is indispensably necessary to charge that the defendant swore falsely. Falsity is the main ingredient of the crime. Under sec. 3741 of Code of 1887, it is necessary to charge that the defendant feloniously and wilfully swore falsely, or that he feloniously, wilfully, and falsely swore, or to use in the place of the word "wilful" some word that is its equivalent. An indictment for perjury is not sufficient which simply charges that the defendant did "feloniously, wilfully, and corruptly depose, swear, and testify," although it concludes, whereby the defendant "did then and there, upon the said trial in the city aforesaid, feloniously, wilfully, and corruptly swear falsely and feloniously commit wilful perjury." The latter words are but the averment of a legal inference from what had been stated, and cannot supply the omission of the word "falsely" in the charging part of the indictment. Fitch v. Com., 92 Va. 824, 24 S. E. Rep. 272.

But it is not necessary to aver that the defendant swore positively and absolutely. It is sufficient, where one swears as he thinks, remembers or believes, to negative the fact, that he so thought believed or remembered. Fitch v. Com., 92 Va. 833, 24 S. E. Rep. 272.

2. INFORMATION—WHEN SUFFICIENT.—In Com. v. Stockley, 10 Leigh 678, an information was filed, and a special demurrer assigned among other objections the following: that the information did not aver that the oath alleged to have been taken willfully, corruptly, falsely and maliciously before the honorable Abel P. Upshur, was taken by his the said Charles B. Stockley's own voluntary act, consent or agreement, agreeably to the statute in such cases made and provided. The court held the information sufficient for perjury committed by a juror on his *voir dire*. The information read as follows: "Commonwealth of Virginia, third judicial circuit, county of Northampton, to wit: Be it remembered that Peter P. Mayo, attorney for the commonwealth of Virginia, prosecuting in the circuit superior court of law and chancery for the said county, cometh into the said court on the 25th day of the month of May in the year 1839, leave of the said court being first had and obtained, and giveth the said court, in his own proper person, to understand and be informed, in behalf of the said commonwealth, that at the circuit superior court of law and chancery begun and held for the said county of Northampton on the 21st of the said month of May in the year 1839, a certain issue was then and there pending between the commonwealth of Virginia and one William Garrison, in a certain plea of felony and larceny, which came on to be tried in due form of law; upon which trial a certain Charles B. Stockley, in the county aforesaid and within the jurisdiction of this court, was duly and legally called upon by George F. Wilkins a deputy sheriff of said county, he the said Charles B. Stockley being then and there a bystander, as a juror, to discharge the duties and function of a juror in the said issue then and there pending between the said commonwealth and the said William Garrison in the said plea of felony and larceny, and he the said Charles B. Stockley was then and there duly sworn on his *voir dire* in the said circuit superior court of law and chancery for the said county of Northampton, by the said court on the 21st day of the said month of May in the year aforesaid, and took his corporal oath upon the holy gospel of God, before the honorable Abel P. Upshur, judge of the said circuit superior court of law and chancery for the said county of Northampton, then and there holding said court, the said circuit superior court of law and chancery, then and there having competent authority to administer the said oath to the said Charles B. Stockley in that behalf; and he the said Charles B. Stockley, after having duly sworn as aforesaid, was interrogated and enquired of by the said circuit superior court of law and chancery for the said county of Northampton, on the said 21st day of May in the year aforesaid, whether he the said Charles B. Stockley had made up and expressed his opinion touching the guilt or innocence of the said William Garrison of the said larceny and felony. And the said Peter P. Mayo giveth the said court further to understand and be informed that the said Charles B. Stockley, being so sworn as aforesaid, not regarding the laws of this commonwealth, and contriving and intending to prevent the due course of law and justice, then and there, in answer to the said interrogatory then and there propounded to him by the said circuit

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superior court of law and chancery for the county of Northampton aforesaid, upon his corporal oath aforesaid, wilfully, corruptly, falsely and maliciously, before the said honorable Abel P. Upshur, then and there holding the said circuit superior court of law and chancery for the county of Northampton aforesaid, did swear that he the said Charles B. Stockley had not made up and expressed his opinion touching the guilt or innocence of the said William Garrison of the said larceny and felony, whereas in fact and in truth he the said Charles B. Stockley had, before the said 21st day of May in the year aforesaid, made up and expressed his opinion touching the guilt or innocence of the said William Garrison of the said larceny and felony; to the evil example of all others in like case offending, and against the statute in such cases made and provided, and against the peace and dignity of the commonwealth."

B. PROCEDURE.

When Demurrer to Indictment Will Be Sustained.—An indictment for perjury charged that the prisoner in order to get a continuance for the cause pending before the court made an oath before said court that a certain Henry J. Fisher was his counsel engaged in said cause, that the paper needed in said cause was in the possession of the said Henry J. Fisher, when in fact and in truth the said Henry J. Fisher was not the counsel of the prisoner, neither was the paper aforesaid in the possession of the said Henry J. Fisher, but was in truth and in fact in possession of the prisoner at the time of taking the oath aforesaid. That the prisoner on the occasion aforesaid and within the jurisdiction of the circuit court of law and chancery for Jackson county, before Nehemiah Smith and John Kouns, who constituted a court, which court had then and there competent power and authority to administer an oath to the prisoner, by his own voluntarily act and consent did wilfully, corruptly and falsely commit wilful and corrupt perjury to the evil example of all others in like cases offending, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the commonwealth. Upon demurrer the indictment was held bad. Com. v. Roach, 1 Gratt. 561.

LI. POISON.

See *ante*, "Murder."

How Acts Must Be Alleged.—An indictment for an attempt to administer poison under Va. Code 1887, § 3669, that does not allege such acts as, in a legal sense, constitute an attempt to commit the offence charged, but only such as show preparation, is demurrable. Hicks v. Com., 86 Va. 223, 9 S. E. Rep. 1024.

Poisoning a Well—Not Defective by Reason of Addition of "And Other Persons."—An indictment charged the prisoner with poisoning the well of one Thomas Stewart, by putting therein a certain poison known as "strychnine," in order that the water so poisoned might be drunk by the said Thomas Stewart and other persons, with intent to kill and injure the said Thomas Stewart and other persons. The prisoner demurred to the indictment on the ground that the use of the words "and other persons" was not a sufficient designation of said other persons, whose names were well known at the time of the finding of the indictment. The court held that under § 3997 of the Va. Code of 1887, providing that where an intention to injure, defraud, or cheat is required to constitute an offence, an indictment is sufficient which alleges the intent generally, and that it shall not be necessary to name the person intended to be injured; that therefore an indictment for poisoning a well, alleging an intent to injure Stewart "and other persons" is not defective by reason of the addition of the latter clause. Davis v. Com., 99 Va. —, 38 S. E. Rep. 191.

Naming the Person Injured—The Word "Injured" Used in § 3997 Opposite to Poisoning.—Section 3997 of the Virginia Code 1887, declaring that "where an intent to injure, defraud or cheat is required to constitute an offence" it shall not be necessary to name, in an indictment, the name of the person intended to be injured, defrauded or cheated, applies to an indictment for an attempt to poison. The word "injure" is more opposite to the offence of poisoning or attempting to poison, than to forgery, cheating and like offences. Davis v. Com. (Va. 1901), 99 Va. —, 7 Va. Law Reg. 495.

LII. RAPE AND ATTEMPT TO RAPE.

A. IN GENERAL.

Form.—An indictment for rape in the words of Va. Code 1887, § 3680, defining the offence, is sufficient. Smith v. Com., 85 Va. 924, 9 S. E. Rep. 148.

So where an indictment for rape follows the usual form, and is in substance sufficiently specific to put defendant fairly on trial for the offence charged, a demurrer thereto is properly overruled. Mitchell v. Com., 89 Va. 826, 17 S. E. Rep. 480.

And in an indictment under the third section of the act against rape passed 8th February, 1819, if the charge is for carnally knowing and abusing a female child under ten, instead of a woman child, it is good after verdict. Com. v. Bennet, 2 Va. Cas. 235.

Idem Sonans.—If an indictment charges that a rape was committed upon Helen Frances Davis, and the true name is Helen Francis Davids; but the proof is, she was as frequently called the first, in the community, as the last, the proof of the rape upon Helen Frances Davids is admissible under the indictment. Taylor v. Com., 20 Gratt. 825.

Surplusage.—The third section of the act against rape passed February 8th, 1819, applied only to rape on a female under ten years of age, and applied whether she consented or not. If the count of an indictment, under the third section charged more than was necessary (as that the prisoner "forcibly ravished," and that it was done "against the will, and without the consent" of the person on whom it was committed), that fact may be rejected as surplusage. Com. v. Bennet, 2 Va. Cas. 235.

And the record of the finding of the grand jury, saying, in commission of rape, which was on the indictment, is mere surplusage. Thompson v. Com., 20 Gratt. 724.

What Averments Are Essential Ingredients.

Alleging Person to Be Free and White.—In indictments under statutes, which enact a punishment against free persons, different from that of slaves, as in rape, it is not necessary to allege that the prisoner is a free person. Com. v. Bennet, 2 Va. Cas. 235.

"Unlawfully" Committed.—The omission to state in an indictment under the act of February, 1819, § 3, that the offence was committed unlawfully, is cured by the statute of jeofails. Com. v. Bennet, 2 Va. Cas. 235.

Effect of Omisson of the Word "Female."—An indictment for rape did not charge that it was committed on a female, but the name given was a woman's name, and the indictment used the pronouns "she" and "her," in speaking of the person upon whom

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the rape was committed: it was held that though it would have been better to use the word "female," as it is the word used in the statute, yet the language used sufficiently showed that the rape was committed on a female, and was therefore good. Taylor v. Com., 20 Gratt. 825.

"Ravish" Is a Technical, Therefore Necessary Word.—It seems to be well settled that the word "ravish" is a technical term and necessary to be employed in the description of the offence in an indictment for rape, and the omission thereof will not be supplied by an averment that the offender did "carnally know." Christian v. Com., 23 Gratt. 954. However, it seems that in an indictment for an attempt to commit rape under sec. 10, ch. 199, Va. Code 1860, as amended by ch. 45, Acts 1871-72, the word "ravish" as descriptive of the offence attempted, was not necessary, but the words attempting "feloniously carnally to know," were sufficient. Christian v. Com., 23 Gratt. 954.

B. ATTEMPT TO RAPE.

In General—What Description Requisite.—In an indictment for an attempt to commit rape it is necessary to describe the offence which the accused is charged with having attempted to commit, with the same legal precision and certainty, and in the terms, with which it is necessary to describe it in an indictment for the commission of the offence itself. As it is necessary to use the technical word "ravish" in an indictment for the offence itself, so is it necessary to use it in the description of the offence in an indictment for an attempt to commit rape and the omission of it will not be supplied by an averment that the offender did "carnally know." Christian v. Com., 23 Gratt. 954.

Thus, an indictment for an assault with intent to rape, which alleges that the defendant violently and feloniously made an assault on a female and feloniously did attempt to ravish her and carnally know her, against her will and by force, sufficiently charges an act done towards the commission of the offence. Cunningham v. Com., 86 Va. 37, 13 S. E. Rep. 309.

When an Indictment Lies.—The Virginia Assembly in the session of 1822-23, enacted a law, providing that if any free negro attempt by force or fraud to have carnal knowledge of a white female, he should be punished, at the discretion of the jury, either with death, or by confinement in the penitentiary, not less than five nor more than twenty years. Va. Code 1849, § 1. In Fields' Case, 4 Leigh 648 (1832), a free negro was indicted for violently and feloniously making an assault upon, and attempting to ravish, a white woman. The jury found the following special verdict: "We find, from the evidence, that the prisoner did not intend to have carnal knowledge of the within named S. L., as alleged in the indictment, '*by force*,' but that he intended to have such carnal knowledge of her '*while she was asleep*'; that he made the attempt to have such carnal knowledge of her when she was asleep, but used no force except such as was incident to getting in bed with her, and stripping up her night garment in which she was sleeping, and which caused her to awake. If the law be for the prisoner upon this finding, then we find him not guilty; but if against him, then we find him guilty, and, in that case, if the offence be not punishable by death, but by confinement in the public jail and penitentiary house, we ascertain the term of his imprisonment therein, to be six years." The court found for the prisoner.

It is impossible from the statement of the case to ascertain fully the facts upon which the verdict was rendered. The jury found as a fact that the prisoner did not "intend to have carnal knowledge by force,"—and as either "force" or "fraud" must be present in order to constitute the offence under the statute upon the authority of which the prisoner was indicted, and neither being found by the jury, as declared in their verdict, expressly so as to "force," and impliedly as to "fraud," as there was no mention of it, the court was doubtless correct in acquitting the prisoner. Nevertheless, the verdict of the jury is misleading. They found that the prisoner did not intend to have carnal knowledge, "by force," but that he did intend to have such carnal knowledge of the woman "while she was asleep." This latter clause is confusing, and unless other material facts known to the jury, but not stated in the case, were found, the assumption that there was "no force" intended is controverted by such latter finding. If the facts were that the prisoner intended to have intercourse with the woman without her consent, and in the prosecution of such purpose, crept into bed with her, and stripped up her night garments intending to gratify his passion while she was asleep, at which point he was thwarted, there seems no escape from the conclusion that the elements of an attempt to rape are present.

At common law force is an ingredient of the crime. By numerous common-law authorities it is held that, if a woman is violated during sleep, or whilst stupefied by inebriation, narcotics, or in a fit when consent cannot be presumed, the force necessarily incident to the act is enough to constitute rape. 1 Whart. Cr. L. (8th Ed.), § 3566 *et seq.*; Min. Syn. Cr. 73, and authorities cited. Force as a necessary element of crime, as in rape, must not be physical; it may be mental occasioned by threats or the like. 2 Whart. Cr. Law, 1808; Am. & Eng. Enc. Law (1st Ed.) vol. 8, p. 99. To ascertain the intent inferences must necessarily be drawn from the declarations, threats, acts and other circumstances in connection with the accused's conduct in relation to the deed. The facts as they appear in the verdict of the principal case, would seem, upon such bare statement, which leaves them free from modifying circumstances, to justify the inference that the prisoner intended to know the woman carnally without her consent; and this intent as inferred from the force incidental to preparation for the accomplishment of the act, is sufficient to constitute the "element of force" requisite for the crime. The several elements constituting an attempt to commit a crime consist of (1) The intent (and by the hypothesis, this is inferred from the conduct, declarations, threats, and circumstances); (2) a direct, ineffectual act towards its commission; and that act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. See Hicks v. Com., 86 Va. 223, 9 S. E. Rep. 1024. Reverting to the facts again as reported and applying this test, an attempt seems present. The pivotal point upon which the whole question turns in its last analysis seems to be the "intent." In the above discussion this has been assumed as an inference justified by the statement of the facts in the verdict. Reading between the lines, however, and assuming the existence of other facts, known to the jury, but not set forth in the verdict, the preponderance of evidence may have justified the jury in inferring that no intent to use force, or have carnal knowledge without the female's consent, was

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present. Thus, if it had been shown in evidence that the woman was the accused's concubine, or that he had visited her on other occasions and had intercourse with her, there would be a *prima facie* presumption that her consent continued, which presumption might be strong enough to rebut the presumption that he intended to have carnal knowledge without the consent of the woman. Other sets of circumstances producing similar results might be assumed, some of which may have appeared in the evidence given at the hearing of the principal case. If such were true the absence of the mental element necessary to make out the crime could be inferred by the jury, and properly so. Some such extenuating circumstance was doubtless shown to the satisfaction of the jury, but the case as stated is silent as to such facts, thus creating a degree of confusion.

Necessary Allegations.—An indictment for an attempt to commit rape should show acts done, not merely to obtain the consent of the female, but showing a purpose to ravish her against her consent. They are necessary elements or constituents of the crime of an attempt. Christian v. Com., 23 Gratt. 954.

So in an indictment for an attempt to commit rape under sec. 3888, of Va. Code of 1887, some act towards the commission of the offence must be alleged, and at the trial proved; but it is sufficient to aver that the accused "violently and feloniously made an assault" in the attempt. Cunningham v. Com., 88 Va. 37, 13 S. E. Rep. 309.

And in an indictment against a black man, for feloniously attempting to ravish a white woman, it was held that the indictment was bad even after verdict unless it averred that she was a white woman.. 1 Rev. Code 1819, p. 585, sec. 4; Com. v. Mann, 2 Va. Cas. 210.

But it seems that in an indictment for an attempt to commit-rape under sec. 10, of ch. 199 of the Va. Code of 1860, as amended by ch. 45 of Acts of Assembly of 1871-72, the word "ravish," descriptive of the offence attempted was not necessary, but the words attempting "feloniously carnally to know," are sufficient. It seems otherwise when the indictment is for rape. Christian v. Com., 23 Gratt. 954.

C. PROCEDURE.

Finding under Indictment for Rape.—On an indictment for rape, the jury may find the accused not guilty of rape, but guilty of an attempt to commit rape. Givens v. Com., 29 Gratt. 830; Glover v. Com., 86 Va. 382, 10 S. E. Rep. 420.

LIII. RESCUE.

An indictment at common law charged the defendant with rescuing property that had been distrained by a sheriff for public dues, from a bailee to whose safe keeping the sheriff had committed it, without charging that the defendant knew in what right the bailee held it. The indictment was defective for not averring that the defendant had such knowledge. And such defect is not cured by verdict, by the statute of jeofails in criminal cases. 1 Rev. Code, ch. 169, § 44; Com. v. Israel, 4 Leigh 675.

LIV. RELIGIOUS MEETINGS.

An indictment for disturbing a religious congregation need not set out the means by which the disturbance and disquieting was effected. Thus, in Com. v. Daniels, 2 Va. Cas. 402 (1824), an indictment was found in the following words: "Virginia, Lewis county, to wit: Jurors for the commonwealth of Virginia, and for the county of Lewis, upon their oath, that William Daniels, late of the county of Lewis, yeoman, on the sixth day of October, in the year of our Lord 1822, with force and arms, at a place commonly called the Flat Woods, in the county of Lewis, within the jurisdiction of the superior court of law for said county of Lewis, during religious worship, did, on purpose, maliciously, and contemptuously disquiet and disturb, a certain congregation of Methodists, being then and there lawfully assembled for the purpose of religious worship, in contempt of public worship, to the evil example of all others in like cases offending, contrary to the form of the statute in that case made and provided, against the peace and dignity of the commonwealth." The defendant demurred to this indictment. It was held that an indictment for disturbing a religious congregation need not set out the means by which the disturbing was effected.

LV. ROBBERY.

Common-Law Form Sufficient.—An indictment clearly charging the felonious and forcible taking, by the accused, from the person of William Meyers, of the money and goods to the value specified, by violence, and putting him, the said Meyers in fear, and that the money and goods thus taken were the property of said Meyers, was demurred to on the ground that it did not charge the offence of "statutory robbery." The court held that there is in Virginia no such thing as "statutory robbery"; that § 3674, of the Code of 1887, does not create or define, but simply modifies the punishment of the common-law crime of robbery, by authorizing the jury, at their discretion, to substitute for the prescribed punishment of death, imprisonment in the penitentiary for the term of not less than eight nor more than eighteen years; that the offence, with all its essential elements as defined at common law, is set forth with substantial accuracy, and as robbery under our statute differs in no respect from robbery at the common law an indictment, good as a common-law indictment, is good also under our statute. Houston v. Com., 87 Va. 257, 12 S. E. Rep. 385.

When Charge Sufficient.—An indictment alleging the felonious and forcible, taking by the accused from the person of another, of goods and money of a named value, by violence and putting him in fear, and that such goods and money were the property of such other person, is a sufficient charge of robbery at common law. Houston v. Com., 87 Va. 527, 12 S. E. Rep. 385.

Description of Property Stolen.—In an indictment for robbery, "silver coin of the value of $2.00" is a sufficient description of the property taken. And upon the trial of such an indictment it is proper to permit the party, from whom the coin was taken, to give evidence as to the number and value of the pieces taken. State v. Jackson, 26 W. Va. 250.

Finding of Assault under Indictment for Robbery.—An indictment may be fatally defective as an indictment for robbery, yet good for an assault. Moreover, if such indictment attempts to charge the offence of robbery and is bad for that offence and charges an assault, it is good for the lesser offence, and a motion to quash such indictment is properly overruled. State v. Howes, 26 W. Va. 110.

Thus, an indictment for robbery, which charged that the prisoners "did make an assault upon G, and one gold watch did take, etc., from the person and against the will of G, etc., feloniously and violently

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did steal," the jury acquitted the prisoners of the felony charged, but found them guilty of assault and battery. The defendant moved in arrest of judgment, because the verdict found them guilty of assault and battery, which was no part of the charge set forth in the indictment. The court held the finding valid under Va. Code 1860, ch. 208, § 27. Hardy v. Com., 17 Gratt. 592.

And in State v. Howes, 26 W. Va. 111, the defendant was indicted for robbery; but the indictment failed to charge, that the property was taken from the person forcibly and against the will of the party from whom taken. The indictment was admitted by the state to be bad as an indictment for robbery; and it was insisted that as the indictment was bad as an indictment for robbery, it was also bad for an assault, and should be quashed. The jury found the defendant not guilty of the felony charged; but found him guilty of an assault. The court decided that while the indictment falls short of charging the crime of robbery, it clearly charges an assault, for which the defendant was convicted, and the defendant certainly has no right to complain, because he was not legally charged with the crime of robbery as well as for the assault, which would necessarily precede that crime. If the indictment properly charges an assault, the surplusage contained in the indictment by reason of an unsuccessful attempt to charge the higher crime will not vitiate it for the lesser one, which is well charged.

LVI. SABBATH BREAKING.

When Indictment Lies against a Corporation—Statute.—Under the W. Va. Code in force in 1879, §§ 16, 17, ch. 149, it was held in State v. B. & O. R. Co., 15 W. Va. 362 (1879), that a corporation could be indicted for "Sabbath breaking." The indictment was against the railroad company for laboring at its trade by running over its track on Sunday certain cars loaded with coal. But it seems that under the present W. Va. Code a railroad company cannot now be indicted for running trains on Sunday. There is no law to sustain such indictment, as there has been a material change in the statutes relating to the violation of the Sabbath, since the decision of State v. B. & O. R. Co., 15 W. Va. 362. Thus, in State v. N. & W. R. Co., 33 W. Va. 440, 10 S. E. Rep. 813, the N. & W. Railroad Company was indicted on a similar charge to that made against the B. & O. R. Company in 15 W. Va. 362, viz.: for laboring at its usual calling, that of a common carrier, running over its road loaded cars on Sunday, the same not being used in household or other work of necessity or charity, for the transportation of the mail, or of passengers or their baggage. The court said: "We hold that this proposition cannot be sustained. Since the decisions of this court in the case of State v. Railroad Company, 15 W. Va. 362, 24 W. Va. 783, sustaining a prosecution against a railroad company for running trains on Sunday, the statute relating to the subject has been greatly changed by chapter 123, Acts 1882. Sections 16, 17, chapter 149, as found in the Codes of 1868, 1887, respectively, which reads as follows," etc. The court here cited in its opinion the statutes referred to, and compared them, showing a variance between them, and concluded that the change made by subsequent acts, prevented any indictment being sustained against a corporation for carrying on its usual business on the Sabbath day. For provisions of Virginia laws relating to Sunday, see Va. Code 1887, §§ 3799, 3801, 3805, 3806; also, W. Va. Code 1899, ch. 149, §§ 16, 17.

Same—What Must Be Alleged Therein.—In an indictment against a railroad company for being found laboring at its trade and calling on a certain Sabbath day it is proper and necessary to allege, that such labor was not in household work or other work of necessity or charity; but it is not necessary to allege that the defendant did not conscientiously believe that the seventh day of the week ought to be observed as a Sabbath, or that it did not refrain from all secular labor on that day, or that the labor was not done in the transportation of the mail, or of passengers or their baggage. The indictment is not defective in failing to state that the defendant did not conscientiously believe the seventh day of the week ought to be observed as a Sabbath, etc. The rule is, "that where exceptions are in the enacting part of a law, it must in the indictment be charged that the defendant is not in any of them: but what comes in by way of proviso in a statute must be insisted on for the purpose of defense by the party accused." See Hill's Case, 5 Gratt. 682. The provision contained in the 17th section of ch. 149 of W Va. Code, in force in 1879, is in the nature of a proviso. It is not an exception in the enacting part of the law; and it was therefore unnecessary to notice it in the indictment, even if the indictment had been against a natural person. As a corporation cannot have a conscientious belief in reference to religious questions, the proviso has no application to this case: and had it even been inserted in the enacting clause in the 16th section, it would not have been proper to have noticed it in this indictment. It is clear that the court did not err in refusing to continue the case upon the facts stated in the first exception. State v. B. & O. R. Co., 15 W. Va. 362.

Same—Proof Necessary to Sustain Indictment.—But it is not necessary to sustain an indictment against a corporation for Sabbath breaking, under the 16th and 17th sections of ch. 149 of the W. Va. Code, in force in 1879, to prove that the act charged was done on the particular day named in the indictment: it is sufficient to prove that the defendant labored in its trade or calling as alleged in the indictment on a Sabbath day within one year before the finding of the indictment against it, and that such labor was not in household or other work of necessity or charity, unless it appears that the defendant is within one of the exceptions of the 17th section of ch. 149 of the Code of this state. State v. B. & O. R. R. Co., 15 W. Va. 362.

However, it is not sufficiently sustained by proving that a part of a load of coal was transported over the railroad on the day named in the indictment: but the assent of the corporation to the Sabbath breaking, must be shown by proving that such Sabbath breaking was habitual or by other satisfactory evidence, and such assent cannot be inferred from a single breach of the Sabbath by the authorized agents of the company while acting within the scope of their employment.

Nevertheless, if on the trial a defendant corporation proves that by a general order it directed its agent and employees not to ship anything except live stock and perishable freight on the Sabbath day, the jury may nevertheless find the defendant guilty, if by proof of the habitual running of freight trains about the time the offence was committed, or from other satisfactory evidence, the jury are satisfied that the running of such trains in violation of such general order met the assent of the corporation. State v. B. & O. R. R. Co., 15 W. Va. 362.

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LVII. SALES.

Without License.—An indictment which charges that the defendant "unlawfully did sell music not manufactured by the seller, within the state, without having a license therefor according to law," is good, it sufficiently appearing that music is a species of goods, wares and merchandise. Com. v. Nax, 13 Gratt. 789.

And an information under the 1st sec. of the Act of February 13, 1866, Sess. Acts 1865-66, p. 82, ch. 2, in relation to the assessment of taxes on licenses, must allege that the sale was "for profit or on commission or for other compensation," or it will be fatally defective on demurrer or on motion in arrest of judgment. Cousins v. Com., 19 Gratt. 807.

Moreover, an information for retailing merchandise without a license, concludes by claiming a penalty imposed by the statute; and upon the trial, the jury find the defendant guilty, they should assess the fine. If the jury merely find the defendant guilty, no judgment can be entered on the verdict; but it should be set aside by the court, and a new trial awarded. Com. v. Scott, 5 Gratt. 696.

LVIII. SLAVES.

An indictment under the statute, 1 Rev. Code, ch. 111, sec. 13, p. 424, for allowing more than five slaves, other than his own, to be and remain at one time on the defendant's premises, need not charge that it was without consent of the owners of the slaves. Com. v. Foster, 5 Gratt. 695.

And in an indictment for advising slaves to escape from their masters, it is improper to admit evidence to prove that the prisoner was guilty of advising the slaves of another person, not named in the indictment, to abscond. Cole v. Com., 5 Gratt. 696.

LIX. STABBING.

See *ante*, "Assault and Battery."

On an indictment for unlawful stabbing under the statute of Virginia, a verdict of "guilty of unlawful stabbing," will not authorize a judgment; but the court should direct a new trial. Marshall v. Com., 5 Gratt. 663.

LX. SEDUCTION.

In General.—Before the Statute of Circumspecte-agatis, 13 Edw. 1, the Court of King's Bench punished offences of incontinency, but since that statute, the cognizance of such offences, has been transferred to the ecclesiastical courts.

As held in Anderson v. Com., 5 Rand. 627 (1826), the offences of adultery, fornication and the like, could not be punished by our courts of law, as common-law offences, unless they be accompanied with other circumstances, which of themselves constitute a misdemeanor; such as the public commission of the act, or a conspiracy. The statutory offence must be punished according to the statute. The seduction and abduction of a female over sixteen years of age, being not within the statute cannot be punished by indictment. It would be otherwise if a conspiracy had been charged. Since this decision, which was in 1824, by the general court, the law has been materially changed. The Va. Acts of 1877-8, p. 283, § 16, Va. Code 1887, § 3877, provide that, any person who shall seduce and have illicit connection with an unmarried female of previous chaste character, shall be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary not less than two nor more than ten years. And as Va. Code 1887, § 3990, provides that no person shall be put upon trial for any felony unless an indictment shall have first been found by a grand jury in a court of competent jurisdiction, it follows that a prosecution now for seduction, must be on an indictment. See Hausenfluck v. Com., 85 Va. 702, 8 S. E. Rep. 683.

Variance.—Though one count in an indictment charges the seduction to have been committed on a certain day and another count charges the same offence to have been committed on a different day, the same offence is charged in each count, and the only difference is as to the time of its commission, such an indictment is good upon demurrer. And it is not error to refuse to compel an election between the dates. Hausenfluck v. Com., 85 Va. 702, 8 S. E. Rep. 683.

Misjoinder.—The first count in an indictment for seduction charged the crime to have been committed on the 24th day of May, 1886, and the second charged "afterwards, to wit, on the 20th day of June in the year 1886," etc., the crime was committed. The indictment was demurred to on the ground of misjoinder of counts. The court overruled the demurrer, saying as follows: "In this case each count sets forth the same crime as committed on different days, and there was no misjoinder of counts, and the court properly exercised its discretion in not quashing the indictment or either count, and in not confining the evidence to any particular day." Hausenfluck v. Com., 85 Va. 702, 8 S. E. Rep. 683.

Election between Counts.—An indictment for seduction charged the crime to have been committed at different times in different counts. A motion was made to compel the state to elect on which count it would prosecute the prisoner. The court held as follows: "The indictment in this case charged the same offence in each count, and the only difference is as to the time of its commission. This could not be two offences. The offence could only be committed once between the same parties, and, while the second count might have been, and probably was unnecessary, it could in no wise confound the accused nor distract the jury," and the motion was overruled. Hausenfluck v. Com., 85 Va. 702, 8 S. E. Rep. 683.

LXI. SHOOTING.

See *ante*, "Mayhem"; also, "Assault and Battery."

Averments—"Feloniously Done."—An indictment for malicious shooting, ought to charge that it was done *feloniously*, and this under the Act of 1817, which does not in terms declare it a felony, but makes it punishable with penitentiary confinement. Trimble v. Com., 2 Va. Cas. 143.

Intent.—Although the statute against unlawful shooting, etc., affixes a penalty when the act is done with the intent to maim, disfigure, disable or kill (in the disjunctive), yet the indictment should charge the intents conjunctively. Although all of the intents be laid, yet proof of either supports the indictment. Angel v. Com., 2 Va. Cas. 231.

And if a person indicted for shooting another with intent to maim, disfigure, disable and kill him, and under the W. Va. Acts of 1881, ch. 29, § 1, takes the stand as a witness in his own behalf, it is competent to ask him, with what intent he shot at the person he tried to shoot. State v. Meadows, 18 W. Va. 659.

Variance.—If A is indicted for shooting C with intent to maim, disfigure, disable or kill him, and the proof is, that he shot at B and missed and accidently hit C, he can be convicted on such indictment for shooting C with intent to maim, disfigure, disable, and kill him. But if A is indicted for an attempt to shoot C with intent to maim, disfigure, disable, and

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kill him, and C is not in fact shot, and the proof is that the attempt was to shoot B, and not C, he cannot be convicted under the indictment. State v. Meadows, 18 W. Va. 659.

Surplusage.—In State v. Newsom, 13 W. Va. 859, there was an indictment under the act concerning malicious and unlawful shooting, etc., contained in the W. Va. Code 1869, ch. 144, § 9, which charged, that the prisoner, "with a certain pistol or revolver, etc., feloniously and with his malice aforethought did shoot one Lewis Dempsey, Jr., with intent," etc. The jury found the prisoner "guilty of unlawful shooting, with intent," etc., without saying whom he shot, and fixed the term of his imprisonment in the penitentiary at one year. The supreme court held that the lower court did not err in overruling the motion to quash, and in overruling the demurrer to the indictment, because, although it alleged the weapon in the alternative as a "pistol or revolver," the expression "or revolver" was mere surplusage, and could be rejected, and therefore need not be proved.

So where upon the indictment under the act concerning malicious and unlawful shooting, etc. (W. Va. Code 1869, ch. 144, § 9), which charges, that the prisoner, "with a certain pistol or revolver, etc., feloniously and with his malice aforethought did shoot one Lewis Dempsey, Jr., with intent," etc., the jury found the prisoner "guilty of unlawful shooting, with intent," etc., without saying whom he shot, and fixed the term of his imprisonment in the penitentiary at one year, it is not error for the court to overrule a motion to quash; and to overrule a demurrer to the indictment, because, although it alleges the weapon in the alternative, as a "pistol or a revolver," the expression "or revolver," is mere surplusage, and should be rejected, and therefore does not have to be proved. State v. Newsom, 13 W. Va. 859.

Malicious Wounding, etc., May Be Proved.—Under sec. 4040 of Va. Code of 1887, a prisoner indicted for malicious cutting and wounding with intent to maim, disfigure, disable, and kill, may be convicted of unlawful cutting and wounding with such intent, or merely of assault and battery, if the evidence introduced prove such offences. Montgomery v. Com., 98 Va. 840, 36 S. E. Rep. 371; Canada v. Com., 22 Gratt. 899.

LXII. TRESPASSES.

See *ante*, "Assault and Battery"; also, "Shooting."

A person indicted for a trespass, with force and arms, may be prosecuted to outlawry. Com. v. Hale, 2 Va. Cas. 241.

What Must Be Alleged in an Indictment for Unlawful Trespass.—And an indictment under § 1, ch. 34, of the statute of 1822-23, for punishing willful trespassers, must allege that the property taken away by the defendant belonged to another person. Com. v. Israel, 4 Leigh 675.

Indictment for Malicious Trespass—Not Error to Omit Words "But Not Feloniously."—However, in an indictment for malicious trespass, it is not error to omit the words "but not feloniously," these words not constituting any part of the description or definition of the offence, but inserted out of abundant caution to exclude the possible conclusion or inference that the legislature intended thereby to confound malicious trespasses with felonies. Dye v. Com., 7 Gratt. 662.

677 *Sherman v. The Commonwealth.

April Term, 1858, Richmond.

Escaped Prisoner—Writ of Error Already Obtained—Action of Appellate Court.*—A prisoner convicted of a felony obtains a writ of error, which is directed to operate as a *supersedeas*: and he then escapes from jail. The appellate court will discharge so much of the order awarding the writ of error as directed it to operate as a *supersedeas* to the judgment. And will further direct that the writ of error be dismissed by a certain day, unless it shall be made to appear to the court by that day, that the plaintiff in error is in custody of the proper officer of the law.

John W. Sherman was indicted, tried and convicted in the Circuit court of Culpeper county, for a felony in advising a slave to abscond from his master; and he was sentenced to six years' imprisonment in the penitentiary. From this judgment he obtained a writ of error from this court, which was directed to operate as a supersedeas to the judgment. Whilst the case was pending in this court the prisoner broke jail, and absconded. And then the attorney general moved the court for a rule upon the prisoner to show cause why the court should not set aside the supersedeas, or postpone the hearing of the cause until the prisoner should return to the proper custody; and the same was made.

The motion was argued by The Attorney General, for the commonwealth, and by Wellford, for the prisoner.

ALLEN, P., delivered the judgment of the court:

The argument as well of the attorney general in support of said rule, as of the counsel who appeared for the plaintiff in error in opposition thereto, having been maturely considered, and it appearing that said *plaintiff in error has
678 since the judgment of conviction escaped from custody and is still at large, it is considered by the court that so much of the order awarding the writ of error in this case as directed it to operate as a supersedeas to the judgment of conviction in the petition set forth, be discharged; and it is further ordered, that said writ of error be dismissed on the first day of May next, unless it shall be made to appear to this court, on or before the day last aforesaid, that said plaintiff in error is in custody of the proper officer of the law.

Ordered, that a copy of this order be certified to the Circuit court of Culpeper county.

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679 *Purcell v. The Commonwealth.

April Term, 1858, Richmond.

Gaming—Public Place—Case at Bar.†—A room, in an

*See principal case cited and approved in Leftwich v. Com., 20 Gratt. 723; Franklin v. Peers, 95 Va. 604, 29 S. E. Rep. 321; State v. Conners, 20 W. Va. 6, 8, 10, 11, 12; State v. Sites, 20 W. Va. 16; Allen v. State, 17 Sup. Ct. Rep. 527, 166 U. S. 138.

†See principal case cited and approved in State v. Brast, 31 W. Va. 383, 7 S. E. Rep. 12.

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out-house within the enclosure of a tavern lot, which had at one time been used in connection with the tavern, and the room over which is still so used, having been rented by a third party and held, used and controlled by him, independent of the proprietor of the tavern, though the occupier boarded at the tavern, and the servants belonging to it attended to the room, is not a part of the ordinary, nor is it a public place, in the sense of the act, Code, ch. 198, § 4, p. 748.†

This was a presentment in the Circuit court of Henry county, at the April term 1857, against Andrew J., Purcell and seven others, for that they "did play at an unlawful game with card at the ordinary of Pernella A. Mead in Martinsville in said county of Henry." Purcell's case was tried separately, and there was a verdict and judgment for the commonwealth.

After the verdict Purcell moved the court to set it aside and grant him a new trial, on the ground that the evidence did not warrant the verdict. But the court overruled the motion, and he excepted.

The only question was whether the place where the playing was done was a part of the ordinary in the sense of the statute. The playing was in a room held and occupied at the time by Hill C. Redd as a law office. This office was on the premises on which is situated the tavern-house of Mrs. Mead, a licensed tavern-keeper, about
680 thirty yards distant from the *same, and within the enclosure around the tavern-house. The playing was in the night time, and after the business hours of the occupant of the office were over; and when it took place, the doors and windows were closed, and no noise or loud talking occurred during the time. Redd had rented the said office, which is on the front floor, from the proprietor of the tavern, for and during the year in which the playing took place, at thirty dollars a year, and he had the exclusive control of the office during that time, and furnished his own bed and lights for said time; but himself and said room were attended by the servants of the ordinary. He was at the time of the playing a boarder, contracted for at the time of renting the room, at said ordinary, under a contract separate from, but made at the same time with the renting of the room; and by the terms of said renting he was to have the right to hold and occupy said office, whether or not he continued to board at said ordinary, until the end of the year. Before said renting the room was held and used for the accommodation of guests at the ordinary; and the room above said office was during the same time, so used.

Upon the application of Purcell, this court granted him a writ of error to the judgment.

Grattan, for the appellant.

The Attorney General, for the commonwealth.

DANIEL, J. The prosecution in this case was had under the 4th section of chapter 198 of the Code, by which a fine of thirty dollars is imposed on any free person who, at an ordinary, race-field or other public place, shall play at any game except bowls, chess, backgammon, draughts, or a licensed game. And the specific charge was for playing at an unlawful game, with cards, at the ordinary of Mrs. Mead in Mar-
681 tinsville *in the county of Henry. The playing at a game with cards was proved; but it was not proved that there was any betting on the game, and the issue was narrowed to the enquiry, whether the room in which the playing took place, was in the contemplation of the statute a part of the ordinary.

The establishment of an ordinary may be composed of several houses, or it may be kept in a single house, or in a part of a house; the other portions being held in a different right, and appropriated to an independent business or use.

If we suppose a sale or lease, for the purposes of an ordinary, of a portion only of an establishment, the whole of which, previous thereto, was held and occupied as a private dwelling, the remaining portion thereof being still retained and occupied by the vendor or lessor as before, for his own exclusive use, it could hardly be maintained in such a case that the vendor or lessor, his family or guests, for a mere playing at cards, in a house or room belonging to the part so retained, could be convicted of gaming at an ordinary.

Without a statute so declaring, would the rule be changed by merely reversing the order, in the holding of the establishment, and supposing that the house or room, though at one time constituting a part of an ordinary, is, at the time of the playing, in the exclusive occupancy of a party, who, under a sale or lease, has in good faith converted such house or room into a private dwelling? I should think not.

In the absence of such a statute, no good reason is perceived why, when the business of the ordinary is conducted in several houses, one or more of them, or, when the ordinary is kept in one house only, one or more of its apartments might not by a sale or lease and an exclusive dedication to other purposes, be to all legal intents severed and disconnected from the ordinary. And (in such a state of the law) the true en-
682 quiry *in a case of the kind before us would seem to be, not whether at some time previous thereto, the house or room in question constituted a part of the ordinary, or was held as an appendage thereto, or used in connection with it, in the conduct of its business, but whether at the time of the playing such was in truth the case.

If at the time of the playing such house or room be in the occupancy of a party who, having no concern or interest in the busi-

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See monographic *note* on "Gaming" appended on Neal v. Com., 23 Gratt. 917.

†The act imposes a fine of thirty dollars on any person who plays, or bets on the sides of those who play, "at any ordinary, race-field or other public place," at any game, except bowls, chess, backgammon, draughts or a licensed game.

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ness of the ordinary, has honestly bought or leased it and appropriated it to his own private and exclusive use, a conviction for such playing would seem to me to be unwarranted either by the letter or spirit of a law which prohibits such playing only when it takes place at "an ordinary, race-field or other public place."

In comparing the 198th chapter of the Code of 1849 with the 147th chapter of the Code of 1819, it will be seen that the two statutes vary from each other materially in their mode of treating the subject under consideration. The act of 1819, after prohibiting the playing at any game except bowls, &c., in an ordinary, &c., in the 5th section, proceeds, afterwards in the 16th section, to declare that every house, out-house, booth, arbor, garden and place within the curtilage of the principal house, tavern, messuage or tenement, or in any wise appurtenant thereto, or at any time held therewith, shall be considered as a part of the tavern, unless the same shall have been bona fide leased to some other person, by deed indented and recorded, &c. But in the act of 1849 there is no declaration as to what shall be deemed and taken to be parts of the ordinary. It is true, that in the 6th and 7th sections of the last mentioned act, a fine is imposed on a keeper of an ordinary or house of entertainment, for permitting unlawful gaming at his house or at any out-house, booth or arbor, or other place appurtenant thereto or held there-
683 with; *and it is declared that in a prosecution therefor, if the gaming be proved, it shall be presumed that it was permitted by the keeper of the house, unless it appear that he did not know of or suspect such gaming, or that he endeavored to prevent it, and gave information against the players. And in the 8th section, it is further provided that if the keeper of such a house let or hire to another person any out-house or other place which has been at any time appurtenant to or held with the house kept by him, with intent that unlawful gaming be permitted thereat, he shall suffer the same punishment and incur the same forfeiture as if such unlawful gaming were permitted at his own principal house; and in a prosecution therefor, if the gaming be proved, it shall be presumed that such out-house or other place was let or hired with intent aforesaid, unless the presumption be repelled in the manner mentioned in the 7th section; which (as we have seen) is by its being made to appear that he did not know of or suspect such gaming, or that he endeavored to prevent it, and gave information against the players. But these sections are obviously pointed at the keeper of the house alone. They make him responsible for the offence of unlawful gaming, when committed by other persons at the houses and places mentioned, even though such houses or places be at the time rented out, unless he exculpate himself in the manner indicated; but they do not declare in what the offence of unlawful gaming consists. That offence, whether its illegality arises from the character of the game, or the character of the place at which the game is played, is defined in the preceding section of the chapter. The offence of playing at an unlawful game and the offence of permitting such game to be played by others, are distinct and substantive offences; and they are made the subject of distinct and separate sections. Having given the definition of unlawful gam-
684 ing, and disposed *apparently of that offence in distinct and appropriate sections of the chapter, we can hardly suppose, in the absence of plain indications of such an intent, that it was the purpose of the legislature to assign to subsequent sections, devoted in terms to another offence, the task of enlarging by implication the definition of the first mentioned offence. Such a mode of legislating upon the subject would be irregular and illogical, and obviously inconsistent with the general scheme and structure of the statute.

As a means of suppressing the vice of unlawful gaming, and of removing it as far as possible from places of public resort, it was altogether competent and proper for the legislature to enjoin it upon every keeper of an ordinary, as a duty, to give information of all commissions of the offence occurring not only at all places connected with his ordinary and within his control, but also at all places which may have been at any time held with the ordinary, though at the time of the commission of the offence, they may be in the exclusive use and occupancy of persons who under bona fide leases have severed them from all connection with the business of the ordinary; but there arises no necessary implication that in doing this the legislature meant to indicate that a mere playing with cards at any of the places last mentioned, should be deemed and taken as a playing at an ordinary, and so be treated as unlawful gaming.

If it had been the purpose of the legislature to make any distinction between a mere playing with cards at a private house, never held with or in any manner connected with an ordinary, and a like playing at a private house, which, though at some time so held or connected, is at the time of the playing in the occupancy of a tenant in good faith renting and holding it for his own lawful and exclusive use, it is but reasonable to suppose they would have declared such
685 *purpose in plain and unambiguous terms. They have made no such declaration; and after allowing to the statute the benefit of the most liberal construction that can be justly claimed for it, in virtue of its character as a remedial law, I have been unable to perceive that the inference of such a purpose is fairly deducible from any of its provisions.

Applying the views thus taken of the law to the facts certified, I am led to the conclusion that the judgment of the Circuit court cannot be sustained. For though the room in which the playing took place (and which was within the same enclosure with the main building, about thirty yards dis-

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tant from the latter), had at one time been held with and used as an appendage to the tavern, such was not the case at the time of the playing. It was in the exclusive holding and occupancy of the witness Redd, who had rented it for the year as a law office. The fact that he was a boarder at the tavern, makes no difference; by the terms of the renting he was to have the right to hold and occupy the office until the end of the year, whether he continued to board at the tavern or not. His use of the room was not in any wise incidental to, or dependent upon his being a guest or boarder at the tavern, but was enjoyed by force of his rights as tenant. Nor is the case affected by the use of the room above his for the accommodation of the guests of the tavern. It does not appear that the access to that room was through the room in question, and the inference that such was the case is repelled by the consideration that the latter was used by Redd as a law office, and that he had, as is stated in the certificate, the exclusive control over it.

The severance of the room in question, therefore, from the tavern, in tenure,
686 occupancy, use and control, *seems to have been complete. And the charge in the presentment is thus, I think, not sustained.

I think the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

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687 *Scott v. The Commonwealth.

July Term, 1858, Lewisburg.

1. **Forgery and Counterfeiting—Examination—Indictment.***—A prisoner is examined for forging and counterfeiting twenty-four pieces of silver coin, and is sent on to the Circuit court for further trial. He cannot be indicted for feloniously having in his possession ten or more pieces of coin, with intent to alter and employ the same as true.

2. **Possession of Forged Coin—Indictment—Allegations.***—An indictment under the statute, Code, ch. 193, § 6, p. 738, for feloniously having in his possession more than ten pieces of forged or base coin, must allege that the prisoner had them in his possession at the same time; and the charge that on a certain day he had them in his possession, is not sufficient.†

3. **Same—Appellate Practice—Refusal of Lower Court to Quash Defective Count—Case at Bar.***—There are counts in an indictment for forging and counterfeiting coin, and also a count for feloniously having in his possession twenty pieces of forged coin, not saying, "at the same time." The prisoner having moved the court to quash the last count, which is overruled, there is verdict and judgment against him, and he obtains a writ of error. This court holding that the count is bad as an indictment for a felony, will not permit it to stand as a count for a misdemeanor, but will reverse the judgment, and quash the count.

4. **Indictment*—Joinder of Counts‡—Felony and Misdemeanor.**—QUÆRE: If in an indictment counts for a felony and for a misdemeanor may be joined. It seems not.§

688 *Isaac B. Scott was examined before the County court of Giles county for a felony, in that he did, on the day of September 1857, in said county, feloniously and falsely forge and counterfeit divers, viz: twenty-four pieces of silver coin current in this commonwealth by the laws and usages thereof called half dollars, with intent to deceive and defraud: And the court ordered that he should be further tried before the Circuit court of said county for the felony with which he stands charged.

At the April term 1858 of the Circuit court of Giles county, the grand jury found an indictment against Scott, which contained seven counts. The first three counts were for forging and counterfeiting coin. The fourth count charged that on a certain day in the county aforesaid, he feloniously did have in his possession twenty pieces of base coin current in this commonwealth by the laws and usages thereof, known and called half dollars, with intent to utter and employ the same as true, he then and there well knowing, &c. The fifth, sixth and seventh counts were for uttering counterfeit coin, and making or having in his possession instruments for counterfeiting.

When the prisoner was arraigned he moved the court to quash the fourth, fifth,

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*See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674; monographic *note* on "Forgery and Counterfeiting" appended to Coleman v. Com., 25 Gratt. 865.

†Code, ch. 193, § 6, p. 738. "If a free person have in his possession forged bank notes, or pieces of forged or base coin, such as are mentioned in the third section of this chapter, knowing the same to be forged or base, with intent to utter or employ the same as true, he shall, if the number of such notes or pieces of coin in his possession at the same time, be ten or more, be confined in the penitentiary not less than one nor more than five years; and if the number thereof be less than ten, be punished as for a misdemeanor."

‡In Mitchell's Case, 93 Va. 776, 20 S. E. Rep. 892, it was said: "In point of law it is no objection that several misdemeanors of the same nature, and upon which the same, or a similar judgment may be given, are contained in different counts of the same indictment. This has been long the general and well-settled rule of the common law, and cannot be now questioned. 1 Chitty Cr. Law 249; Dowdy v. Com., 9 Gratt. 727; *Scott's Case, 14 Gratt. 687;* 1 Bishop's Cr. Pro., sec. 452."

As to the query contained in the fourth headnote, see also, Hardy v. Com., 17 Gratt. 594 *et seq.*

§Code, ch. 208, § 28, p. 777. "If a person indicted of felony be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part as he is convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor."

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sixth and seventh counts in the indictment, upon the ground that he had never been examined before the County court of Giles for the offence charged against him in these counts; and he also moved the court to quash the fourth count, on the ground that the charge therein set out was not in the language of the statute; which makes the possession of ten pieces or more of base coin at the same time a felony. But the court overruled the motion as to the fourth count, and sustained it as to the fifth, sixth and seventh. And thereupon the prisoner excepted.

Upon the trial several exceptions were taken, but one of which it is necessary
689 to notice. After the evidence *had been introduced, the attorney for the commonwealth moved the court to instruct the jury, that if they believed from the evidence in the cause, that the prisoner before the finding of the indictment, had in his possession in Giles county, ten pieces or more of the base, forged and counterfeit coin, referred to in the indictment, knowing the same to be base and forged, with a felonious intent, then he should be found guilty under the fourth count of the indictment. This instruction the court gave; and the prisoner excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment at three years: And the court rendered a judgment accordingly. Whereupon the prisoner applied to this court for a writ of error; which was allowed.

Staples, for the prisoner.

The Attorney General, for the commonwealth.

DANIEL, J. It seems to me that the prisoner's objections to the fourth count of the indictment, were both well taken.

The forging of coin, and the felonious having in possession such forged coin, are distinct and substantive offences. Code, ch. 193, § 3 and 6.

In Page v. Commonwealth, 9 Leigh 683, it was decided by the General court, that an examination of the prisoner for "feloniously using and employing as true, for his own benefit, a certain counterfeit note, well knowing the same to be counterfeit," did not warrant counts in the indictment for forging the note, and that the Circuit court erred in refusing to quash said counts, on the motion of the prisoner. And in Commonwealth v. Mowbray, 11 Leigh 643, where the prisoner was examined and remanded to the Circuit court for forging an order, the same court decided that such proceeding was not sufficient ground on which to
690 found an indictment *for uttering and publishing the order; and that the Circuit court erred in refusing to entertain the prisoner's motion to quash counts in the indictment charging him with the latter offence.

To my mind, the features which mark the felonious possession of forged coin, as an offence different from that of the forgery of the same, are as distinct as those which have been thus declared to distinguish forgery from uttering and publishing. And I do not think that the attorney general has succeeded in his effort to place this case outside of the reason and influence of the cases of Page and Mowbray. I cannot accede to the correctness of his position, that the charge of feloniously having base coin in possession is necessarily involved in the charge of forging it. For if it be conceded that the act of forging necessarily implies the possession, by the counterfeiter, of the coin, during the process of its fabrication, and at and (for an instant at least) after the completion of the process, it is yet obvious that the necessity of such an implication does not extend to the possession of any given number of pieces of the coin at one and the same point of time. The offence of "forging ten or more pieces of coin," would be complete, though it should appear that each piece in succession was commenced and finished, and had passed out of the hands, and beyond the control of the forger, before another came into his possession; whilst in order to make out the felony of having such coin in possession, the statute, in terms, requires it to be shown that the party accused had in his possession ten or more pieces at the same time. The judgment of the County court, therefore, remanding the prisoner to be tried for forging and counterfeiting twenty-four pieces of coin, does not serve to show that he has been examined for the offence of having said pieces or any ten of them in his possession at the same time.

691 *In cases of felonious homicide, and some other crimes not necessary to be instanced, a single act constitutes the basis and main element of each of a series of offences which are severally graduated and especially characterized by the greater or less degree of malice or wickedness of motive with which the felonious act may have been perpetrated. In such cases the order of the examining court remanding the accused to the Circuit court, to be tried for the felonious act aforesaid, is a sufficient warrant and authority for indicting and trying him for all or any one of the offences in the series. But the reason of such a rule does not extend to the several offences of forging, uttering, and feloniously having in possession base coin. It is true that these offences have certain properties and qualities common to them all. They each consist in frauds practiced or intended in respect to the current coin; and in order to convict a party of any one of the offences, it is necessary to show that there has been a forgery of the coin. These offences are thus of a kindred character, and belong to the same class. But they do not constitute such a series of offences as to justify its being predicated of any one of them that it is the major, and includes within itself, necessarily, all the elements of the other two, or of either one of them. In enquiring into an act of forgery, you do not necessarily institute an examination into the act of uttering the thing forged. And in

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enquiring into the act of felonious uttering (though it be necessary to enquire whether the coin is forged), it is not necessary to enquire whether the accused was the forger. And so an examination into either of these two offences would be perfect, without any enquiry as to whether the party accused had at the same time ten or more pieces of the base coin in his possession; and vice versa.

It is the right of persons charged with crime, to insist that an examination into the facts, the specific unlawful
692 *acts constituting the offence of which they are accused, shall precede any indictment against them. When, therefore, a party indicted for feloniously having in his possession base coin, objects to the charge, on the ground that he has not been previously examined for the offence, such objection is not met by showing that he has been examined for either of the two other offences of a kindred character.

It seems to me, that the objection of the prisoner to the fourth count, for defects apparent on its face, was also clearly well taken. The charge that the prisoner "had in his possession twenty pieces of base coin" on a particular day, "the day and year last aforesaid," mentioned in the preceding counts, did not, expressly or by necessary implication, allege that he had ten or more of such pieces in his possession at the same time. The truth of such a charge is not at all inconsistent with the idea that the twenty pieces may have come into and again passed out of his possession on the same day, one after another, or otherwise in such succession and order that no ten of them were in his possession at the same time.

For some purposes the law refuses to recognize any fractions of a day, and, by a fiction, treats it as if it were a point of time incapable of further division. This rule, or rather departure from rule, however, furnishes no authority for holding that a statute, which makes a conjecture or combination of circumstances at the same time essential to the constitution of a crime, can be satisfied by alleging and showing that such circumstances all transpired on the same day. There is nothing in the words of the statute on which the fourth count is based, from which to infer that the language in respect to time is used in any other than its ordinary and literal sense. The defect is not helped by charging that the prisoner "feloniously" had the twenty pieces in his possession. To make the count
693 *good, it does not suffice to style the prisoner's offence a felony. It is absolutely essential to the validity of the count, that it should also distinctly set out and charge the acts which constitute the offence. The having ten or more pieces in possession at the same time, is of the essence of the offence, and necessary to mark it as a felony.

It is argued, however, by the attorney general, that conceding the objections taken by the prisoner to the fourth count to be both good, it would not follow as a necessary consequence, that there was any error in the course of the Circuit court in respect to the prisoner's motion, inasmuch as said count is substantially a good and sufficient count for the misdemeanor of having in possession, with intent to utter, &c. pieces of base coin less in number than ten at the same time, punishable by the 6th section of ch. 193 of the Code, already cited. And to meet any difficulty which in this aspect of the case might arise from the joinder of counts for felony with a count for a misdemeanor, he refers to the 28th section of ch. 208 of the Code, p. 777.

This section declares, that if a person convicted of felony be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor.

It is clear that whatever may be the influence of this section (if any) on a joinder of counts in felony with counts in misdemeanor, it does not sanction the course of proceeding to try the prisoner, in the face of his objection, duly and timely taken, for a felony upon a count, illegal as a count for felony, for want of a previous examination of the offence therein charged, and defective on its face. If upon the prisoner's motion to quash the count in question, on the score of such illegality and defect,
694 the court, whilst recognizing *the existence of such illegality or defect, was still of the opinion that the count was good as a count for a misdemeanor, and that it was proper to proceed to try the prisoner thereon for a misdemeanor, it should have shaped the course of the prosecution accordingly. By simply overruling the prisoner's motion, the court in effect decided that the count was a legal and sufficient count in felony. And the prisoner was accordingly put upon his trial, and tried, not for a felony and a misdemeanor, but for a felony, upon an indictment, one count of which was illegal and defective, and was convicted upon a general finding on the whole indictment.

We have no statute which cures the error of such a course of proceeding. And the only bearing (if any) obviously, which the section under consideration can have on the case, is on the question whether, after reversing, in proceeding to render such judgment as ought to have been rendered by the Circuit court, on the prisoner's motion to quash, we should render a judgment quashing the fourth count, or a judgment allowing it to stand as a count for a misdemeanor. And in this aspect of the case, it would appear, upon the reasoning of the attorney general, to be a matter of entire indifference to the commonwealth whether the count is quashed or retained. For if the constituent elements of the misdemeanor therein charged are necessarily embraced in the other counts charging the forgery, a verdict of the jury upon those counts, finding facts not sufficient to make out the forgery, but still sufficient to establish the

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misdemeanor, would, in the terms of the section in question, justify a conviction of the prisoner for the misdemeanor.

The general rule of the common law practice is to allow several felonies or several misdemeanors to be charged in several counts in one indictment, but not to allow of the joinder of a felony with a misdemeanor. 1 Chitty's Cr. Law 209; 695 Wharton's Precedents 13. *It appears (it is true) from cases to which our attention was called by the attorney general, and also from others referred to by the author last cited, that in several of our sister states the common law doctrine has been so far extended as to admit of the joinder of felonies and misdemeanors, where the misdemeanor is a constituent of the felony. The practice in Virginia, however, hitherto has been in conformity with the common law practice. The attorney general has cited no precedent, and I have not been able to find one, in which our courts have sanctioned a departure from that practice. The section in question does not in terms deprive a person charged with felony of any right which he might otherwise have, to demur to an indictment, or to move to quash it for an improper joinder of counts in felony with counts in misdemeanor. The provision is one which in its terms concerns the verdict in criminal trials, and declares simply what shall be the legal consequences of a verdict of a particular character in a given case. It does not profess to regulate the pleadings and proceedings in the previous stages of a prosecution. If designed to influence the previous pleadings at all, it does not, I think, admit of a construction which could give it the effect of changing the rules of such pleadings further than to save from the consequences of a demurrer for misjoinder, an indictment joining a count for a felony with one for misdemeanor, where the latter is a constituent of the former. And whether it is in practice to be allowed to change the course of the pleading at all, is a question which I do not think it is necessary we should now decide. The motion and effort of the prisoner in the Circuit court was not to quash the indictment for a misjoinder, but to quash a defective count. That count though wanting (as we hold) in some of the essentials of a good indictment for a felony, is in its general structure and phraseology, an 696 indictment for *a felony, and not an indictment for a misdemeanor. And leave is asked now for the first time, in the appellate court, for the commonwealth to proceed on this count for a misdemeanor, in connection with the remaining counts for a felony. The question as to the design of the section under consideration, is, therefore, presented in an aspect much less favorable to the pretensions of the commonwealth than it might be if the commonwealth were merely seeking to avoid the consequences of a misjoinder. I can conceive of no just advantage to the commonwealth, likely to result from granting the leave. For if, as already intimated, the charges of the fourth count are necessarily embraced in the counts for the forgery, the jury will be at liberty to find the prisoner guilty of the misdemeanor under those counts. If on the other hand said count contains any allegations not covered by the counts for the forgery, it would be obviously going beyond the design of the law to allow of such a joinder of counts. At best, it is not essential to any fair result that the fourth count should be allowed to remain in the indictment. As a count for a felony, it is defective and illegal; and though as a count for a misdemeanor it would in my opinion be substantially good (if standing alone), notwithstanding the offence is charged to have been done feloniously, and is otherwise irregularly stated, it might, if left to stand in the indictment, tend to the confusion of the jury, and consequently to the possible injury of the prisoner. Without undertaking, therefore, to express any definitive opinion as to the design (if any) of the law in question, in respect to the pleadings in criminal trials, I have come to the conclusion that the proper course is to quash the fourth count; and this the more readily, as I understand all the other members of the court to be of the opinion that in no case ought a count for felony to be joined with one for a misdemeanor.

697 *For reasons already stated, it is apparent that the instructions asked for by the attorney for the commonwealth were erroneously given; as they in effect authorized the jury to find the prisoner guilty of a felony under the fourth count, though they might believe that he did not have in his possession any ten of the pieces of base coin, at the same time.

Upon the whole, therefore, I am of the opinion that the judgment of the Circuit court ought to be reversed; and a judgment rendered by this court quashing the fourth count, and remanding the cause for a new trial to be had on the first, second and third counts of the indictment.

The other judges concurred.

Judgment reversed.

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698 *Caldwell v. The Commonwealth.

July Term, 1858, Lewisburg.

1. **Recognizance—Several Cognizors—One Scire Facias.***—One *scire facias* may issue against several cognizors in one recognizance: But it must treat the recognizance as several, and the judgment must be several.

2. **Same—Performance Rendered Impossible by Act of Law—Case at Bar.**†—The recognizance is that the principal shall appear before the Circuit court at a certain time to answer a charge of felony. At the time he was required to appear he was in the

*Recognizance—Several Cognizors—One Scire Facias.—See *foot-note* to Gedney v. Com., 14 Gratt. 318.

†Same—Performance Rendered Impossible by Act of Law—Effect.—In United States v. Van Fossen, 28 Fed. Cas. 358, the principal case is cited as approving the proposition that where the performance of the condition of a recognizance becomes impossible by

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penitentiary, having been tried, convicted and sentenced for another felony. Afterwards, and before a judgment on the *scire facias* against his bail, his time under his sentence expires, and he is sent back to the jail of the county in which he was to appear for trial before the Circuit court; and he is tried and acquitted.—The prisoner's confinement in the penitentiary having rendered it impossible for him to appear at the court at the time prescribed by the recognizance, it constitutes a good defence for the bail to the *scire facias*.

3. **Same—Same—How Such Defence May Be Made.**—In such case the defence may be made by plea; but it may also be made by petition or motion; and the facts being agreed by counsel for the bail and the attorney for the commonwealth, the question of law may be decided by the court.

At an examining court held for Ohio county on the 8th day of February 1853, Robert J. Drew, charged with felony, and Alfred Caldwell his security, entered into a recognizance in the usual form, in the sum of five hundred dollars each, conditioned that the said Drew would appear at the Circuit court of said county on the first day of the next term thereof, then and there to stand his trial for the said felony, and not depart thence without leave of the said court.

On the first day of the next term of said court, to wit, the 14th day of May 1853, the said Drew having been called and not appearing, his default was recorded, and a scire facias was ordered to be issued
699 *against him and his said surety, on the said recognizance.

A scire facias was accordingly issued, which was returned executed upon said Caldwell, but "no inhabitant," as to said Drew.

On the 23d day of June 1854 the defendant Caldwell demurred to the scire facias, and the attorney for the commonwealth joined in the demurrer.

On the next day, to wit, the 24th day of June 1854, Caldwell filed a petition, representing to the court that upon the day of the forfeiture of said recognizance the said Drew was imprisoned as a convict in the penitentiary of Virginia, for an offence committed by him, between the day of the execution of said recognizance and its forfeiture. But that the said Drew having within the last two months been discharged from said penitentiary, was then in the jail of Ohio county, there confined to await and abide his trial for the offence mentioned in the recognizance. And praying that, for as much as no end of justice would be defeated thereby, the court would remit the penalty of the said recognizance, or so much thereof as might seem under the circumstances reasonable and just.

Annexed to the petition was a memorandum, signed by the attorney for the commonwealth, containing an admission of facts, corresponding, substantially, with those stated in the petition.

The court ordered the petition to be filed, and the matter thereof continued until the said Drew (who had been indicted for the offence mentioned in the recognizance, and against whom the prosecution had been hitherto continued) should have had his trial on the said indictment.

About a year thereafter, to wit, on the 19th day of June 1855, Drew was tried on the said indictment, and acquitted.

700 *Afterwards, during the same term, to wit, on the 23d day of June 1855, the matters of law arising on the demurrer to the scire facias, were argued and decided against the defendant; and judgment was thereupon rendered against him for five hundred dollars, with interest and costs. Before the judgment was rendered, it appears Caldwell insisted that the court ought to discharge or exonerate him from the penalty of the said recognizance. But the court refused to allow such exoneration and discharge, either in whole or in part, and entered judgment against him for the full penalty of said recognizance. To which refusal and judgment Caldwell excepted.

At the same term, to wit, on the 5th day of July 1855, Caldwell moved the court to set aside the judgment, and grant him a rule against the commonwealth, returnable on the first day of the next term, to show cause why he should not be exonerated and discharged from the penalty of said recognizance, by reason of the matters and things set forth in the petition aforesaid, and the admission of the attorney for the commonwealth thereto annexed, and an addition then made to the petition, stating that said Drew had been tried on the indictment, found not guilty and discharged. On the next day the court overruled the said motion; "for these among other reasons:

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the act of God, or of the law, or of the obligee, the default is excused.

In that case, the principal was prevented from appearing before the United States district court because, at the time appointed for appearance, he was in actual confinement in the penitentiary of Missouri. But the court held that this was no defence to the sureties on the recognizance given to the United States. The court (citing among others the principal case) said, that if it had been shown that the *United States* had, by a subsequent arrest and conviction in another district, for another defence against it, prevented the performance of the condition, the question would have been more complicated and difficult of solution; and one respecting which the cases in the state courts seem to differ.

The court then continues by saying: "The United States and the state of Missouri are wholly distinct parties, and the action of the state authorities cannot be imputed to the government of the United States as an obstruction or interruption by it to the performance of the condition of the recognizance. It is therefore plain that there is no act of the obligee which excuses the default of the principal obligor. Hence, the defence pleaded must rest upon the proposition that the performance was excused by the act of the law. This makes it necessary to consider what is an act of the law, in the sense of the rule."

As shown above, the court, in this case, did not consider the existing facts to constitute such an act of law as would relieve the sureties from their liability on the recognizance.

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That the motion is addressed to the discretion of the court, an the court can dispose of the application without the formal presence of the commonwealth; because the court had at a former day of the term disposed of the matter by giving judgment on the scire facias in the name of the commonwealth against the defendant Caldwell; because the court, of its knowledge of the facts attending the trial of the cause, is satisfied that if the said Drew had not forfeited his recognizance, but had appeared and had his trial, at the time to which he was recognized by the recognizance
701. referred to, *the said Drew would have been convicted. The term of the court to which said Drew was recognized was the trial term of his co-indictees, James Morgan, William Parker and John S. Smith, and who were severally tried and convicted. On the trial of said Drew one of the witnesses who testified at that term, from misrecollection, as the court believes, stated a fact important to the issue in the trial of Drew, differently from what he stated it on the former trial; and the court being satisfied of the want of reasonable conditions for remitting the said recognizance, or any part thereof."

The said Caldwell applied to this court for a supersedeas; which was awarded.

Fry and H. M. Matthews, for the appellant.

The Attorney General, for the commonwealth.

MONCURE, J. The Circuit court did not err in overruling the demurrer to the scire facias. It was decided by this court in Gedney v. The Commonwealth, ante, p. 318, that one scire facias may be issued against several cognizors in one recognizance; and that case governs this. Of course the scire facias must treat the recognizance as several, and not joint; and the judgment must be several. That is the case here. The scire facias correctly recites the recognizance; and though it calls on the cognizors to show why the commonwealth should not have execution against them, "of the said five hundred dollars," yet the words, "according to the force, form and effect of the recognizance aforesaid," immediately follow, and plainly show that the scire facias was intended to be, and actually is, in strict conformity with the recognizance.

The second assignment of error, that "the court should have awarded a writ of
702 enquiry," was not relied *on by the counsel for the plaintiff in error, in their argument before this court, and is clearly without any just foundation.

The remaining assignments of error are, I think, well founded. The plaintiff in error had a good defence to the scire facias. The performance of the condition of the recognizance was legally impossible. On the day on which the principal cognizor was to make his personal appearance before the Circuit court of Ohio county, according to the terms of the said condition, he was imprisoned as a convict in the penitentiary of the state, as he had been for some time before, and continued to be for some time thereafter. There were no means whereby the surety could withdraw the principal from the penitentiary, and bring him, or have him brought to the Circuit court of Ohio, to be surrendered in discharge of the recognizance. The principal is considered to be in the custody of the bail; and the law undoubtedly gives to the bail great power in arresting the principal and surrendering him in discharge of the recognizance. But that power is not invincible. It may be overcome by the act of God, as for instance the death of the principal; or by the act of the law, as in this case. And when so overcome, the law excuses the non-performance of the condition, because it compels no man to do impossibilities. So also such non-performance may be excused by the act of the cognizee.

That it may be excused by the act of God, is well settled by authority. In Coke Lit. 206, a, it is said, "If a man be bound by recognizance or bond, with a condition that he shall appear the next term in such a court; and before the day the cognizor or obligor dieth, the recognizance or obligation is saved." In The People v. Manning, 8 Cow. R. 297, the principal cognizor was so sick on the day for his appearance that he could not be removed, and continued
703 sick until *he died on a subsequent day. This was held to be a good defence to an action of debt on the recognizance. The court, by Savage, Ch. J., said, "In all cases where the condition of a bond or recognizance is possible at the time of making the condition, and before the same can be performed it becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved.

That such non-performance may be excused by the act of the law, is also well settled. In The People v. Bartlett, 3 Hill's N. Y. R. 570, which was an action of debt on a recognizance, conditioned that R. should personally appear at the next Court of general sessions of the county of L, to answer to an indictment; it was held to be a good defence to the action, that between the date of the recognizance and the term of the court therein mentioned, R was arrested and committed to jail in another county, where he was kept in confinement till after the day of appearance. The court, by Nelson, Ch. J., lays down the same general principle before stated, "that where the performance of a condition of a bond or recognizance has been rendered impossible by the act of God, or of the law, or of the obligee, the default is excused:" and several authorities are cited to sustain the principle. In that case the party was confined in jail before conviction. In this case he had been convicted and was confined in the penitentiary. So that this case, if possible, is stronger than that, in favor of the defence.

Even in civil cases, in which the undertaking of the bail is different from what it is in criminal, and is to some extent a se-

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curity for the debt, he may be discharged by the act of God or of the law. Petersd. on Bail 389, 390, 10 Law Libr. In Wood v. Mitchell, 6 T. R. 247, it was held that after a defendant had been convicted of felony and sentenced to transportation, the bail were entitled to their discharge.

704 *The bail in this case then had a good legal defence to the scire facias; and if he had availed himself of it regularly, by plea, he would have been discharged by verdict and judgment. He did not so avail himself of it. But he brought the fact on which it was founded fully to the notice of the court by petition, on the day after he demurred to the scire facias, and a year before the demurrer was overruled and judgment rendered against him. The petition was sworn to in open court, and the facts therein stated were admitted in writing to be true by the attorney for the commonwealth. It was, in effect, a case agreed between the plaintiff in error and the commonwealth. The facts being admitted, there was no issue to be tried and no necessity for a jury. Nothing remained to be done but for the court to pronounce the law upon the facts; as upon a special verdict or a case agreed. No objection was made by the court or the attorney for the commonwealth to the form in which the defence was made: It would have been made by plea, if either had so required. The petition did not formally pray for a discharge from the recognizance, but in effect it did so. The petitioner wanted all the relief to which the facts entitled him. The court might, and ought to have entered a judgment for an exoneretur, and discharged the petitioner from his recognizance. In the People v. Manning, cited supra, it was contended that relief in such cases should be obtained by motion, and not by plea. The court said, "Perhaps it might be obtained in that way; but this is no reason against pleading the defence, if it be a bar to the action." In the case of Wood v. Mitchell, cited supra, the proper course for obtaining relief was held to be, "to move for permission to enter an exoneretur on the bail piece."

Instead of discharging the petitioner from the recognizance on the facts agreed, the court directed the petition to be filed,

705 and the matter thereof continued *until the prisoner Drew should have had his trial on the indictment against him. The trial was accordingly had about a year thereafter, and the prisoner was acquitted. Instead of then discharging the petitioner from his recognizance, as he insisted, the court a few days thereafter overruled his demurrer to the scire facias, and rendered judgment against him for the penalty, with interest and costs. And when, during the same term, the petitioner moved the court to set aside the judgment, and grant him a rule against the commonwealth to show cause why he should not be exonerated and discharged from the penalty of said recognizance, by reason of the matters and things set forth in the petition, and in an addendum thereto, stating that the prisoner had been tried and acquitted, the court overruled the motion, and refused to allow such exoneration and discharge, either in whole or in part, assigning reasons for such refusal, which, in my opinion, are wholly inadequate. If the only ground for the motion had been the facts stated in the addendum to the petition, that the prisoner had been tried on the indictment and acquitted, it would strongly have addressed itself to the discretion of the court, and would have justified the exercise of that discretion in favor of the petitioner. "The object of a recognizance (said Ch. J. Marshall in The United States v. Feely, 1 Brock. R. 255) is not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not found to be guilty. If the accused has, under circumstances which show that there was no design to evade the justice of his country, forfeited his recognizance, but repairs the default as much as is in his power by appearing at the succeeding term and submitting himself to the law, the real intention and object of

706 the recognizance *are effected, and no injury is done." In that case, a motion was made to stay proceedings on a scire facias which had been sued out by the United States against Feely and his security, on a recognizance conditioned for the appearance of Feely on the first day of the preceding term, to answer an indictment against him. Feely did not appear, and his default was recorded. He afterwards appeared, and was in custody when the motion aforesaid was made. The report does not show whether he offered any, and if any, what excuse for his non-appearance according to his recognizance. It was contended on the part of the United States, that the court possessed no power over the recognizance: that being forfeited, it had become a debt due to the United States, which was no more subject to the control of the court than a debt upon contract. It was admitted that in England the Court of exchequer exercises this power; but it was contended that the statutes of the 33 Hen. 8, ch. 39, and of 1 Geo. 2, expressly delegated it, and that from these statutes alone the authority of the Court of exchequer is derived. The chief justice reviewed the authorities, and came to the conclusion, that entirely independent of the statute, the courts of England exercised the power which the court in that case was required to exercise. And accordingly, all proceedings on the recognizance were ordered to be stayed until it should appear whether the accused should continue to submit himself to the law, or should attempt to evade the justice of the nation.

In the Commonwealth v. Craig, &c., 6 Rand. 731, there was a recognizance to appear and answer an indictment for felony. The accused failed to appear, and his default was recorded. A rule was then entered against him and his sureties, to show cause why a scire facias should not be

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707 awarded against them. At *the following term the accused appeared, and was taken into custody. The sureties offered to prove that by reason of wounds received in a rencontre the accused had been rendered unable to attend according to his recognizance. The court adjourned to the General court, among others, the question, whether, if the above mentioned fact were proved, the sureties ought to be discharged from their recognizance? Brockenbrough, J., delivering the opinion of the court said, "It appears clear that the courts of oyer and terminer have the right, at any time before a recognizance is estreated, either to estreat or spare it. This is a discretion vested in them for the obvious purpose of remitting the obligation in a hard case. Estreats are, strictly speaking, not known in this state, but by analogy to the practice in England, the courts here have certainly the power to spare the recognizance, at least, at any time before the scire facias awarded. If the court of Montgomery (from which the question was adjourned) was satisfied, by competent evidence, that the recognizor was disabled by his wounds from attending the court, it is reasonable and just that his misfortune should not be visited upon him and his sureties; particularly as, by his appearance afterwards, the ends of public justice will be answered: and in such case, the court ought not to award any sci. fa. against them."

These cases show that our courts, at common law, possessed and exercised a power of discharging recognizance before the same were adjudged to be forfeited. The statute has extended this power, and provided that "when, in an action of scire facias on a recognizance, the penalty is adjudged to be forfeited, the court may, on application of a defendant, and in a county or corporation court, with the consent of the attorney prosecuting, remit the penalty, or any
708 part *of it, and render judgment, on such terms and conditions as it deems reasonable." Code, ch. 211, § 10, p. 785.

The motion of the plaintiff in error in this case, considering it as a mere application addressed to the discretion of the court, in the exercise of its common law or statutory power over the subject of recognizances, was entitled to much more favor than the application in either of the cases before cited from 1 Brockenbrough and 6 Randolph. For besides being sustained by all the grounds for relief which existed in those cases, it is sustained by this further and additional ground, that the plaintiff in error had a good legal defence to the scire facias, which he brought forward in due time, and would have made by plea if he had been required to do so, and had not been induced, by the course pursued by the court, to believe that the benefit of the defence would be secured to him, at least in the event that the accused should stand his trial upon the indictment.

But it is unnecessary in this case to decide, and I therefore express no opinion upon the question, which was much discussed in the argument, whether an appellate court may review a judgment of a court of original jurisdiction, given in the exercise of its discretionary power (whether of common law or under the statute) over the subject of recognizances. The plaintiff in error had a good legal defence, to the benefit of which he was entitled in some form or other. He might have made it by plea. But the facts on which it rested being admitted, there was no necessity for a plea, and he might and ought to have been discharged on petition or motion, as matter of right and not of mere discretion. The Circuit court having refused so to discharge him, and rendered judgment against him upon his recognizance, I am of opin-
709 ion *that the judgment is erroneous and ought to be reversed, and a judgment rendered exonerating and discharging him from his recognizance, and dismissing the scire facias.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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710 *Pifer v. The Commonwealth.*

July Term, 1858, Lewisburg.

Criminal Law—Judgment—Additional Sentence at Subsequent Term.†—On a prosecution for misdemeanor, there is a verdict against the defendant for a fine, and the court enters up a judgment thereon for the fine and costs, and directs a *capias ad audiendum* against the defendant; and at a subsequent term sentences him to six months' imprisonment in the county jail.—The judgment for the fine and costs was final, and no further judgment could be rendered in the case. The judgment for the imprisonment was therefore error.

The plaintiff in error was indicted for a misdemeanor in the Circuit court of Harrison county. On his appearance he moved

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***For monographic note on Fines and Costs in Criminal Cases, see end of case.**

†**Amendment of Record.**—In Price v. Com., 33 Gratt. 825, the court, quoting from and distinguishing the principal case, said that until the end of the term at which it is rendered, a judgment remains in the breast of the court, subject to revision, alteration, or rescission; no injustice or injury being done thereby to the defendant. And see *foot-note* to Price v. Com., 33 Gratt. 819, where the principal case is also cited.

See also, monographic *note* at end of case.

Trial for Misdemeanor—Presence of the Accused.—State v. Conkle, 16 W. Va. 748, and State v. Campbell, 42 W. Va. 249, 24 S. E. Rep. 876, cite the principal case as authorizing the proposition that, in misdemeanors, the personal presence of the defendant is not necessary at the trial.

Trial for Felony—Presence of the Accused.—But a person indicted for felony must be personally present during the trial; and such presence must be shown by the record. State v. Conners, 20 W. Va. 6, citing the principal case. See also, Jackson v. Com., 19 Gratt. 656, and *foot-note*: Hooker v. Com., 13 Gratt. 763, and *foot-note*.

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to quash the indictment. His motion was overruled; and he put in the plea of not guilty. At the trial term he failed to appear in pursuance of his recognizance; but the trial proceeded in his absence, and the jury found him guilty, and assessed a fine of two hundred dollars against him. The court thereupon pronounced judgment against him for the fine and the costs of the prosecution; and on motion of the attorney for the commonwealth, a capias ad audiendum was awarded, returnable at a future day of the same term, to bring him before the court to show if any thing he had to say, why the court should not then proceed to pronounce further judgment against him according to law. The first process being returned not found, further process was awarded, returnable to a succeeding term. At some succeeding term the plaintiff in error having been arrested on a capias ad audiendum, came in his proper person and moved to quash the writ, and to be discharged from custody; which motion was overruled. He thereupon moved the court to set aside the verdict and judgment
711 thereon, *rendered at a former term and grant him a new trial. This motion was overruled, and the plaintiff in error filed an exception to the refusal to grant a new trial, and obtained a writ of error. The exception sets out an affidavit of the plaintiff in error, that he had employed counsel to defend him, but that the trial took place in the absence of himself and his counsel; and that if he had been present or properly represented by counsel at the trial, he could have proved that he was not at the place where the offence was charged to have been committed, at the time it was charged to have been so committed.

Robert Johnston, for the appellant.

The Attorney General, for the commonwealth.

ALLEN, P., after stating the case, proceeded:

There was no valid objection to the indictment; and if the motion for a new trial had been made in time or could have been entertained, the plaintiff in error did not show any good excuse for his failure to defend himself. The motions to quash the indictment and to grant a new trial, were properly overruled. The only question of interest in the case arises upon the motion to quash the capias ad audiendum, and upon the judgment of the court sentencing the plaintiff to imprisonment in the jail of the county for six months.

A judgment, whether in a civil or criminal case, is the sentence of the law pronounced by the proper tribunal, as the result of the proceedings instituted for the redress of injury or the punishment of offences. In civil cases, judgments are either interlocutory or final. Interlocutory, as where the right of the plaintiff is established by a failure to plead or a withdrawal of a plea, but where the damages are not ascertained, and for which the intervention of a jury is necessary. On the return of this enquiry, the right to recover
712 *having been established, final judgment is entered up. But whenever final judgment is entered after the writ of enquiry awarded and executed, or after a verdict on the merits, such final judgment finishes the proceedings, nothing more remains for the court to do, and execution may be done in pursuance of the judgment.

As the judgment is entire, and when a verdict has passed, is the sentence of the law upon the result of the proceedings instituted as aforesaid, it can make no difference whether that sentence is merely for the fine assessed by the verdict, or combined with it and superadded to it, is accompanied with imprisonment; which punishment the law affixes to the finding of the fact, when in the exercise of the legal discretion of the court it is deemed proper to impose it. It becomes when rendered an entire judgment upon the facts as found, and in the language of the books finishes the proceedings; and it would seem to follow that as the judgment is the determination of law upon the verdict or particular state of facts, it cannot be divided, and a part of the final sentence be pronounced at one term, and after having to that extent passed entirely from the control of the court, that it should at a subsequent period, take up the same finding and pronounce another sentence in addition to the one already entered upon the same state of facts. Neither judgment would be interlocutory. The judgment for the fine and costs would be final, and execution could issue and be collected; the defendant, if arrested on a capias pro fine, could at once discharge himself by payment; and he might be inclined to do so, to acquiesce in the judgment imposing a mere fine, but not willing to waive any legal objection he might have to the verdict, if imprisonment was to be superadded. If judgment for the fine may be imposed at one term and for imprisonment at another, either the
713 defendant would *be deprived of a legal right, or the court might be placed in the attitude of upholding a verdict as good for one purpose, and declaring it void for another.

In misdemeanors, the personal presence of the defendant is not necessary at the trial; a verdict and judgment for the fine may be found and rendered in his absence; and after the term he can neither move for a new trial or in arrest of judgment. But until final judgment he may so move. In England, in cases of misdemeanor, the jury merely passed upon the fact of guilt. The amount of the fine against him was fixed by the judgment of the court. In the case of the Queen v. Templeman, 1 Salk. R. 55, it was held that defendants may submit to a fine, though absent, if they have a clerk in court that will undertake for the fine. But where a man is to receive any corporal punishment, judgment cannot be given in his absence: and the reason given is, that there is a capias pro fine, but no

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process to take a man and put him on a pillory. Duke's Case, Id. 400, is to the same effect. In Rex v. Hann & Price, 3 Burr. R. 1786, the defendants, who had confessed themselves guilty of a misdemeanor, moved for a rule to dispense with their personal appearance, on the undertaking of their clerk in court to answer for their fines. It was agreed by court and counsel, that such motion was subject to the discretion of the court, either to grant or refuse it, where it was clear and certain that the punishment would not be corporal; yet it ought to be denied in every case where it was either probable or possible that the punishment would be corporal.

The reason assigned for the decisions shows that the court did not suppose that separate judgments could be given for the fine and for the corporal judgment. They could render judgment for the fine in the absence of the defendant, because he could be arrested on a capias pro fine, but they
714 could not render judgment *for corporal punishment, because there was no process to take a man and set him on a pillory. But if separate judgments could be rendered, the reason was not sound. They considered the judgment an entirety, and if rendered for the fine on the undertaking of the clerk, the whole subject had passed from the jurisdiction of the court, and there could be no sentence for corporal punishment. That there cannot be two judgments for one offence, is affirmed by Hawkins' Pleas of the Crown, ch. 48, § 23, p. 634, who says, that if a judgment of outlawry be voidable only and not void, and the defendant will not bring a writ of error, nor plead in a convenient time, proper execution shall be awarded against him, but no sentence can be pronounced, because the outlawry is a judgment, and no man shall have two judgments for one offence.

The Code, ch. 199, § 42, p. 752, directing that the term of confinement in the jail, of a person found guilty of a misdemeanor, where that punishment is prescribed, should be ascertained by the court, and the fine, except where it is otherwise provided, shall be assessed by the jury, so far as the term of confinement and the amount of the fine are not fixed by law, does not change the character of the judgment. It is still to be a final judgment upon the verdict finding the defendant guilty. The provision authorizing the court to ascertain the term of imprisonment and the jury the amount of fine, does not change or modify the form of the judgment. That remains the same, and is an entirety, the sentence of the law upon the facts found by the verdict.

The forms of writs and entries, as found in Robinson's Forms, p. 49 and 270, show the practice of the state. The writ, after setting out the verdict of guilty and fine assessed, commands the officer to arrest the defendant, &c. to show if any thing for himself he hath or knows to say, why
715 the court should not proceed *to pronounce judgment according to law? And the form of the entry of the judgment on such writ, is for the fine assessed, and that he be imprisoned, &c. There is no foundation for the argument that these forms were adopted before the change in our law requiring the jury, on a conviction for a misdemeanor, to assess the amount of the amercement. That alteration in our law was made as early as 1786, 12 Hen. Stat. 355.

The act in relation to gaming, 1 Rev. Code, p. 563, § 5, directed, that on a conviction for gaming the defendant should be committed to jail until he gave security for his good behavior for twelve months after the conviction. And by another section, p. 569, § 22, it was provided that whenever judgment should be rendered against any offender by virtue of said act, if he be not present, the court might award a capias pro fine, and also to bring the body of the offender to be dealt with as the law directs. If this were held to constitute an exception to what I suppose to be the general rule, and to authorize separate and successive judgments on the same verdict against the same defendant, the exception in the particular case, created by express enactment, would only prove the rule in all other cases. But I do not consider it to be an exception. The offence is punished by the judgment for the fine and costs. That is final, and may be executed, although the defendant is not brought in and recognized to be of good behavior. The court renders no further judgment on the verdict. The provision to recognize the defendant, is not part of the punishment for the offence of which he has been convicted, but is a measure of precaution, the exercise of preventive justice, resulting from the conviction of an offence, and final judgment thereon. After such judgment and the term ended the defendant has no day in court to allege any
716 thing against it. I do not *understand it to be a controverted point, that if no judgment has been pronounced for the fine, the defendant may, whenever he is brought in to hear judgment at the same or any succeeding term, move in arrest of judgment or for a new trial. The form of the writ which may be regarded in this particular as evidence of the law, indicates that when he is brought in to hear sentence for any punishment, pecuniary or corporal, as the result of the verdict of guilty, he may show cause against it. And if when no judgment is pronounced the cause shown may be sufficient to arrest the judgment or set aside the verdict, can the court, by pronouncing judgment for the amercement, preclude the defendant, when about to be sentenced to corporal punishment, from showing that the judgment should be arrested, or that the verdict should be set aside. Either this must be the result, or the judgment for the fine and costs must be regarded as merely interlocutory, and upon which no execution could issue. The judgment, however, in terms is final, so far as it goes; execution may have been issued and levied out of the property of the defendant. And one of the grounds upon

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which the practice has been vindicated is, that where in the judgment of the court corporal punishment should be added to the pecuniary fine, the party, by removing his property and concealing himself, may escape all punishment, if judgment for the fine and costs may be pronounced and execution issued thereon forthwith.

I think when the judgment was rendered for the fine and costs, it was final. There was an end of the proceedings, and nothing remained but to enforce the judgment by proper process. After the term, it could not be modified, or added to or altered by the court; and if erroneous, the defendant's remedy was in a court of error.

It follows, therefore, that the writ
717 of capias ad audiendum *was improvidently awarded, and the court erred in overruling the motion of the defendant to quash the same, and to discharge him from arrest, and in the proceeding to render further judgment against the defendant on said verdict, whereby he was sentenced to be imprisoned in the jail of said county, without bail or mainprize for the term of six months.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

FINES AND COSTS IN CRIMINAL CASES.

I. Introductory.
A. Definition of and Limitation upon Fines.
B. Nature and Origin of Costs.
II. Practice Relating to Fines.
A. In General.
B. Powers of Courts in the Matter of Fines.
C. Joint Prosecutions.
D. Sheriff.
E. Payment and Remission of Fines.
III. Practice Relating to Costs.
A. In General.
B. Informer or Private Prosecutor.
C. Defendant.
IV. Costs in Civil Suits. (See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.)

I. INTRODUCTORY.

A. DEFINITION OF AND LIMITATION UPON FINES.

1. DEFINITION.—A fine signifieth a pecuniary punishment for an offence or a contempt committed against the sovereign. 1 Coke Litt. 126b.

2. CONSTITUTIONAL LIMITATIONS.—Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Va. Const., art. 1, § 11; U. S. Const., art. VIII; Bullock v. Goodall, 3 Call 44; Jones' Case, 1 Call 555.

And a fine imposed on an officer who has committed no fault, for the benefit of one who has sustained no injury, is superlatively excessive, unconstitutional, oppressive and against conscience, and a court of equity should give relief. Goodall v. Bullock, Wythe's Reports 328.

B. NATURE AND ORIGIN OF COSTS.

1. NATURE.—The general principle is, that costs are considered as an appendage to the judgment, rather than a part of the judgment itself; that they are considered, in some sense, as damages, and are always entered, in effect, "as an increase of damages by the court." McRea v. Brown, 2 Munf. 46.

It is expressly provided by statute, Va. Code 1887, § 3547, that the law of costs shall not be interpreted as penal laws.

2. ORIGIN.—At common law no costs were allowed, the amercement of the vanquished party being his only punishment. They were first allowed, *eo nomine*, by the statute of Gloucester, 6 Edw. 1, to plaintiffs, and subsequently, 23 Hen. VIII, to the defendant, in like manner as the plaintiff would have had them if he had recovered. 3 Bl. Com. 399; 4 Min. Inst. (3d Ed.) 969.

For general statutory provisions in Virginia, see Va. Code 1887, ch. 173.

II. PRACTICE RELATING TO FINES.

A. IN GENERAL.

Variance between Penalty and Verdict—Effect.—Where the penalty is fine and imprisonment, and the jury in a verdict of guilty, fail to assess the fine, the prisoner may, nevertheless, be imprisoned. Com. v. Frye, 1 Va. Cas. 19.

Constitutionality of a Statute Permitting Oyster Inspectors to Impose Fines.—Va. Code 1887, § 2134, as amended by Acts 1894, p. 778, requiring oyster inspectors to collect "all fines, taxes and all sums due, or would be due," on oyster ground rented, or used and not rented, and conferring "the same powers to collect the same which a county treasurer has for the collection of taxes," and also giving said inspectors power to remove enough oysters to pay the same, is not unconstitutional, as allowing the inspector to impose fines, as the fine is imposed by the statute itself. Thomas v. Rowe (Va.), 22 S. E. Rep. 157.

Municipal Corporations—Ordinances—Power to Fine Does Not Include Commitment.—A power conferred on a muncipal corporation to adopt ordinances and to enforce violations thereof by prescribed fines, does not confer the power of imprisonment before trial for a violation of the ordinance, nor after trial for failure to pay the fines. Bolton v. Vellines, 94 Va. 393, 26 S. E. Rep. 847.

Retroactive Effect of Statute Relating to Gaming Laws.—A statute enacting "that in all recoveries hereafter had for the violations of the gaming laws, the fee recovered shall be ten dollars for the commonwealth's attorney, and the sum of thirty dollars shall be paid to the literary fund in lieu of the sum as at present provided," has no application whatever to offences committed before its passage, but such offences remain liable to prosecution and punishment under the pre-existing law, in the same manner as if the statute had never been passed. Pitman v. Com., 2 Rob. 800.

Trial—Procedure—Jury Find the Verdict, and the Court Renders Judgment Accordingly.—On an indictment charging that the defendant did aid, abet and assist a certain male slave to escape from his owner, it is a proper procedure for the jury to find the defendant guilty, ascertain the term of his imprisonment, and assess his fine, and then for the court to render judgment according to verdict. House v. Com., 8 Leigh 755. See, in this connection, the case of Harvey v. Com., 23 Gratt. 941, in which the court, p. 948, affirms the above procedure to be correct even in the absence of statute so providing.

Judgment—How Fieri Facias Should Run.—A writ of *fieri facias* upon a judgment of a circuit court for a

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fine against a person convicted of a misdemeanor ought to run against goods and chattels and real estate. Gill v. State, 39 W. Va. 479, 20 S. E. Rep. 568.

Judgment—Damages Where Fine or Amercement is Imposed.—The statute allowing damages on affirmance (Acts of 1830-31, ch. 11, § 32; Suppl. to R. C. p. 149) does not apply to the affirmance of a judgment imposing an amercement or fine; the amercement or fine not being a debt or damages, within the meaning of that act. But though the judgment of affirmance in such case award damages according to law for retarding the execution, yet as no specific damages are thereby adjudged, and the law gives none, the error is merely formal, and the appellate court will disregard it. Abrahams v. Com., 1 Rob. 675.

Judgment—Contempt—Appeal.—An appeal may be taken to the court of appeals from a judgment of the circuit court imposing a fine upon a person for a contempt of the court, in aiding to obstruct the execution of a decree of the court. Wells v. Com., 21 Gratt. 500.

Judgment Confessed for Fine—Evidence in Civil Action.—In Virginia, where the defendant on an indictment for a misdemeanor, without pleading, confesses a judgment for a specific sum as a fine, the record is not evidence in a civil action for the same cause, to prove the fact. Nor is it evidence to enhance the damages. Honaker v. Howe, 19 Gratt. 50.

B. POWER OF COURTS IN THE MATTER OF FINES.

When the Court Assesses Fine.—In the courts of the United States, the court and not the jury should assess the fine. U. S. v. Mundel, 6 Call 245. See Va. Code 1887, § 3904.

Power of a Court to Add Imprisonment to a Verdict Laying a Fine.—Where a person is indicted for feloniously and maliciously cutting, striking, wounding, etc., with intent to maim, disfigure, disable and kill, the indictment charging that the accused made the assault feloniously and maliciously, cutting, etc., and the jury find "the prisoner not guilty of the malicious cutting and wounding as charged in the within indictment, but guilty of an assault and battery as charged in the within indictment, and assess his fine at certain figures," it was held proper for the jury to assess a pecuniary fine upon the prisoner but not proper to add the punishment of imprisonment. But upon such conviction the court may sentence the prisoner to be imprisoned in the county jail, in addition to the pecuniary fine. Canada v. Com., 22 Gratt. 899.

When a Court Cannot Impose a Fine in Addition to Confinement in the Penitentiary.—Where a verdict is rendered on an indictment for an injury done with intent to maim, etc., under W. Va. Code 1899, ch. 144, § 9, finding the defendant not guilty of doing an act maliciously, but guilty of unlawfully doing an act charged, the court cannot, under the statute, sentence the prisoner to confinement in the penitentiary, and also impose a fine. State v. Mooney, 27 W. Va. 546.

Judgment Set Aside at Same Term—Prisoner Absent.—Where upon a trial for murder, the jury finds the prisoner not guilty of the murder, but guilty of involuntary manslaughter, and assesses upon him a fine, and the court thereupon enters a judgment discharging him, and then at the same term of the court sets aside the judgment, and enters a judgment against him for the fine, and a certain term of imprisonment, and directs him to be arrested and committed, it is proper, although the prisoner was not present in court at the time the second judgment was entered. Price v. Com., 33 Gratt. 819.

But on a prosecution for a misdemeanor, if there is a verdict against the defendant for a fine, and the court enters up a judgment thereon for fine and costs, and directs a *capias ad audiendum* against the defendant, the judgment for the fine and costs is final, and no further judgment can be rendered in the case, and therefore a sentence, at a subsequent term, to imprisonment in the county jail, is erroneous. Pifer v. Com., 14 Gratt. 710; Price v. Com., 33 Gratt. 819; Barnes' Case, 92 Va. 794, 23 S. E. Rep. 784.

Indictment—Amendment during Absence of Prisoner—Arrest.—Where defendants are indicted jointly for a misdemeanor, and having been duly summoned, fail to appear, the court may, in their absence, amend the indictment, and order their arrest and imprisonment for non-payment of a fine before a *fieri facias* has been issued. Shiflett v. Com., 90 Va. 386, 18 S. E. Rep. 838.

Superior Courts—Separation of Punishments.—Where an offence is punishable with fine and imprisonment, a superior court may render judgment for the fine only. Com. v. Crump, 1 Va. Cas. 171.

Justices' Court—Departure from Statutory Authority.—In the construction of Va. Code 1887, § 3796, regarding Sabbath violation, the question arose, in *Ex parte* Marx, 86 Va. 40, 9 S. E. Rep. 475, as to whether upon a fine being imposed by a justice of the peace, and defendant's refusal to pay same, the justice's committal of the defendant to jail, "for one year unless the fine be sooner paid," was valid. *Held*, that the commitment was a departure from the terms of the statute, from which the justice derived his authority, the letter whereof must be strictly followed, and by which no particular term of imprisonment is prescribed, and was therefore defective and invalid. Jones' Case, 20 Gratt. 848.

C. JOINT PROSECUTIONS.

Joint Indictment—Separate Fines.—Two or more persons may be jointly indicted or proceeded against, by information, for retailing ardent spirits without a license, and upon their conviction there should be a separate fine against each for a specified sum. Com. v. Harris, 7 Gratt. 600.

And in conformity to this principle, it is held that, a husband and wife may be jointly indicted for a single act of retailing ardent spirits; but in such case if they are convicted, a fine must be assessed, and a judgment rendered against each separately. Com. v. Hamor, 8 Gratt. 698.

And in an indictment for assault against several, a joint award of one fine aginst all, is erroneous; it should be several against each defendant. Jones v. Com., 1 Call 555.

Therefore, it is error to assess joint fines against two defendants, although such assessment be against husband and wife and for the same offence. Com. v. Ray, 1 Va. Cas. 262.

But where there is an indictment against two or more persons for an assault, and they plead severally, and there is a verdict rendered finding them guilty, and assessing several fines on each, an attorney's fee is not to be taxed against each, but only one attorney's fee against all the defendants. Com. v. Sprinkles, 4 Leigh 650.

D. SHERIFF.

Execution—Omission to Make Return—Fine.—Not more than one fine can legally be imposed on the sheriff, or other officer, for failing to return one execution. Tomkies v. Downman, 6 Munf. 557.

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But a sheriff neglecting to return an execution, at the request of the plaintiff, is not liable to a fine. Bullock v. Goodall, 3 Call 44.

Execution—Judgment by Default.—A judgment by default against a sheriff, for fines collected upon executions in behalf of the commonwealth, may be sustained, although his receipt for the executions be not inserted in the record. Segouine v. Auditor, 4 Munf. 398. See, in this connection, Va. Code 1887, § 721.

Execution—Judgment for Aggregate Receipts.—A notice that a motion will be made for a judgment against a sheriff, for the amount of his receipt for sundry executions for fines, "as appears by the copy of said receipt," is sufficient, without mentioning the aggregate sum due, the separate amount of each execution, or the time when delivered to the sheriff. And the judgment thereupon, for the aggregate sum due, without distinguishing the amount of each execution, will be sustained, if conformable to law in other respects. Segouine v. Auditor, 4 Munf. 398. See, in this connection, Va. Code 1887, § 721.

E. PAYMENT AND REMISSION OF FINES.

1. PAYMENT.

Statutes Imposing Fines—To Whom Payable—How Recoverable.—Where any statute imposes a fine, unless it be otherwise expressly provided, or would be inconsistent with the manifest intention of the general assembly, it shall be to the commonwealth and recoverable by presentment, indictment, or information. Where a fine without corporal punishment is prescribed, the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and if not so limited, by action of debt, or action on the case, or by motion. The proceeding shall be in the name of the commonwealth. Va. Code 1887, § 712; Com. v. Collins, 9 Leigh 666.

Married Woman—Fieri Facias—Separate Estate.—A *fieri facias* upon a judgment of a circuit court for a fine against a married woman convicted of a misdemeanor may be levied upon her separate estate, real or personal. Gill v. State, 39 W. Va. 479, 20 S. E. Rep. 568. See, in this connection, W. Va. Code 1899, ch. 35, § 5.

When Fine Can Be Paid in Coupons.—Fines imposed for a violation of law are embraced in the act of 1871 (Va. Code 1887, ch. 22), known as the funding act, and a person upon whom such a fine is imposed, may discharge it by the over-due coupons taken from the bonds mentioned in said acts. Clarke v. Tyler, 30 Gratt. 134; Williamson v. Massey, 33 Gratt. 249. See Va. Code 1887, § 406.

Sabbath Violation—Fine—How Recovered.—Va. Code 1887, § 3799, makes punishable as an offence the violation of the Sabbath, and prescribes the penalty. Upon a breach of this statute the question arose as to whether the fine under such section could be imposed by a justice of the peace, under Va. Code 1887, § 2939, relating to the jurisdiction of justices of the peace. The court held that such a fine is recoverable before a justice of the peace, and by a civil warrant; and that the constitutional right to trial by jury do not extend to such offence. *Ex parte* Marx, 86 Va. 40, 9 S. E. Rep. 475. See Va. Code 1887, § 717.

Mandamus—Fines Collected by Sheriff or Sergeant—Auditor.—Fines collected by the sheriffs of counties, or the sergeants of cities or towns, are to be paid by him to the treasurer of his county, city, or town, and not to the auditor of accounts of the state; and thereupon a mandamus will not lie at the suit of a sheriff or sergeant, to compel the auditor to receive coupons which have been paid to him in the discharge of a fine. Va. Code 1887, § 736. Tyler v. Taylor, 29 Gratt. 765.

Insolvent Debtor's Act Does Not Embrace Fines for Misdemeanors.—In the absence of express statutory provision a person convicted of a misdemeanor, and committed until he shall pay the fine against him, cannot discharge himself therefrom, under an act made and provided for the relief of insolvent debtors. Com. v. Chapman, 1 Va. Cas. 138. See also, Quinling v. Com., 2 Va. Cas. 494.

2. REMISSION.

Power of Executive to Remit Fines.—The governor shall not remit in whole or in part, any fine or amercement assessed or imposed by any court of record, court-martial, or other authority having jurisdiction to assess or impose the same, except that whenever a judgment shall have been rendered against any person for a contempt of court, other than a non-performance of or disobedience to some order, decree, or judgment, the governor shall have power to pardon the offence and remit the punishment, whether corporal or pecuniary, either in whole or in part. Va. Code 1887, §§ 4199-4200; Wilkerson v. Allan, 23 Gratt. 10.

Equitable Relief against Fines.—A court of equity will relieve against a fine on the same principles upon which it relieves against forfeitures and penalties. Goodall v. Bullock, Wythe's Reports, 328.

III. PRACTICE RELATING TO COSTS.

A. IN GENERAL.

Limitation upon Jury's Discretion in Laying Fines.—Under a statute it was expressly declared that in actions for assault and battery, if the jury should find under a certain sum, the plaintiff should not recover any costs. Construing this provision in Bills v. Harris, 2 Va. Cas. 26 (1815), the court held that this act limited the discretion of the jury, and they had no right to give costs where the law said they should not be given.

A State, City, or Town Is Not Liable for Costs.—W. Va. Code 1899, ch. 161, § 13 provides that in no instance, in criminal cases, shall there be a judgment against the state for costs. And in prosecutions for the violation of public ordinances of cities, towns and villages, costs are not recoverable against such cities, towns or villages. City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. Rep. 152. See Va. Code 1887, § 3556.

B. INFORMER OR PRIVATE PROSECUTOR.

Informer—Liability for Costs When a Volunteer.—A volunteer informer ought to be made a prosecutor, and liable for costs in case of failure; but one who is compelled to be an informer, cannot be considered a prosecutor. Wortham v. Com., 5 Rand. 669; Com. v. Dove, 2 Va. Cas. 29.

When, therefore, in a prosecution for a misdemeanor, at the instance of a voluntary prosecutor, the defendant files a plea in abatement, that one of the grand jurors who found the indictment was not a freeholder, and the issue made upon that plea is found for the defendant, and the indictment quashed, the court should give judgment for the costs against the prosecutor. Com. v. St. Clair, 1 Gratt. 556.

And on a trial for a misdemeanor, if the jury find for the defendant, the voluntary informer is liable for the costs, and after verdict the prosecutor cannot show by parol evidence that he was called on by the

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grand jury, and did not voluntarily give the information. Com. v. Dove, 2 Va. Cas. 29.

Informer—Bastardy Process—Liability for Costs.—Where one is accused of being the father of a bastard child, and upon being tried for same, is discharged, he shall recover his costs against the party in whose name the proceedings are had. W. Va. Code 1899, ch. 80, § 4; Swisher v. Malone, 31 W. Va. 442, 7 S. E. Rep. 439; Tennant v. Brookover, 12 W. Va. 337; Barbour Co. Court v. O'Neal, 42 W. Va. 295, 26 S. E. Rep. 182.

Informer—Inability to Pay Costs—Effect on Prosecution.—Under Va. Code 1887, § 3991, regulating criminal proceedings against persons, the prosecutor's insolvency or inability to pay costs is, ordinarily, good cause for ruling him to find security for such payment; but if, in the opinion of the court, public justice requires that the prosecution should proceed, it may refuse to dismiss the indictment, though the prosecutor be insolvent, and security for costs be not given. Com. v. Hill, 9 Leigh 601.

Informer—Witness—Costs.—On an indictment for an assault and battery on the voluntary information of the person assaulted, the informer and prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted. Gilliam v. Commonwealth, 4 Leigh 688.

And a prosecutor in an information for assault and battery, who is liable for the costs, is a competent witness for the commonwealth. Baker v. Com., 2 Va. Cas. 353.

C. DEFENDANT.

1. LIABILITY FOR FEES AND COSTS.—The Code of 1849, ch. 206, § 10. Va. Code 1887, § 4049, gives to all jurors sitting in criminal cases compensation at one dollar for each day he attends on such jury, and the court, upon the prisoner's conviction, will direct the clerk to include the allowance in the bill of costs. Souther v. Com., 7 Gratt. 673.

But Va. Code 1887, § 4199, expressly declares that the prisoner shall only be subjected to such costs as the commonwealth is bound to pay; and therefore does not embrace the fees of the clerk, sheriff, or attorney for commonwealth, and in the absence of express provision, they cannot be imposed upon the prisoner. Anglea v. Com., 10 Gratt. 696.

As held by JUDGE SAMUELS in Finch v. Com., 14 Gratt. 643, a prisoner who is convicted of a felony, and obtains a writ of error to the court of appeals, where the judgment is affirmed, is not responsible for the fees of the clerk or the attorney general.

But in Abraham's Case, 1 Rob. 675, it was declared that a judgment in a county or corporation court, against a master for permitting a slave to go at large and hire himself out contrary to law, is properly rendered for the costs of the prosecution, including jail fees, as well as for the fine.

2. ENFORCEMENT AND REMISSION OF FINES.

Judgment for Costs—How Enforced.—The payment of costs adjudged against the defendant in criminal proceedings, may be enforced by execution against his property as in other cases; and the execution must issue from the court in which the proceedings are had, and judgment rendered. Anglea v. Com., 10 Gratt. 706.

Capias Pro Fine.—A *capias pro fine* cannot issue for costs alone. Com. v. Webster, 8 Gratt. 707.

But in Virginia the costs are a part of the fine, and the defendant, being taken in a *capias pro fine*, can only be released by paying the costs as well as the fine. Com. v. Fields, 33 Gratt. 291.

As held by LOMAX, J., in *Re* Webster, 8 Gratt. 702, a party who is imprisoned upon a *capias pro fine* for a fine and costs, can only obtain his discharge from imprisonment by paying the fine and costs. But see statutory limitation as to term of imprisonment, Va. Code 1887, § 4071. Also, in this connection, see Quinling v. Com., 2 Va. Cas. 494.

Writ—When Improper to Issue for Costs Alone.—Where there is a judgment in favor of the commonwealth for a fine and costs of prosecution, the writ may issue for the fine and the costs; but where the judgment is for costs without a fine, the writ is not a proper process to enforce the judgment. *In re* Webster, 8 Gratt. 702.

Executive Pardon Does Not Release Costs.—Where a person is convicted and sentenced for a felony or misdemeanor, and is afterwards pardoned by the executive, which pardon releases him from all fines, penalties and forfeitures incurred by the conviction and sentence, and previous to the pardon an execution has been issued for the costs incurred in his prosecution by the commonwealth, the pardon does not release him from these costs. Anglea v. Com., 10 Gratt. 696; Wilkerson v. Allan, 23 Gratt. 10. See Va. Code 1887, §§ 4199, 4200; W. Va. Code 1899, ch. 14, § 22.

IV. COSTS IN CIVIL SUITS.

See monographic *note* on "Costs" appended to Jones v. Tatum, 19 Gratt. 720.

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INDEX.

ACTIONS.

1. In indebitatus assumpsit for work and labor, if there was a special contract, which remains in full force, fixing the price of the work, plaintiffs have no right to prove the value of the work, and can only recover the contract price.
Baltimore & Ohio R. R. Co. *v.* Polly, Woods & Co., 447

2. In an action for work and labor by a contractor on a rail road against the company, under a special contract which provides that the final estimate of the engineer shall be conclusive upon the parties, if the plaintiff proves that the final estimate made by the engineer was fraudulently made, he may recover without proving further that he was unable to procure such final estimate as is required by the contract after demand on the company, or other proper exertions on his part. Idem, 447

3. If in an action for work and labor by a contractor on a rail road against the company, under a special contract which provides that upon receiving the full amount of the final estimate made out agreeably to the terms of the contract, he shall give a release under seal from all claims or demands whatsoever, growing out of the said contract; the giving such release is a condition precedent to his recovery, if the final estimate has been properly made out; but not if the final estimate was fraudulently made. Idem, 447

4. If the rail road company has paid to the contractor the whole amount of the final estimate, the contractor cannot maintain an action for the work done under the contract, unless he can prove that there was fraud or intentional misconduct on the part of the engineer making the estimate. Idem, 447

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2. If exceptions to an answer are not well founded, it is not ground to reverse a decree, that they were not set down to be argued, but the cause was heard and decided without passing upon them.
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3. The appellate court cannot reverse the judgment for the refusal of the court to send the jury to view the premises, unless it appears from the record that a view was necessary to a just decision.
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5. Where, upon the motion of the prisoner, the venue is changed, and the record sent by the clerk from whence the trial is removed to the court to which it is sent, does not show that the indictment was found by the grand jury; but the prisoner is tried and convicted; upon a writ of error to the Court of appeals, that court may direct a certiorari to the court whence the case was sent, for a better record: and if it appears from the record returned that the indictment was found by the grand jury, the judgment will not be reversed.
Shifflet's Case, 652

6. In such case, if it appears from the record returned with the certiorari, that the prisoner had appeared, and that
720 the *court had on his motion, quashed one of the counts in the indictment; though on his trial he pleaded to the whole indictment, and was tried on the count which was quashed as well as the others, yet this is not cause for reversing the judgment. Idem, 652

7. When in an indictment for felony, the court will quash a faulty count, though it may be good as a count for a misdemeanor. See Criminal Jurisdiction and Proceedings, No. 9, and Scott's Case, 687

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ATTACHMENTS.

The estimates of work done by a contractor for a rail road company are made up to the 20th of each month, when they are considered due, though not paid for some days after. As the price of the work done by the contractor after the 20th may be forfeited to the company for several causes, before the 20th of the next month, no debt is due from the company to the

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contractor until the 20th arrives: and therefore an attachment being served on the company on the 14th of the month, there is nothing then in its hands due to the contractor, which may be attached, though in fact no forfeiture occurs, and on the following 20th of the month the amount of the estimate may be due.

Baltimore & Ohio R. R. Co. *v.* Gallahue's adm'rs, 563

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The proviso in the act of February 28, 1828, Sup. Rev. Code 272, § 1, limiting actions on indemnifying bonds to seven years, does not apply to an action on a bond executed prior to the passage of that act.

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1. An entry into a dwelling-house in the day time, through a door that was so closed that it came within the casing, and to open which required some degree of force, constitutes in law a breaking; though there was no fastening of any other kind to the door. Finch's Case, 643

2. The word "break," in the Code, ch. 192, § 12, p. 728, is borrowed from the law in regard to burglary, and is to be understood as it would be when used in a charge of burglary. Idem, 643

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COMMISSIONERS IN CHANCERY—To sell land.

1. Commissioners appointed by a court of equity to sell lands, make the sale and take bonds for the purchase money, payable to themselves; and before the money is paid, the commissioners are removed and others are appointed. These last may sue at law on the bonds in the names of the first, to whom the bonds were made payable.

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2. Though it is usual to state in the declaration or by endorsement thereon, or on the writ, that the action is brought for the benefit of the parties entitled, yet this is not essential. And if the defendants have any doubt whether the suit is brought for the benefit of the last commissioners, they can by motion have a rule upon them to avow and prosecute or disavow and dismiss the action. Idem, 42

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See Actions, No. 2, 3, and
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CONFESSIONS.

1. A young man living in the jailer's family, and who occasionally, in the absence of the jailer, attended on the prisoners and kept the keys of the jail, is not a person in authority, whose threat or promise will exclude the confessions of a prisoner in the jail awaiting his trial.

Shifflet's Case, 652

721 *2. What is not an inducement to a prisoner to make a confession.

Idem, 652

CONTRACTS.

1. The agreement between a rail road company and a contractor provides: And whereas the above work must be inspected and received, it is hereby agreed that the engineer of the company or some one appointed by him, shall be the inspector of said work, shall determine when this contract is complied with according to its just and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same; and his decision shall be obligatory and conclusive between the parties to this contract, without further recourse of appeal: *held*:

1st. The decision of the engineer is conclusive upon the parties: and this in relation to the price of a species of excavation not mentioned in the specifications.

2d. Such a contract is legal and binding on the parties.

Condon *v.* South Side R. R. Co., 302

2. In such a contract, if it is proved that the final estimate has been fraudulently made out, the contractor may recover the value of the work.

Baltimore & Ohio R. R. Co. *v.* Polly, Woods & Co., 447

3. Such a contract provides, that upon receipt of the final estimate, the contractor shall give a release under seal from all claims or demands whatever growing out of said contract. In an action by the contractor against the company for work and labor, if he proves that the final estimates were fraudulently made out, he may recover without having executed the release.

Idem, 447

CONVERSION.

H devises a tract of land and grist mill thereon, to his wife during widowhood; and directs that at her death or marriage the same shall be sold; but not until his youngest child comes of age; and the proceeds to be divided equally among all his children. There were four children, the youngest of whom, J, came of age in 1839. A daughter E married L in 1836, who died in 1842; E afterwards married S and died in 1856, S surviving her. T died an infant intestate and unmarried before 1839. M died in 1840, and bequeathed her share to E. L during his marriage with E, and S as guardian or agent of J, rented out the land, and L took one-third of the rents,

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paid one-third to M till her death, when he took two-thirds, and S as guardian or agent of J took one-third. After the death of L, E and S rented out the land and took the rents in the same way; and after E married S he rented it out and took the rents in the same way until 1850, when W was appointed the agent of J, and took his share of the rents. E left one child by L and two by S. J seems to have lived out of the state. S was the administrator of E, and S S was administrator of T, and administrator de bonis non of M: *held*:

1st. The land and mill is to be considered as money, and to pass as such to and from the legatees of H.

Harcum's adm'r & als. *v.* Hudnall, 369

2d. Though the legatees might have elected to take the same as land, yet such an intention must have been clearly manifested; and all the parties interested in the property must have united in the election. Idem, 369

3d. The renting out of the land and taking the rents by L during his life, is not sufficient evidence of an election on his part to take the land. Idem, 369

4th. M having in her will spoken of a bill about to be filed for the sale of the land, and having given either the land or the proceeds of sale to E, it is evident she had not elected to take the land as land; and therefore no election by L could change the character of the bequest. Idem, 369

5th. The property having been directed to be sold when J came of age, it will be considered as money from that period: And the interest which E took under her father's will being an interest in money, the proceeds of the sale of the property whenever it should be made, at her death nothing passed to her children as her heirs at law. Idem, 369

6th. M having lived until J came of age, her bequest to E was a bequest of money, the proceeds of the sale of the land. Idem, 369

7th. T having died before J came of age, and therefore before the time fixed for the sale of the property, quære, if his interest passed as real estate to his heirs, or as money to his administrator. Idem, 369

8th. If T's interest descended to his heirs, they took it subject to be converted into money by a sale, just as he held it. Idem, 369

9th. The interest of E was not an estate in the premises, but a mere chose in action, a right to have a sale of the
722 property, *and to receive her two-thirds of the proceeds. The acts of her first husband L in renting out the land and receiving the rents, was not a reduction of the chose in action into possession; and therefore on his death it survived to E; and on her second marriage and death, her second husband is entitled to it as her administrator. Idem, 369

10th. The rents of the property before the sale belonged to the persons who were entitled to the principal subject, and would go to them in common with the moneys arising from the sale, as personal property. And those received by L in his lifetime were thus reduced into his possession, and became his absolute property. Idem, 369

CONVEYANCES.

1. Upon a bill by a creditor to subject land in the hands of the executors of the purchaser, they having in their answer stated that he has always claimed under the title bond of his vendor, a conveyance cannot be presumed.

Erskine's ex'ors *v.* North & als., 60

2. When a conveyance of the legal title will be presumed in favor of a party in possession under a complete equitable title from the patentee, to prevent a forfeiture under the act of February 27, 1835, in relation to delinquent lands. See Presumptions, No. 4, and

Hale *v.* Marshall, 489

CONVEYANCES—Fraudulent.

1. A debtor cannot divide his property into parcels, and protect himself in the enjoyment of one parcel, by giving up the other; he cannot require his creditors to accept a part and give up the residue: and when he attempts it, the deed is fraudulent and void.

Quarles & als. *v.* Kerr & als., 48

2. Though a deed is not fraudulent by reason of a postponement of the time of sale and the reserving the property to the grantor in the meantime, yet where the time of sale may be hastened or postponed by the grantor, so as to enable him to defeat any creditor who should attempt to subject the interest in the property reserved to the grantor, to the payment of his debt, the deed is fraudulent. Idem, 48

3. The including in such deed perishable property which must be consumed or become worthless before the time fixed for the sale, though it may not of itself be sufficient to set aside the deed as fraudulent, yet it is a fact indicative of a fraudulent intent. Idem, 48

CORPORATIONS.

1. The president and acting manager of a private corporation is trustee in a deed of marriage settlement; and as trustee he sells the trust property, in violation of his duty as trustee, and purchases a part of it for the corporation.—The corporation is a participator in the violation of the trust, and is liable therefor.

Barksdale & als. *v.* Finney & als., 338

2. The cestuis que trust having sued the trustee for an account of the trust subject, and made the corporation a party; and having taken a decree against the trustee for the amount of the purchase money for which the trust property sold, which proves

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unavailing, may then pursue the property in the hands of the corporation, if it is still in its possession, or have a decree against the corporation for the price at which it was purchased. Idem, 338

3. H owns or controls all the stock of the B corporation, and he contracts with third persons to obtain a charter for another corporation, of which they shall be the corporators, and to transfer to the new corporation all the stock, and to convey all the real estate and other property (except slaves) of B, as also some real estate of his own. The charter is obtained and the stock is transferred, but there is no conveyance of the real estate: but the new corporation takes possession of it, and holds it as its own.—The new corporation is the successor of B, and takes the property subject to pay the debts of the corporation of B, to the value of the property received.

Idem, 338

4. The charter of B made its stock personal estate; but provided that its real estate should only be conveyed as other real estate.—The legal title could only pass by deed from B. Idem, 338

5. Where the stock of a corporation is declared to be personal estate, and the certificates are made transferable on the books of the corporation; and it is authorized to acquire real estate; such estate vested in it as a corporation, and not as individual shareholders. The certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and on the expiration of the charter, to his proportion of the assets remaining after the payment of the debts; and every purchaser of the stock takes it subject to the same liabilities. Idem, 338

723 *6. A creditor of a corporation, the whole stock and property of which has been transferred to its successor, which takes it subject to the debts of the first corporation, and which it is ample to pay, is not bound to convene all the creditors before the court, but may prosecute his own claim alone. Idem, 338

7. A creditor of the corporation B prosecuting his claim against the successor to B, is not bound to make the judgment creditors of H, to whom the successor of B has contracted to pay an annual rent, a party to the suit. Idem, 338

COSTS.

A prisoner convicted of felony, and obtaining a writ of error to the Court of appeals, where it is affirmed, is not responsible for the fees of the clerk or the attorney general. See Code, ch. 211, § 10, 11, p. 782. Finch's Case, 643

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. A discharge by an examining court of a prisoner committed on a charge of felony, is not a bar to another prosecution for the same offence, except when the record shows that the discharge was upon an examination of the facts charged.

McCann's Case, 570

2. Under a common law indictment for murder, the prisoner may be found guilty of murder in the first or second degree or manslaughter. Livingston's Case, 592

3. Quære: If a prisoner has been convicted of murder in the second degree or manslaughter, and obtains a new trial, whether he can be put upon his trial again for a higher offence than that of which he has been convicted. Idem, 592

4. Upon a trial for homicide, it is competent for the commonwealth to introduce physicians or surgeons to give their opinions on a state of facts testified to by themselves or other witnesses, in respect to a wound or beating proved to have been inflicted on the deceased, as to whether such wound or beating would be a cause adequate to produce the death, or was the actual cause of the death. Idem, 592

5. In such case the questions put and the answers given should be so put and given as not to elicit or express an opinion by the physician or surgeon on the credit of the witnesses or the truth of the facts testified to. Idem, 592

6. If a party be dissatisfied with an instruction, he ought to state his objection at the time. If no objection be made to an instruction at the time it is given, and no exception taken, or the point saved; but objection be made for the first time, after verdict, and in the form of a motion to set it aside; the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and if of opinion that a just verdict has been rendered, according to the law and the evidence, will not set it aside on account of that objection. Bull's Case, 613

7. A presentment for gaming not setting out any offence against the statute, may be quashed on motion.

Huff's Case, 648

8. A prisoner is examined for forging and counterfeiting twenty-four pieces of silver coin, and is sent on to the Circuit court for further trial—He cannot be indicted for feloniously having in his possession ten or more pieces of coin with intent to alter and employ the same as true.

Scott's Case, 687

9. There are counts in an indictment for forging and counterfeiting coin, and also a count for feloniously having in his possession twenty pieces of forged coin, not saying "at the same time." The prisoner having moved the court to quash the last count, which is overruled, there is a verdict and judgment against him, and he obtains a writ of error. This court holding that the count is bad as an indictment for a felony, will not permit it to stand as a count for a misdemeanor, but will reverse the judgment and quash the count.

Idem, 687

10. Quære: If in an indictment counts

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for a felony and for a misdemeanor may be joined.—It seems not. Idem, 687

11. In a prosecution for a misdemeanor, if there be a conviction and a judgment for the fine and costs, there cannot be, at another court, a judgment of imprisonment. Pifer's Case, 710

DECREES.

Bill by trustee to enforce the deed, and decrees for sale and distribution of the fund. Then bill by a creditor excluded to set aside the deed for fraud on its face:

1st. Fraud in the deed not having been put in issue in the first case, the decree does not bar the second suit.

2d. The decree in the first case being interlocutory merely, it can be no bar to the second suit.

Quarles & als. *v.* Kerr & als., 48

724 *DEEDS.

1. Under the act of 1819, 1 Rev. Code, ch. 99, § 15, p. 365, the courts of any of the United States had authority to take the acknowledgment of a feme covert to her execution of a deed.

Grove *v.* Zumbro, 501

2. The certificate of the court of the acknowledgment of a feme covert, should show the privy examination of the wife; her declaration that she did freely and willingly seal and deliver the said writing, and wished not to retract it; and that she then acknowledged the said writing so again shown to her. If it omits the fact, "that she did not wish to retract it," it is fatally defective. Idem, 501

DELINQUENT AND FORFEITED LANDS.

1. A patent for land forfeited for nonpayment of taxes, was unauthorized by any law prior to the Code of 1849; and therefore the entry and survey of land gave the patentee no equity therein.

Atkins & als. *v.* Lewis & als., 30

2. Though the entry and survey of land was made prior to the sale thereof under a decree of the court as forfeited land, yet the sale having been made prior to the issuing of the patent, and the land having been purchased by the original owner, who paid as the cash payment thereof, more than sufficient to pay all taxes, damages and costs due the commonwealth; and the court having, after the issuing of the patent, directed the balance of the purchase money to be released to the purchaser, and the commissioner of delinquent lands having conveyed the land to him; his title is good against the patentee who never was in possession, and who claimed the commonwealth's title under the act of March 22, 1842. Idem, 30

3. Upon the question whether land has been forfeited under the act of 1835, for the failure of the owner to have it placed upon the books of the commissioner of the revenue and pay the taxes due thereon, or whether it was within the exception to the second section of that act, it appears that a person under whom the defendant claims was in possession of the land at the time of the passage of the act. The defendant may rely on his possession to defeat the forfeiture, if his possession was such as the statute prescribes.

Hale *v.* Marshall, 489

4. After twenty-five years' possession of land under a complete equitable title derived from the patentee, he living in an adjoining county for years, and neither himself nor any one claiming under him setting up any claim to the land against the equitable title, a conveyance of the legal title may be presumed in favor of the party in possession, to prevent a forfeiture of land; if the legal title is necessary. Idem, 489

5. A party in possession of land claiming it under a good equitable title, is within the exception to § 2 of the act of February 27, 1835, p. 12, concerning delinquent lands. Idem, 489

6. What will not invalidate the proceedings for the sale of delinquent lands in a suit between the purchaser under them and a third party. See Evidence, No. 2, and

Hitchcox *v.* Rawson, 526

DEMURRER.

See Pleadings at Law, and Practice at Common Law.

DOWER.

1. Testator devises all his land to his different children, giving the wife one of the parcels during her widowhood, which parcel has the improvements upon it. He also gives her his slaves for life, all the rest of his personal property to enjoy and use for the best interests of his children; and the interest on the bonds due him to be used by her for the benefit of his children. —This will be held to be in lieu of dower under the act, Code ch. 110, § 4, 5, p. 474-5.

Craig's heirs *v.* Walthall & wife, 518

2. In such case the widow having been told that the provision in the will was in lieu of dower, and advised to renounce it, declines to do so, and expresses herself satisfied with the provision; and takes possession of the property and holds it four years, until she marries.—She has elected to take under the will, and cannot then claim dower. Idem, 518

3. The principles applicable to the case of a widow as to the necessity of electing between her right of dower and the provisions of her husband's will, are the same as those applicable to other cases.

Dixon *v.* McCue & als., 540

4. If the widow's taking dower in the real estate will clearly interfere with the provisions of the will, she must elect. Idem, 540

5. Though the widow took the whole land under the will for five years, and also took a legacy of property to the value of five hundred dollars to aid her in

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725 *carrying on the farm; still she, having been under a mistake as to her rights under the will, will not be held to have elected to take under it; but may still take her dower. Idem, 540

DYING DECLARATIONS.

On a trial for murder, the commonwealth, to introduce the dying declarations of the deceased, proved that he was told that his physicians thought that unless he could be relieved of the shortness of breath under which he was then suffering, he would die very soon. He then made the statements which were proposed to be introduced as evidence; and he was asked if these were made as his dying declarations; to which he answered they were. The deceased was then told that the doctors were of opinion he was certainly dying, and that he would die very soon; and what he had said was repeated to him, and he was asked if he made that statement again, and did he make it as a dying declaration; and he said that he did. The statement is admissible evidence as dying declarations.
Bull's Case, 613

EJECTMENT.

1. Defendants in possession of land, as against a plaintiff who never was in possession, but claims the commonwealth's title under the act of March 22, 1842, may set up an outstanding title in another to protect their possession.
Atkins & als. *v.* Lewis & als., 30

2. A declaration in ejectment, which describes the land as part of a larger tract owned by plaintiff, near certain creeks which have no public notoriety, is defective, and may be demurred to.
Hitchcox *v.* Rawson, 526

3. In such a case a verdict which finds for the plaintiff the land in the declaration mentioned, is too vague to enable the officer to deliver possession; and there must be a venire de novo. Idem, 526

4. What will not affect the validity of the proceedings for sale of forfeited land, as between a purchaser under them and a third party, in an ejectment. See Evidence, No. 2, and Idem, 526

ELECTION.

1. Land being directed to be sold and the proceeds being given—though the legatees may elect to take the same as land, yet such an intention must be clearly manifested; and all the parties interested in the property must unite in the election.
Harcum's adm'r & als. *v.* Hudnall, 369

2. What not evidence of an election to take the land. See Conversion, No. 3, 4, and Idem, 369

3. What will constitute a case of election for a widow. See Dower, No. 1, and
Craig's heirs *v.* Walthall & wife, 518

4. What will constitute an election by the widow. See Dower, No. 2, and
Idem, 518

5. The principles applicable to the case of a widow as to the necessity of electing between her right of dower and the provisions of her husband's will, are the same as those applicable to other persons.
Dixon *v.* McCue & als., 540

6. If the widow's taking dower in the real estate will clearly interfere with the provisions of the will, she must elect.
Idem, 540

7. Though the widow took all given to her by the will, still she, having been under a mistake as to her rights under the will, will not be held to have elected to take under it, but may still take her dower.
Idem, 540

EMANCIPATION.

See Slaves and Free Negroes.

EQUITABLE JURISDICTION AND RELIEF.

A court of equity has jurisdiction in a suit by a high sheriff against his deputy and the sureties of the deputy to have a settlement of the accounts of several administrations upon estates committed to the high sheriff, and which went into the hands of the deputy. And the suit may be maintained though the bill does not allege, and it is not proved, that the high sheriff had paid the balances reported to be due on the settled accounts, or any part of them.
Tyler & als. *v.* Nelson's adm'x, 214

EVIDENCE.

1. Defendants in ejectment rely upon an outstanding title in a third person, and offer in evidence an abstract of the patent certified by the register, which is received without objection. This is to be regarded in the appellate court as prima facie evidence that such a grant was issued, though the case came up on a demurrer to evidence.
Atkins & als. *v.* Lewis & als., 30

726 *2. On the trial of an ejectment, plaintiff claims under a conveyance from a commissioner of delinquent lands, and offers the record of the proceedings for the sale of the lands, in evidence. The defendant objects to it for irregularities on its face: 1. That the land was not forfeited, because the forfeiture for non-payment of taxes was in the name of the patentee, who had sold and conveyed the land before it was returned delinquent in 1801 and to 1814; though it was never entered by any other name. 2. Because the decree for the sale was at a special court. 3. Because the decree was conditional upon the purchaser's giving bond. 4. Because the court on petition made an order directing the deed to be made to parties not reported to be purchasers. 5. Because the deed was made by one commissioner of delinquent lands; though there was but one, and the order directed him.—But none of these invalidate the proceedings so as to render them null as between the purchaser and a third party, in a collateral proceeding.
Hitchcox *v.* Rawson, 526

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3. Upon a trial for murder, it having been proved that the prisoner had beat the deceased, the complaint of the deceased of pain suffered by her within two hours after the beating, is competent evidence.
Livingston's Case, 592

4. When commonwealth may introduce physicians or surgeons to testify, and to what. See Criminal Jurisdiction and Proceedings, No. 4, 5, and Idem, 592

5. See Dying Declarations, No. 1, and Bull's Case, 613

6. On the trial of a prisoner for burning a mill, the commonwealth proves by the owner of the mill, that a short time previous to the burning the prisoner had made violent threats against him.—It is not competent for the prisoner to ask him or any other witness, whether other persons had not made threats against him.
Shifflet's Case, 652

7. In such case the previous threats being proved, the commonwealth may prove that shortly after the burning, the prisoner violently abused and threatened the owner, and said as he was about to leave, "You have not yet got what I intend to give you." Idem, 652

EXCEPTIONS.

A bill of exceptions taken to the opinion of the court refusing to grant a new trial in a prosecution for a felony, sets out the evidence.—The appellate court will not reverse the judgment, unless, by rejecting all the parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court below still appears to be wrong.
Bull's Case, 613

EXECUTORS AND ADMINISTRATORS.

1. The sureties of a deputy sheriff are liable for the amount of bonds taken by the first administrator on an estate, and after his death delivered by his administrator to the sheriff to whom the estate had been committed, as a part of the unadministered assets, after the estate had been committed to the sheriff.
Tyler & als. *v.* Nelson's adm'x, 214

2. What is sufficient evidence that the deputy had collected the bonds which had been delivered to him. Idem, 214

3. Administration granted where the deceased lived and died out of the state, and left no estate within it, is not void.
Andrews *v.* Avory & als., 229

4. An administrator appointed in Virginia, whose intestate lived and died in North Carolina, and left no estate in Virginia, goes to North Carolina, and without qualifying there, takes possession of the assets, and brings them to Virginia.—His sureties in Virginia are liable for his faithful administration of these assets.
Idem, 229

5. An administrator having sold slaves under a decree of the court, in a suit by some of the next of kin against himself and others as next of kin, for a sale and distribution, his sureties are not responsible for the proceeds of the slaves; he having sold them as commissioner of the court, and not as administrator. Idem, 229

6. Testator had in his lifetime taken the bond of two men who were partners, for a partnership debt, and it was unpaid at his death. He directed his property to be sold and its proceeds and his other moneys, &c., to be kept at interest for the support of his family; and these debtors being reputed wealthy men, the executor permitted the debt to remain uncollected until one of them died, and the firm as well as its members proved to be insolvent.—The executor is bound to account for the debt.
Southall's adm'r *v.* Taylor & als., 269

7. In this case one of these partners purchased property at the public sale made by the executor, and executed his bond with his partner as his surety.—The executor having failed to collect the money when he might have collected it, and
727 *the obligors having failed, the executor is bound to account for the amount of the debt. Idem, 269

8. One partner is not such security as an executor is authorized to take in selling the property of his testator. Idem, 269

9. Testator devises land to his wife for life; and at her death to be sold and equally divided among his children. One of these children dies under age, intestate and unmarried. Another dies before a sale of the property, and gives her share to her sister. Years after her death, a suit is brought for a sale of the property and division of the proceeds, and the administrator of the two deceased children is a party. There being no suggestion of any debts due from them, their interests may be decreed to the other children, according to their respective interests.
Harcum's adm'r & als. *v.* Hudnall, 369

FEES.

A prisoner convicted of a felony, and obtaining a writ of error to the Court of appeals, where the judgment is affirmed, is not responsible for the fees of the clerk or attorney general. See Code, ch. 211, § 10, 11, p. 782. Finch's Case, 643

GAMING.

1. An indictment for playing at cards at a public place, may be sustained by proof that the party bet at faro at the time and place stated in the indictment.
Gibboney's Case, 582

2. An indictment for gaming under the 1st section of ch. 198 of the Code, must charge the playing of one of the games specified; or it must show by averment that the gaming charged is of the like kind as those specified; that is, that the chances of the game are unequal, all other things being equal. Huff's Case, 648

3. A presentment for gaming not setting

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out any offence against the statute, may be quashed on motion. Idem, 648

4. A room in an out-house within the enclosure of a tavern lot, which had at one time been used in connection with the tavern, and the room over which is still so used, having been rented by a third party, and held and used and controlled by him, independent of the proprietor of the tavern, though the occupier boarded at the tavern, and the servants belonging to it attended to the room, is not a part of the ordinary, nor is it a public place, in the sense of the act, Code, ch. 198, § 4, p. 743.
Purcell's Case, 679

HOMICIDE.

When in a case of homicide it appears that a wound or beating was inflicted on the deceased which was not mortal, and the deceased whilst laboring under the effect of the violence, becomes sick of a disease not caused by such violence, from which disease death ensues within a year and a day, the party charged with the homicide is not criminally responsible for the death, although it should also appear that the symptoms of the disease were aggravated, and the fatal progress quickened, by the enfeebled or irritated condition of the deceased, caused by the violence.
Livingston's Case, 592

HUSBAND AND WIFE.

1. Land directed to be sold and the proceeds divided, until it is sold a husband cannot reduce his wife's interest therein into possession.
Harcum's adm'r & als. *v.* Hudnall, 369

2. In such case, the husband having received the rents, they are reduced into possession by him, and thereby become his absolute property. Idem, 369

3. A slave having been lent to husband and wife, on their marriage, by the wife's father, he by his will gives the slave and her increase to his daughter for life, with remainder to her children. The husband hving died a few months after the father, leaving his wife surviving him, in the absence of all proof, the court will not presume the assent of the father's executors to the legacy so as to vest the life estate of the wife in the husband; but it will be held to survive to the wife.
Livesay *v.* Helms & als., 441

4. Testator owning a large tract of valuable land, and leaving a widow and six infant children, describes separate parcels of the land by boundaries, one of which he gives to each of his children. As to one of these he says, "It is my will that the above described part of my farm shall be owned by my son John (about thirteen); and I do bequeath it to him subject to the control of my dear wife during her widowhood, and then to my son John for life."—The widow takes a beneficial interest under the will.
Craig's heirs *v.* Walthall & wife, 518

*INDICTMENTS.

1. See Gaming, No. 1, and
Gibboney's Case, 582

2. See Criminal Jurisdiction and Proceedings, No. 2, and
Livingston's Case, 592

3. In an indictment for murder, the omission of the word "deliberately," will not be fatal on general demurrer.
Bull's Case, 613

4. What an indictment for gaming must show. See Gaming, No. 2, and
Huff's Case, 648

5. An indictment for selling ardent spirits without a license, to be drunk where sold, must allege that the selling was by retail. Boyle's Case, 674

6. An indictment under the statute, Code. ch. 193, § 6, p. 733, for feloniously having in his possession more than ten pieces of forged or base coin, must allege that the prisoner had them in his possession at the same time; and the charge that on a certain day he had them in his possession, is not sufficient. Scott's Case, 687

INFANTS.

M and V are joint owners of real estate, and they enter into an agreement in writing, that if either wishes to sell the property, he may fix the price he will take, and if the other refuses to give it, he may have the whole property sold at auction. And in case of the death of one or both of the parties, their executors and administrators are directed to carry out the agreement as fully as if they were living. V died leaving a widow and several infant children, having made a will previous to the agreement, by which he forbade his executrix to sell any of his real estate. After V's death M had the property sold at auction, on terms which were satisfactory to V's representative, and which were proved to be beneficial to the children. A bill by the widow and children of V against the purchaser, for a specific execution of the contract, will be sustained, and a decree enforcing the sale will pass the title of the infants; though the proceeding does not conform to the act concerning the sale of infants' lands, nor to that concerning partitions.
Goddin *v.* Vaughn's ex'x & als., 102

INJUNCTIONS.

Where an injunction has been obtained in vacation, the defendant may file his answer, and move the court to dissolve the injunction, without filing the answer either at rules or in term.
Goddin *v.* Vaughn's ex'x & als., 102

INSTRUCTIONS.

1. Where the plaintiff's case is clearly made out, and the only question is whether the defendant has made out a good defence; it is not deciding upon the weight of evidence to instruct the jury upon the assumption of the facts as true, which the evidence

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tended to prove if they believe it, that the defence is not sufficient; if the instruction itself is correct.
Davis *v.* Miller, &c., 1

2. Where an instruction to the jury is asked, which is equivocal in its meaning; which upon one construction is correct, but upon another construction is incorrect, it should not be refused, if by so doing the jury may be misled; but should be given with an explanation giving it the meaning which will make it proper.
Baltimore & Ohio R. R. Co. *v.* Polly, Woods & Co., 447

3. Where a party asks for an instruction which is itself proper to be given, it is error to refuse to give it as asked; though it is given with an addition which it does not appear is based upon any evidence given at the trial. Idem, 447

4. In such case it is error to substitute for the instructions asked for, another, which, though it may state the law correctly, is long and complicated, calculated to mislead the jury, and does not cover the points of the instructions asked for.
Baltimore & Ohio R. R. Co. *v.* Laffertys, 478

5. On a trial for murder, where the evidence repelled the idea of self-defence, the court instructed the jury that if they believed from the evidence the deceased and the prisoner were engaged in a sudden and mutual combat, in which no weapon dangerous in itself was used, and during the progress of the fight the prisoner struck the deceased an ordinary blow or blows with his fists or feet, without any intention either to kill the deceased or to do him great bodily harm, but to repel his attack, and that the death of the deceased was caused thereby accidentally, and apart from the prisoner's intention, then the prisoner is guilty of involuntary manslaughter.—This is not error. Bull's Case, 613

6. In such a case the court further instructs the jury, that though no weapon dangerous in itself is used, but only the fists and feet; yet if the jury are satisfied *from the evidence that the manner of inflicting the blows was cruel and unusual, and exceeded in number and violence what was necessary to repel the deceased, and he died of such beating; then the prisoner is guilty of voluntary manslaughter. This is not error.
729 Idem, 613

7. When objection to an instruction should be taken, and what the consequence of postponing it. See Practice at Common Law, No. 17, and Idem, 613

JURISDICTION.

In a suit for freedom, though detention of the plaintiff where the suit is brought is necessary to give the court jurisdiction, yet as the court has general jurisdiction over the subject matter of controversy, the objection to the jurisdiction in the particular case, for this cause, is matter in abatement of the proceeding, and must be pleaded, or brought to the notice of the court by rule or motion, before the jury is sworn in the cause.
Hunter *v.* Humphreys, 287

JURORS.

As a general rule, the testimony of jurors is inadmissible to impeach their verdict; especially on the ground of their own misconduct. Bull's Case, 613

LARCENY.

1. Lost property may be the subject of larceny. Tanner's Case, 635

2. To constitute a larceny of lost property, the person finding it must know, or have the means of knowing, the owner, or have reason to believe that the owner may be discovered; and he must intend at the time of finding the property, to appropriate it to his own use. Idem, 635

LIMITATIONS—Statute of.

1. The proviso in the act of February 28, 1828, Sup. Rev. Code 272, § 1, limiting actions on indemnifying bonds to seven years, does not apply to an action on an indemnifying bond executed prior to the passage of the act.
Duval, adm'r &c. *v.* Malone & al., 24

2. When the possessor of land has acknowledged a title in the claimant, then the possession will not be deemed adverse; and whenever the act of the possessor acknowledges a right in the claimant, the statute of limitations will not operate, because such acknowledgment deduced from circumstances negatives the idea of adverse possession.
Erskine's ex'ors *v.* North & als., 60

3. A widow qualifies as administratrix of her husband, and takes possession of and holds certain slaves, in which she claims a life estate as having been given to her by her father's will. She is afterwards removed from her office of administratrix; but she continues to hold the slaves, claiming them as her own for life; and she holds them for more than five years after she ceased to be administratrix: *held*: The statute of limitations will protect her against any claim by the administrator de bonis non and next of kin of her husband. And the fact that one of the next of kin had been a married woman during the whole period will not prevent the running of the statute against her.
Livesay *v.* Helms & als., 441

MANSLAUGHTER.

See Instructions, No. 5, 6, and Bull's Case, 613

MISDEMEANOR.

1. See Indictments, and Criminal Jurisdiction and Proceedings.

2. On a prosecution for a misdemeanor, there is a verdict against the defendant for a fine, and the court enters up a judgment

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thereon for the fine and costs, and directs a capias ad audiendum against the defendant; and at a subsequent term sentences him to six months' imprisonment in the county jail.—The judgment for the fine and costs was final, and no further judgment could be rendered in the case.

Pifer's Case, 710

MURDER.

In an indictment for murder, the omission of the word "deliberately," will not be fatal on general demurrer.

Bull's Case, 613

PARTIES.

1. Commissioners appointed by a court of equity to sell lands, make the sale and take bonds for the purchase money, made payable to themselves; and before the money is paid the commissioners are removed and others are appointed. The last commissioners are entitled to sue at
730 *law on the bonds, in the names of the first, to whom the bonds were made payable.

Clarksons *v.* Doddridge & al., 42

2. Whilst a suit for specific execution of a contract against the purchaser is pending, the purchaser conveys the property in trust to secure a debt. The cestuis que trust are pendente lite purchasers, and are not necessary parties.

Goddin *v.* Vaughn's ex'x & als., 102

3. When suit by high sheriff against deputy and his sureties, on account of the administration of an estate committed to the sheriff, should be revived in the name of the personal representative of the high sheriff.

Tyler & als. *v.* Nelson's adm'x, 214

PARTITION.

1. In the partition of real estate, each part owner is entitled to have in severalty a part equal to his interest in the whole subject, if this is practicable with a due regard to the interests of all concerned. But if such partition cannot be made without impairing the portions of some others, the property may be divided into shares of unequal values, and the inequality may be corrected by a charge of money on the more valuable in favor of the less valuable portion, or by other means recognized in the law of partition. Code, ch. 124, § 2, p. 526.

Cox & als. *v.* McMullin, 82

2. The general rule of partition requires an allotment of the several parcels to the part owners; yet it may benefit both classes of owners to assign the parcels; or it may benefit one class without injury to the other, to assign rather than to allot. And in either case the commissioners may avoid the risk of an unfortunate allotment, by resorting to an assignment. Idem, 82

PARTNERS.

One partner is not such security as an executor is authorized to take in selling the property of his testator.

Southall's adm'r *v.* Taylor & als., 269

PAYMENTS.

When presumption of payment will not arise. See Presumptions, No. 1, 3, and

Erskine's ex'ors *v.* North & als., 60

PLEADING AT LAW.

1. A declaration on an indemnifying bond in the name of the administrator de bonis non of the high sheriff, sets out the bond as made to himself; and without craving oyer of the bond, the defendants demur.—As there is enough in the declaration to enable the court to proceed to judgment according to law and the very right of the case, the demurrer should be overruled.

Duval, adm'r &c. *v.* Malone & al., 24

2. A declaration in ejectment, which describes the land as part of a larger tract owned by the plaintiff, near certain creeks which have no public notoriety, is defective, and may be demurred to.

Hitchcox *v.* Rawson, 526

POWERS.

T conveys land to S and C his wife, to have and to hold the same to S for his life, with reversion to C and her heirs. And S covenants with T and C that she shall have the privilege during coverture to nominate "by last will and testament or power of appointment" in the presence of two witnesses, such person or persons as she might designate for her heir or heirs to the property aforesaid after the death of S. C died in the lifetime of S, having made an olograph will, by which she devised the property:—*held*:

1st. The deed to S and C conferred on her the power of disposing of the land in the lifetime of S.

2d. The power of disposition was properly executed by an olograph will; the provision for the two witnesses applying not to the disposition by will, but to other modes of executing the power.

Sherman's adm'r & al. *v.* Hicks & als., 96

PRACTICE AT COMMON LAW.

1. To take advantage by demurrer, of a variance between the declaration and the bond declared on, the defendant should crave oyer of the bond.

Duval, adm'r &c. *v.* Malone & al., 24

2. What not an expression of opinion on the evidence. See Instructions, No. 1, and

Davis *v.* Miller, &c., 1

3. The court may refuse to receive a plea which presents an immaterial issue, or may strike it out if it has been filed, or may either during the progress of the trial or after verdict set aside the issue, or in a proper case render judgment notwithstanding the verdict.

Duval, adm'r &c. *v.* Malone & al., 24

4. Action by one for the benefit of another. Though it is usual to state in
731 the *declaration or by endorsement thereon, or on the writ, that the action is brought for the benefit of the party entitled, yet this is not essential. And if

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the defendant has any doubt whether the suit is brought for the benefit of the true owner, he can have a rule upon him to avow and prosecute or disavow and dismiss the action.

Clarksons *v.* Doddridge & al., 42

5. How objection to the jurisdiction of the court in a suit for freedom, is to be made. See Jurisdiction, No. 1, and

Hunter *v.* Humphreys, 287

6. In assumpsit upon the common count for work and labor, &c., defendant offers a special plea setting out a special contract, and averring that the work, &c., sued for was done under it, and the acts to be done by the defendant were done. The special plea, if it contains a defence to the action, only amounts to the general issue; and should be rejected.

Baltimore & Ohio R. R. Co. *v.* Polly, Woods & Co., 447

Same *v.* Laffertys, 478

7. In indebitatus assumpsit for work and labor, defendant has no right to arrest the plaintiffs in the course of making out their case, by an offer to show that the work was done under a special contract, it not having appeared from the plaintiffs' evidence that there was any such contract.

Idem, 447

Idem, 478

8. If it appears in the course of the plaintiffs' evidence, that the work was done under a special contract which remains in full force and ascertains the price; they have no right to prove the value of the work, and can only recover the contract price, upon proving the contract fully executed on their part. Idem, 447

9. If it appears from the plaintiffs' evidence, that the work was done under a written contract, they must, before they go any further, produce it, or duly account for its non-production, and prove its contents. Idem, 447

10. If it appear for the first time, on the cross-examination of the plaintiffs' witnesses, or from the defendant's evidence, that the work was done under a special contract, or that the contract was in writing, the plaintiffs will then be required to proceed in the same way as if the fact had appeared in the course of their own evidence in chief. Idem, 447

11. It is for the judge who tries a cause to determine whether he will give or refuse an instruction asked for, before the argument is commenced or after it is concluded. Idem, 447

12. Where an instruction to the jury is asked which is equivocal in its meaning; which upon one construction is correct, but upon another construction is incorrect; it should not be refused, if by so doing the jury may be misled; but should be given with an explanation giving it the meaning which will make it proper. Idem, 447

13. Where a party asks for an instruction which is itself proper to be given, it is error to refuse to give it as asked; though it is given with an addition which it does not appear is based upon any evidence given on the trial. Idem, 447

Baltimore & Ohio R. R. Co. *v.* Laffertys, 478

14. In an action by a contractor on a rail road against the company, for work and labor, the plaintiffs having offered evidence tending to show that certain excavation which was a part of the work in controversy, was solid rock, and the defendant having offered evidence tending to show the contrary; the defendant moved the court to have the jury taken to view the premises, they being about thirty miles off on the line of the road, and offered to send the jury on the train of the company and to defray the expenses. The court having overruled the motion, the appellate court cannot say the court below erred, unless it appears from the record, that a view was necessary to a just decision: and that does not appear. Idem, 447

15. Parties cannot by their consent authorize a jury to render their verdict to the clerk in the absence of the judge, and be discharged. And if a verdict is thus rendered and the jury discharged, it is no verdict. Idem, 447

16. The parties agree to recall the jury to ascertain whether they agree to the verdict as rendered; and it appears from the statement of three of them, that they did not understand it according to its legal effect. As the question before the court was whether the verdict delivered by the jury to the clerk should be made their verdict by their assent in open court, it was proper to hear all that the jurors had to say upon the subject, and be well satisfied whether they understood and fully concurred in the verdict. And under the circumstances the court should have sent the jury to their room to consider further of their verdict, or should have ordered a new trial. Idem, 447

17. If a party be dissatisfied with an instruction, he ought to state his objection at the time. If no objection be made
732 *to the instruction at the time it is given, and no exception taken or the point saved; but objection be made for the first time, after verdict, and in the form of a motion to set it aside; the court will consider whether, under all the circumstances, the party may be prejudiced by the instruction; and if of opinion that a just verdict has been rendered, according to the law and the evidence, will not set it aside on account of that objection. Bull's Case, 613

18. As a general rule, the testimony of jurors is inadmissible to impeach their verdict; especially on the ground of their own misconduct. Idem, 613

PRACTICE IN CRIMINAL CASES.

See Criminal Jurisdiction and Proceedings.

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PRACTICE IN CHANCERY.

1. Trustee files a bill to enforce the trust deed, and in this suit the court decrees the sale and distribution of the trust subject among the creditors provided for, except one, who is excluded under the provisions of the deed, because he sued out execution on his judgment. This creditor then files a bill to set aside the trust deed, on the ground that it is fraudulent on its face: *held*:

1st. That the question whether the deed was fraudulent was not put in issue in the first case, and therefore could not be decided: and the decree in that case cannot be a bar to the second.

2d. The decree in the first case being interlocutory merely, it cannot be a bar to the second suit.

Quarles & als. *v.* Kerr & als., 48

2. When contract for sale of infant's land will be enforced though proceeding does not conform to the act concerning sales of infants' lands, nor to that concerning partitions. See Infants, No. 1, and

Goddin *v.* Vaughn's ex'x & als., 102

3. It is not error in an interlocutory decree enforcing a specific execution of a contract against a purchaser, that it does not direct a deed to be made and tendered to him. Idem, 102

4. Where a decree for specific execution of a contract against a purchaser, provides that if the purchase money, or a part of it, is not paid by a day certain, the property shall be sold, it is not error to appoint the counsel for the plaintiffs, there being no objection to the person, the commissioner to make the sale; nor is it error to refuse to associate one of the counsel of the purchaser with him. Idem, 102

5. Where all the facts are before the court, and the objection to the title to land purchased is a question of law, it is unnecessary to refer the title to a commissioner. Idem, 102

6. Whilst suit is pending, the purchaser conveys the property in trust to secure a debt. The cestuis que trust are pendente lite purchasers, and are not necessary parties. Idem, 102

7. Where an injunction has been obtained in vacation, the defendant may file his answer and move the court to dissolve the injunction, without filing the answer either at rules or in term. Idem, 102

8. If exceptions to an answer are not well founded, it is not ground to reverse a decree, that they were not set down to be argued, but the cause was heard and decided without passing upon them. Idem, 102

PRESUMPTIONS.

1. As between a creditor of B having a right to subject land, and a purchaser from B, the presumption of satisfaction of the debt as against the purchaser can only begin to arise from the time he had notice of it; and if twenty years have not since elapsed, the legal presumption has not arisen.

Erskine's ex'ors *v.* North & als., 60

2. Upon a bill by a creditor to subject land in the hands of the executors of a purchaser, they having in their answer stated that he has always claimed under the title bond of his vendor, a conveyance cannot be presumed. Idem, 60

3. Even if the time has elapsed from which the legal presumption of payment may arise, yet the circumstances may repel that presumption; and they do so in this case. Idem, 60

4. After twenty-five years' possession of land under a complete equitable title derived from the patentee himself living in an adjoining county for years, and neither he nor any person claiming under him setting up any claim to the land against the equitable title, a conveyance of the legal title may be presumed in favor of the party in possession, to prevent a forfeiture of the land under the act of February 27, 1835, p. 12, in relation to forfeitures of delinquent lands; if the legal title be necessary.

Hale *v.* Marshall, 489

733 *PRIVY EXAMINATION.

See Deeds.

PROMISSORY NOTES.

1. Payment by the maker to the payee and endorser of a negotiable note, after it has been protested for non-payment, taken up by the payee and transferred by him to his creditor as collateral security for a larger debt, such payment being without knowledge of the transfer, is not a good defence to an action brought on the note by the transferee and holder against the maker.

Davis *v.* Miller, &c., 1

2. Payment of a dishonored note by an endorser, does not extinguish its negotiability as to him and all parties liable thereon to him, though it discharges the liability of subsequent endorsers, whose liability will not be revived by his putting the note again in circulation. Idem, 1

3. When an over-due note is transferred, the holder takes it subject to all the defences and equities to which it was subject in the hands of his immediate endorser, whether or not he has any notice thereof: except that an accommodation note in his hands is not therefore invalid. Idem, 1

4. Quære: If the equities to which such overdue note is subject, in the hands of the endorsee, are or are not only such equities as attach to the note itself; as illegality or want of failure of consideration, or a release or payment, or a counter claim agreed to be set off, which is equivalent to payment. Idem, 1

5. A set-off as between the maker and the payee acquired after the transfer of an over-due note, though acquired without

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notice of the transfer of the note, cannot be set off against the holder. Idem, 1

6. By the endorsement of negotiable notes, though after due, the legal title passes without notice to the maker. But in the transfer of choses in action not negotiable, only the equitable title passes, and the maker may make payments to the payee or obligee until he has notice of the transfer. Idem, 1

7. The act, Code, ch. 144, § 14, p. 583, in relation to suits by assignees, does not apply to negotiable paper, though such paper has been transferred after due. Idem, 1

8. The declaration on a negotiable note states the endorsement and delivery as at the time of the making; and the proof is that the delivery was after the note fell due.—This is not a variance; and if it was, could only be taken advantage of at the trial by a motion to exclude the evidence, or to instruct the jury to disregard it. Idem, 1

RECOGNIZANCE.

1. In taking a recognizance, the justice, in putting the name of his county in the caption uses a contraction; but the contraction is so used that it is obviously intended for a county, and there is no difficulty in ascertaining the county intended.—This is not error.
Gedney *v.* The Commonwealth, 318

2. Though it is not stated in the body of the recognizance of what county the justice was, yet as it states that he was a justice of the said county, that refers to the county named in the caption, and is sufficient. Idem, 318

RICHMOND.

The shares of a rail road company are not liable to be taxed by the council of the city of Richmond, either under the charter of the city, or under § 19, ch. 54 of the Code.
City of Richmond *v.* Daniel, 385

SCIRE FACIAS.

1. In a scire facias upon a recognizance, a substantive and direct averment that the recognizance was transmitted by the justice to the clerk of the county court, is not necessary. The recital of the recognizance, which purports to be taken by a justice in the county, and the implied averment of the transmission of the recognizance contained in the prout patet per recordum, is sufficient.
Gedney *v.* The Commonwealth, 318

2. The mistake of the clerk in stating, as by a copy of the recognizance to our said county court transmitted, is not a fatal objection to the scire facias upon a demurrer thereto. Code, ch. 171, § 31, p. 650. Idem, 318

3. One scire facias may issue against several cognizors in one recognizance: But it must treat the recognizance as several, and the judgment must be several. Caldwell's Case, 698

4. The recognizance is that the principal shall appear before the Circuit court at a certain time to answer a charge of felony. At the time he was required to 734 *appear, he was in the penitentiary, having been sent there for another felony. Afterwards and before a judgment on the scire facias against the bail, his time expires, and he is sent back to the jail of the county in which he was to appear for trial before the Circuit court; and he is tried and acquitted.—The prisoner's confinement in the penitentiary having rendered it impossible for him to appear at the court at the time prescribed by the recognizance, it constitutes a good defence to the scire facias. Caldwell's Case, 698

5. In such case, the defence may be made by plea; but it may also be made by petition or motion; and the facts being agreed by counsel for the bail and the attorney for the commonwealth, the question of law may be decided by the court. Idem, 698

SET-OFF.

1. A set-off as between the maker and payee acquired after the transfer of an over-due negotiable note, though acquired without notice of the transfer of the note, cannot be set off against the holder.
Davis *v.* Miller, &c., 1

2. By the endorsement of negotiable notes, though after due, the legal title passes without notice to the maker. But in the transfer of choses in action not negotiable, only the equitable title passes, and the maker may make payments to the payee or obligee, until he has notice of the transfer. Idem, 1

3. Quære: If the equities to which an over-due note is subject in the hands of the endorsee, are or are not only such equities as attach to the note itself; as illegality, or want of failure of consideration, a release or payment, or a counter claim agreed to be set off, which is equivalent to payment. Idem, 1

SHERIFFS.

1. A court of equity has jurisdiction in a suit by a high sheriff against his deputy and the sureties of the deputy, to have a settlement of the accounts of several administrations upon estates committed to the high sheriff, and which went into the hands of the deputy. And the suit may be maintained though the deputy had settled the administration accounts before the probate court; and though the bill does not allege and it is not proved that the high sheriff had paid the balances reported to be due on the settled accounts, or any part of them.
Tyler & als. *v.* Nelson's adm'x, 214

2. Upon the death of the high sheriff the suit should be revived in the name of his personal representative, and not in the

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name of the personal representatives of the different estates; it being his suit against his agent. Idem, 214

3. The bond of the sureties of the deputy, which was given during the first year of the sheriffalty, bound them to indemnify the high sheriff for the acts of his deputy during the continuance in office of the high sheriff.—Their liability does not extend to indemnify the high sheriff for the acts of the deputy in relation to an estate committed to the sheriff during his second year of office. Idem, 214

4. The sureties of the deputy are liable for the amount of bonds taken by the first administrator on the estate, and after his death delivered by his administrator to the sheriff in the first year of his sheriffalty, as a part of the unadministered assets, after the estate had been committed to the sheriff. Idem, 214

5. Where an estate has been committed to the sheriff in the first year of his sheriffalty, the sureties of the deputy will be responsible for assets received by him after the end of the year. Idem, 214

6. What sufficient evidence that deputy had collected the bonds which had been delivered to him. Idem, 214

SLAVES AND FREE NEGROES.

1. Testator provides in his will that the slaves loaned his wife for life shall have their choice of being emancipated or sold publicly.—Their emancipation is made by the will to depend upon their election to be free; and as slaves have no legal capacity to choose, the provision is void and of no effect.

Bailey & als. *v.* Poindexter's ex'or, 132

2. Testator having given by his will a large real estate and also annuities to certain free negroes, then says, "It is my will and desire that my executors hold all the residue of my estate as trustees for the support of F, L and A, and the children of A and L," &c. And should it be necessary in carrying out this clause of my will, to sell my slaves, I desire my executors to sell them privately or publicly as may seem best, selecting them good homes and good masters." The three legatees are free negroes, and about eighty slaves are included in the residue of testator's estate: *held*:

1st. That the slaves included in the residue cannot be held in trust for
735 the *free negroes, as they cannot be held directly by them.

2d. That though the provision that the slaves shall be held in trust by the executors for the free negroes is illegal, the provision that if necessary the slaves shall be sold, is not invalidated by the illegal provision; but is legal and valid; and the free negroes shall take the proceeds of the slaves.

3d. The whole property in the residue being given to the executors in trust, the addition of the words "for the support and maintenance of the beneficiaries." does not limit the bequest to that object, but the whole beneficial interest passes to the free negroes.

Dunlop & als. *v.* Harrison's ex'ors & als., 251

3. In a suit for freedom, though detention of the plaintiff where the suit is brought is necessary to give jurisdiction to the court, yet as the court has general jurisdiction over the subject matter of controversy, the objection to the exercise of jurisdiction in the particular case, for this cause, is matter in abatement of the proceeding, and should be pleaded, or brought to the notice of the court by rule or motion before the jury is sworn in the cause.

Hunter *v.* Humphreys, · 287

4. In July 1829, Mrs. H, of P. G. county, Maryland, by her will emancipated some of her slaves at her death; and then says, "I give to my brother B during his life, all the rest of my slaves; and at his death, those above the age of fifteen years to be immediately free and fully emancipated: and those under the age of fifteen years to be bound out in P. G. county in the state of Maryland, until they arrive at the age of eighteen years, when they and their increase shall be free and fully emancipated. A child of one of the female slaves left to B for life, born during the life of B, is emancipated by the will. Idem, 287

5. Testator gives his whole estate, including lands, slaves, bonds, &c., to his nephew R, of Pittsburg. And then in a postscript, he says, "I wish you to take the negroes to Pennsylvania where they will be free. He appointed no executor, but B qualified as administrator with the will annexed.

1st. Quære, If the will creates a trust in favor of the negroes.

2d. If the negroes are entitled to their freedom, they cannot maintain an action at law for its recovery aginst B the administrator; his duty is to deliver them to R.

3d. Slaves emancipated by will cannot maintain an action at law against the executor to recover their freedom, without proving the assent of the executor to the bequest.

Reid's adm'r *v.* Blackstone & als., 363

6. Testatrix makes her will in August 1857, by which she emancipates one slave by name. By another clause she says, "I direct in regard to the balance of my negroes, that they shall be manumitted on the 1st day of January 1858." She then directs her executors to raise a fund out of her estate sufficient for the purpose, and use it in settling her said slaves in Liberia, or any other free state or country in which they may elect to live; and then says, "And I further direct, that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners:" *held*: The freedom of the slaves

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is made dependent on their election; and they having no legal capacity to elect, the will is ineffectual to emancipate them.
Williamson & als. *v.* Coalter's ex'ors & als., 394

SPECIFIC EXECUTION.

1. When contract for a sale of infant's land will be enforced, though proceeding does not conform to the act concerning sale of infants' lands, nor to that concerning partitions. See Infants, No. 1, and
Goddin *v.* Vaughn's ex'x & als., 102

2. It is not error in an interlocutory decree enforcing a specific execution of a contract against a purchaser, that it does not direct a deed to be made and tendered to him. Idem, 102

3. Where a decree for a specific execution of a contract against a purchaser, provides that if the purchase money, or a part of it, is not paid by a day certain, the property shall be sold, it is not error to appoint the counsel of the plaintiffs, there being no objection to the person, the commissioner to make the sale; nor is it error to refuse to associate with him one of the counsel of the purchaser. Idem, 102

4. Where the facts are before the court, and the objection to the title to land purchased is a question of law, it is unnecessary to refer the title to a commissioner. Idem, 102

STATUTES.

1. The act of February 28, 1828, 736 Sup. *Rev. Code, 272, § 1, limiting actions on indemnifying bonds, construed in
Duval, adm'r &c. *v.* Malone & al., 24

2. The act, Code, ch. 144, § 14, p. 583, in relation to suits by assignees, construed in
Davis *v.* Miller, &c., 1

3. The act of March 22, 1842, in relation to forfeited and delinquent lands, construed in
Atkins & als. *v.* Lewis & als., 30

4. The act, Code, ch. 171, § 31, p. 650, in relation to pleadings, construed in
Gedney *v.* The Commonwealth, 318

5. The act, Code, ch. 122, § 7, p. 517, in relation to wills, construed in
Phaup & als. *v.* Wooldridge & als., 332

6. The act, Code, ch. 54, § 19, p. 286, in relation to taxation by towns, construed in
City of Richmond *v.* Daniel, 385

7. The act of March 2, 1854, § 15, in relation to taxes on collateral inheritances, construed in
Eyre *v.* Jacob, sheriff, 422

8. The act of February 27, 1835, § 2, Sess. Acts 1834-5, p. 12, in relation to delinquent lands, construed in
Hale *v.* Marshall, 489

9. The act, 1 Rev. Code of 1819, ch. 99, § 15, p. 365, in relation to the privy examination of femes covert, construed in
Grove *v.* Zumbro, 501

10. The act, Code, ch. 110, § 4, 5, p. 474-5, in relation to dower and jointure, construed in
Craig's heirs *v.* Walthall & wife, 518

11. The act, Code, ch. 151, § 12, 17, p. 603, in relation to attachments, construed in
Baltimore & Ohio R. R. Co. *v.* Gallahue's ex'ors, 563

12. The act, Code, ch. 205, § 11, p. 765, in relation to examining courts, construed in McCann's Case, 570

13. The act, Code, ch. 198, § 4, p. 743, in relation to gaming, construed in
Gibboney's Case, 582

14. The act, Code, ch. 192, § 12, p. 728, in relation to housebreaking, construed in
Finch's Case, 643

15. The act, Code, ch. 211, § 10, 11, p. 782, in relation to costs in cases of felony, construed in Idem, 643

16. The act, Code, ch. 182, § 7, p. 684, in relation to certiorari, construed in
Shifflet's Case, 652

17. The act, Code, ch. 208, § 34, p. 778, in relation to defective counts in an indictment, construed in Idem, 652

18. The act, Code, ch. 198, § 4, p. 743, in relation to gaming, construed in
Purcell's Case, 679

19. The act, Code, ch. 193, § 6, p. 733, in relation to forgeries, construed in
Scott's Case, 687

20. The act, Code, ch. 208, § 28, p. 777, concerning verdicts, construed in
Idem, 687

STATUTES—Construction of.

Though the legislature may have authority to make a law to operate retroactively, yet it must clearly appear that such was the intention.
Duval, adm'r &c. *v.* Malone & al., 24

SUITS FOR FREEDOM.

See Slaves and Free Negroes.

SURETIES.

1. One partner is not such security as an executor is authorized to take in selling the property of his testator.
Southall's adm'r *v.* Taylor & als., 269

2. See Sheriffs, and
Tyler & als. *v.* Nelson's adm'x, 214

3. See Scire Facias, No. 4, 5, and
Caldwell's Case, 698

TAXATION.

1. The shares of a rail road company are not liable to be taxed by the council of the city of Richmond, either under the charter of the city, or § 19 of ch. 54 of the Code.
City of Richmond *v.* Daniel, 385

2. The act of March 2, 1854, § 5, which imposes a tax on collateral inheritances, is within the constitutional powers of the general assembly, and is still in force.
Eyre *v.* Jacob, sheriff, 422

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TENANTS IN COMMON.

1. There are two tenants in common of land having but an equitable title. One of them cannot appropriate to himself any specific portion thereof, or do any act whatever, in derogation of the right of the other to enjoy equally with himself the common property, and every parcel of it.
Cox & als. *v.* McMullin, 82

2. The legal title to the land held in common being conveyed to one of the joint owners, he reciting that he owns the whole, conveys one-half of it to a third person, and purports to convey the upper moiety. But it will be held that the deed passed
737 only an equal undivided *moiety of the common subject: and that the other joint owner and the grantee held in common the whole subject, and every part thereof. Idem, 82

3. Although a party holding in common with others, can do nothing to impair or vary, in the slightest degree, the rights of his cotenants; yet if he execute a deed for a specific portion of the common subject, or make a contract in regard to it; and upon partition such portion falls in severalty to the party so making the deed or contract, he will be bound by his act.
Idem, 82

TRUSTS AND TRUSTEES.

1. A trustee in a deed of trust to secure a debt falling due at different periods, advances to the debtor money to pay the first installment, and takes a transfer of it.—He can only subject the property to satisfy himself, after the balance of the debt is paid; and his interest does not disqualify him from acting as trustee.
Goddin *v.* Vaughn's ex'x & als., 102
Same *v.* Mason & als., 102

2. Whilst suit against the purchaser for a specific execution of the contract is pending, he conveys the property to secure a debt. The cestuis que trust are pendente lite purchasers, and are not necessary parties. Idem, 102

3. A bequest of slaves to trustees in trust for free negroes is illegal and void: But an alternative direction that if necessary the slaves shall be sold, is valid, and the free negroes may take the proceeds.
Dunlop & als. *v.* Harrison's ex'ors & als., 251

4. Property being left to trustees in trust for certain free negroes, the addition of the words "for the support and maintenance of the beneficiaries," does not limit the bequest to that object, but the whole beneficial interest passes to the free negroes.
Idem, 251

5. The president and acting manager of a private corporation is trustee in a deed of marriage settlement; and as trustee he sells the trust property, in violation of his duty as trustee, and purchases a part of it for the corporation.—The corporation is a participator in the violation of the trust, and liable therefor.
Barksdale & als. v. Finney & als., 338

6. The cestuis que trust having sued the trustee for an account of the trust subject, and made the corporation a party, and having taken a decree against the trustee for the amount of the purchase money for which the trust property sold, which proves unavailing, may then pursue the property in the hands of the corporation, if it is still in the possession of the corporation, or have a decree against it for the price at which it was purchased. Idem, 338

7. All who participate in a breach of trust are jointly and severally liable. And a purchaser concurring in a fraudulent breach of trust, and actively participating in it, and converting the property to his own use, incurs the like liability with the fraudulent trustee. Idem, 338

8. In such case a part of the property sold having been slaves, which having been used in a dangerous occupation, one of them was injured, and this slave and another were returned to the cestuis que trust. On a decree against the purchaser for the price at which he purchased the slaves, he should be credited for those returned at their value when returned. Idem, 338

9. Testator gives all his estate including slaves to his nephew R, of Pittsburg. And then in a postscript he says, "I wish you to take the negroes to Pennsylvania where they will be free." Quære: If the will creates a trust for the negroes.
Reid's adm'r *v.* Blackstone & als., 363

10. Testator by his will directs his farm shall be kept for five years and cultivated by his widow for the support of his family, and longer if the executor thinks it will promote the interests of the family; and the executor is vested with power to sell at the proper time, say five years. And as each child arrives at the age of twenty-one years, he or she shall have his or her share of his estate. The widow lives on the farm and cultivates it for five years, when the oldest child is within a few months of being twenty-one years old, and then the executor offers the land for sale: *held*: If it was not the positive duty of the executor to sell the land in time to pay the oldest child his share of the estate, the executor acting in good faith, and being of opinion that the interests of the family require a sale, and that opinion not disproved by the evidence, it would be an uncalled for and improper exercise of power in the chancellor's interfering and undertaking to substitute his discretion in the place of that of the executor.
Dixon *v.* McCue & als., 540

VARIANCE.

1. The declaration on a negotiable
738 note *states the endorsement and delivery as at the time of the making; and the proof is that the delivery was after the note fell due.—This is not a variance; and if it is, can only be taken advantage of at the trial by motion to exclude the evidence, or to instruct the jury to disregard it.
Davis *v.* Miller, &c., 1

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2. To take advantage by demurrer of a variance between the declaration and the bond declared on, the defendant should crave oyer of the bond.
Duval, adm'r &c. *v.* Malone & al., 24

VENDOR AND PURCHASER.

1. Upon a sale of real estate at public or private sale, where nothing is said about the title, the purchaser is entitled to have a clear title with covenants of general warranty.
Goddin *v.* Vaughn's ex'x & als., 102

2. But where the sale is of such a character and made under such circumstances, as fully to make known to the purchaser the exact nature of the title he is to expect; as where the sale is made avowedly by an executor under the provisions of the will, or by a sheriff or commissioner under an order of court, he can, of course, demand only such title as was in contemplation of the parties when the sale was made.
Idem, 102

3. A purchaser not informed at the time of his purchase of land at auction, that the title to one moiety thereof is vested in infants, and that it can only be obtained by a suit in chancery, may, when informed of the fact, refuse to proceed with the purchase, and abandon it. Idem, 102

4. But if such purchaser, upon being informed of the state of the title immediately after the sale, plainly manifests his intention to proceed with the purchase, content to take a conveyance for the one moiety which can be made at once, and to look to the Court of chancery for the title to the other moiety, he thereby waives the objection which he was entitled to make for the want of a conveyance with general warranty. Idem, 102

VERDICTS.

1. In a special verdict, if the facts found make a case upon which the court may render a judgment upon the merits, the verdict is not defective because other facts exist which might have been found, and which would have made a different case requiring a different judgment.
Hunter *v.* Humphreys, 287

2. Parties cannot by their consent authorize a jury to render their verdict to the clerk in the absence of the judge, and be discharged. And if a verdict is thus rendered and the jury discharged, it is no verdict.
Baltimore & Ohio R. R. Co. *v.* Polly, Woods & Co., 447

3. For what may be done in such case, see Practice at Common Law, No. 16, and
Idem, 447

4. The declaration in ejectment does not describe the land so as to distinguish it; and the verdict finds for the plaintiff the land in the declaration mentioned. This is too vague to enable the officer to deliver possession; and there must be a venire de novo.
Hitchcox *v.* Rawson, 526

WILLS.

1. See Slaves and Free Negroes, No. 2, and
Dunlop & als. *v.* Harrison's ex'ors & als., 251

2. See Powers, No. 1, and
Sherman's adm'r & al. *v.* Hicks & als., 96

3. Under the Code, ch. 122, § 7, p. 517, marriage is a revocation of a will, "except a will made in pursuance of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her (the testator's) heir, personal representative or next of kin."
Phaup & als. *v.* Wooldridge & als., 332

4. What is a beneficial interest given by a will. See Husband and Wife, No. 4, and
Craig's heirs *v.* Walthall & wife, 518

WITNESS.

1. It being proved that a witness is a practicing physician, he is a competent witness to express an opinion as an expert upon a medical question.
Livingston's Case, 592

2. Upon a trial for homicide, it is competent for the commonwealth to introduce physicians or surgeons to give an opinion on a state of facts testified to by themselves or other witnesses, in respect to a wound or beating proved to have been inflicted on the deceased, as to whether such wound or beating would be a cause adequate to produce the death, or was the cause of the death. Idem, 592

3. As a general rule, the testimony of jurors is inadmissible to impeach their verdict; especially on the ground of their own misconduct. Bull's Case, 613

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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME XV.

FROM OCTOBER 1, 1858, TO JULY 1, 1860.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.

WILLIAM DANIEL, RICHARD C. L. MONCURE,

GEORGE H. LEE, GREEN B. SAMUELS,*

WILLIAM J. ROBERTSON.†

Attorney General: JOHN RANDOLPH TUCKER.

---

*Judge Samuels died on the 5th day of January, 1859.

†Judge Robertson was elected in May, 1859, to fill the vacancy occasioned by the death of Judge Samuels, but did not sit in the cases of the April term of that year, reported in this volume. And having been a director in the Virginia Central Railroad Company prior to his election, he did not sit in the case of the Va. Central R. R. Co. v. Sanger.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Commonwealth v. Drewry & als.

October Term, 1858, Richmond.

1. **Statute Extending Office of Sheriff—Constitutional.**—The act of March 15, 1856, Sess. Acts 1855-56, ch. 8, § 2, p. 8, extending the term of the sheriff from July 1, 1856, to January 1, 1857, is constitutional.

2. **Same—Embracing Two Subjects—Case at Bar.***—The act does not embrace two subjects in the sense of the constitution, article 4, § 16.

3. **Bond of Sheriff—Failure to Execute Bond for Term Extended by Statute—Liability of Sureties.**†—The sheriff elected in May 1854, executed his official bond and entered upon his office and continued to act until January 1857, but did not execute a bond under the act of March 15, 1856. His successor, elected in May 1856, executed his official bond in June following, but did not enter upon his office until January 1857. If the said act was unconstitutional, still the first sheriff held over after the 1st of July under the constitution, article 6, § 23; and having collected the state taxes of 1856, his sureties in the bond of 1854 are liable for them.

This was a motion in the Circuit court of the city of Richmond, by the auditor of public accounts, on behalf of the commonwealth, against John M. Drewry,
2 *late sheriff of Norfolk county, and Elizabeth Drewry and four others as his official sureties, to recover the land, property, capitation, free negro and September license taxes of 1856, due from Drewry as sheriff, and the interest and damages thereon according to law.

The case came on for trial in January 1858, when there was a judgment against John M. Drewry for twenty-six thousand six hundred and three dollars and seventy-one cents, with interest at the rate of six per cent. per annum from the 15th of November 1856 until paid, and three thousand nine hundred and ninety-nine dollars and fifty-

*Statutes—Embracing More Than One Object—Effect.—In Cutlip v. Sheriff of Calhoun County, 3 W. Va. 596, the act of January, 1867, locating the county seat at another place in the county, which was entitled "An act locating the county seat of Calhoun county," the third section of which act authorized the Board of Supervisors to sell the county property at Arnoldsburg, was construed by the majority of the court and held to be repugnant to art. IV, § 36 of the constitution, which provides, that "No law shall embrace more than one object which shall be expressed in its title." MAXWELL, J., in a dissenting opinion says, that the construction of this act should not have been considered in the case upon *habeas corpus*, but proceeds to give his impression upon the question; he proceeds as follows, "Without deciding whether the construction given by the Ohio and California courts or that given by the court of Maryland be correct, to apply the construction of the Maryland court to the act of January 22d, 1867, the main body of the act is valid, and the third section only would be void, while to apply the construction of the Ohio and California courts the entire acts would be valid. The constitution of Virginia of 1851, has the provision in it in the precise form it is found in the constitution of this state.

"The supreme court of appeals of Virginia had the construction of the provision under consideration in the case of the *Commonwealth v. Drewry and others, 15 Gratt. 1.*

"The title of the act which was brought in question was, 'An act concerning sheriffs and commissioners of the revenue, their duties and compensation,' while the act itself was apparently inconsistent with its title.

"JUDGE SAMUELS, delivering the opinion of the court, touches the subject very cautiously, and disposes of it as follows: 'It may be difficult to declare the effect of this provision if, at any time hereafter, an act of assembly shall be found to conflict therewith, it is enough for the purposes of this case to say that no such conflict exists therein. The act is in reference to a single object, to wit: county organization.'

"The judge says the act is in reference to a single object, which he says is 'county organization,' but it seems to me a great stretch of imagination to find any such object expressed in the title of the act, yet the act was held valid.

"It looks to me very much like a determination to maintain the act, notwithstanding the object is not expressed in the title.

"The act passed March 4th, 1869, entitled, 'An act to repeal chapter 1, of the acts of 1867, was intended to repeal the act passed January 22d, 1867, entitled 'An act locating the county seat of Calhoun county,' and it might be a question of very serious consideration in a proper case whether the act is not unconstitutional and void, because its object is not expressed in its title, if the provision of the constitution is not to be construed as merely directory to the legislature, as it is held in Ohio and California."

†**Bond of Officer—Failure to Obtain Court's Approval—Effect upon Sureties.**—In State v. Proudfoot, 38 W. Va. 746, 18 S. E. Rep. 953, citing the principal case, it is held that the failure of an officer to obtain an approval of his official bond as required by statute does not affect his liability or that of his sureties, if it was otherwise legally executed and delivered.

See also, Monteith v. Com., 15 Gratt. 172.

Offices—Incumbents—Failure of Successor to Qualify—Effect.—In Johnson v. Mann, Judge, 77 Va. 278, it is held that under the constitution and laws of this

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five cents for damages thereon; subject to a credit of four thousand two hundred and eleven dollars and fourteen cents, as of the 16th of July 1856, and a further credit of seven hundred and fifty-one dollars.

The cause as to the sureties was continued, and came on to be tried on the 4th day of February 1858, when the court held that there was no liability on the defendants as sureties of Drewry; and therefore dismissed the motion. To this opinion and judgment of the court the commonwealth excepted.

It appeared that John M. Drewry had been duly elected the sheriff of Norfolk county in May 1852, and had qualified and acted as such for the term extending from July 1st, 1852, to July 1st, 1854. That he had been re-elected in May 1854, and had qualified and acted as sheriff from the end of his first term to January 1st, 1857. That in July 1854 he had executed a bond with the defendants as his sureties, with condition for the faithful performance of his duties. That he had given no new bond under the provisions of the act of March 15th, 1856, ch. 8, Sess. Acts 1855-56, but that he collected the taxes for the year 1856. That Thomas D. Butt was elected, in May 1856, sheriff of Norfolk county, and on the 21st of June following executed a bond with sureties, with condition
3 for the *faithful performance of the duties of the office: And on the same day appeared in open court of said county, and took the several oaths prescribed by law; and entered upon his duties as sheriff on the 1st of January following.

It appeared further, that there were three commissioners of the revenue in the county of Norfolk, and their books were certified in the usual form to have been delivered to Drewry the sheriff on the 14th of June 1856; and these books were received by the auditor at Richmond, one of them on the 30th of June, one other on the 1st, and the third on the 28th of July. But the defendants proved that though one copy of each of the books had been returned to the clerk's office, and was examined by the clerk before the 15th of June, and so probably were all the copies of the books of one of the commissioners; that as to the books of the other commissioners, all the copies were not examined before that date, and that these last books were not delivered to the sheriff before the 1st of July. The amount appearing to be due on the land and property books of each of the commissioners was stated: And the attorney for the commonwealth withdrew the account against the sheriff for the license tax; and moved for a judgment for the amount appearing to be due for other taxes. And the court having dismissed the motion, the commonwealth applied to this court for a supersedeas to the judgment, which was awarded.

The Attorney General, for the commonwealth.

Hubard and Murdaugh, for the appellees.

SAMUELS, J. By the constitution of Virginia, article 6, § 30, it is ordained, amongst other things, that the voters of each county shall elect a sheriff, who shall hold his office for two years. By § 23
4 of the *same article, it is ordained that judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices after their terms of service have expired, until their successors are qualified. By article 4, § 38, it is ordained that the manner of conducting and making returns of elections, of determining contested elections, and of filling vacancies in office, in cases not specially provided for by the constitution, shall be prescribed by law.

In obedience to the mandates of the constitution, the general assembly enacted the statute of April 22, 1852, ch. 71, p. 64, of Sessions Acts. By the first section of this statute it was enacted, amongst other things, that a sheriff should be elected on the fourth Thursday of May then next, and on the same day in every second year thereafter. By the eighteenth section of the statute, the term of the office of sheriff began on the first day of July next succeeding the election. By the nineteenth section the sheriff, before entering upon the discharge of his duties, was required to take the oaths prescribed by the Code of Virginia, and to give all such official bonds as were then required of him. Under this law John M. Drewry was elected sheriff of Norfolk county on the day named in 1852; and again elected on the same day in the year 1854; and having taken the oaths required by law, and given the bond in which the defendants here are sureties, and which is the subject of controversy in this case, on the first day of July 1854 he was inducted into office as sheriff, and entered upon the discharge of its duties. No successor of Drewry, in his office of sheriff, qualified so as to enter upon the duties of the office on the first day of July 1856, nor at any time before January 1st, 1857. Drewry continued to discharge the duties of his office in so far as

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state incumbents continue to discharge the duties of their offices, after their terms of office have expired, until their successors have qualified, and the court further says in commenting on the principal case: "But it is insisted that the case of the Commonwealth v. Drewry, 15 Gratt. 1, is conclusive authority in this case for the petitioner.

"That case arose under a statute passed by the legislature in 1856, to extend the then current term of sheriffs from the first day of July, when the term would expire, to the first day of January succeeding. That act was passed under the constitution of 1851. This court held that act not in violation of the constitution then in force.

"There is no statute under our present constitution extending the term of any office, and it might well be a matter of grave doubt whether the legislature could, under the present constitution, exercise any such power. This circumstance is sufficient to show that that case can have no influence as authority in the case under consideration."

See also, Lawhorne, *ex parte*, 18 Gratt. 91, and *note*, citing the principal case.

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to collect the commonwealth's revenue in his county for the year 1856, the subject of contest in *this suit. In this state of things (if nothing else existed) it would seem that Drewry's term commencing July 1st, 1854, by its original limitation endured to the last day of June 1856, and thereafter, by the provision of the constitution, until his successor qualified.

It is alleged on behalf of the defendants that the action of the general assembly in enacting the statute of March 15, 1856, Sess. Acts, ch. 8, § 2, p. 8, has in some way changed Drewry's term of office, and of consequence the liability of his sureties, which is co-extensive in point of time with his term. This objection I conceive is not well taken, upon the true construction of the constitution. In the partition of power between the three departments of government, the power of making laws is conferred on the general assembly; some laws they are compelled by mandate to make; other laws they are forbidden to make; these are the only limits to their powers; all subjects of legislation not affected by mandate, nor by prohibition, are within the discretion of the general assembly. It is conceded by all that the act of April 22, 1852, fixing the commencement of the sheriff's term on the first of July next after his election, was a legitimate exercise of power. It is earnestly insisted, however, that the act of March 15th, 1856, is unconstitutional in fixing the first of January next after the election as the beginning of the sheriff's term for Drewry's successor. If we yield to this objection we must hold that the act of April 22, 1852, has in effect become part of the constitution; that it would require the sovereign authority of the people assembled in convention to change this, a mere act of legislation: that a single exercise of legislative power exhausts and destroys the power. Such was not the intention of the framers of the constitution, nor of the people when they adopted it. The power of legislation over this subject, as over many others, was intended to be exercised *from time to time to meet the exigencies of the public service. There is no prohibition to forbid on the 15th March 1856, an exercise of power because at a previous tie, April 22d, 1852, the power had been exercised. If, however, this act of March 15th, 1856, should be held unconstitutional in whole or in part, it is not perceived how the defendants could be relieved by such decision. Drewry was duly elected in May 1854, and duly inducted into office July 1854. Under the constitution and law at that time, there was a possibility that the term of two years might be prolonged until a successor should qualify: and for this whole term, whatever it might be, the sureties were bound.

It was insisted by the defendants, that if the act of March 15th, 1856, was warranted by the constitution, still as Drewry did not give the bond required by that act, the prolongation of the term was without warrant of law. I have already said that the constitution of itself required Drewry to continue in the discharge of his duties until a successor was qualified. It directs such continuance without reference to any particular cause of delay in the successor, but upon the fact that the delay has occurred; it fixes no limit of time beyond which the delay shall not have its effect to prolong the term of the incumbent.

It would be conceded that if a successor, from sickness, casualty, or inability to comply with the requisition to give security, should not qualify, the incumbent would continue in office. If it be admitted that Drewry might have been his own successor for the period between July 1st, 1856, and January 1st, 1857, by giving the bond required by the act of March 1856, yet such bond was not given, and he did not qualify as such successor. I attach no weight to the argument that the general assembly might prolong the office of an incumbent for a long period of time, by postponing the term of his successor. The existence of a power *is not to be questioned only because it may be abused. The most salutary powers, plainly granted, may be perverted; yet it would be unreasonable to hold that therefore these powers do not exist. If in any case the general assembly keeping within the letter of its charter, shall yet enact laws from sinister motives, it might be difficult for the courts to interfere. But any speculation as to what the court could do in such a case, would be disrespectful to the general assembly; as there is nothing to justify any suspicion of improper motive in passing the law of March 1856. On the contrary, the law, as it stood prior to that time, was inconvenient and of doubtful construction. The commissioners of the revenue were required by law to deliver their books on the 15th of June to the sheriff; at the end of every second year the sheriff went out of office on the 30th of June, if a successor qualified; a sheriff had no authority to receive voluntary payment of taxes before the 1st of July; nor authority to distrain for taxes until a later day. If it should be held that the outgoing sheriff was chargeable with the duty of receiving and accounting for taxes, he would be charged with a duty beginning only after he was out of office; if the incoming sheriff might be charged with the duty of receiving the books from commissioners of the revenue on the 15th of June, this would be a duty existing before the term of office commenced. It would be improper to express any opinion whether the outgoing or the incoming sheriff should be chargeable with the duty of collecting the taxes when the office passed from the one to the other on the first of July; the subject is referred to solely for the purpose of showing the propriety of removing all doubt; as is done by the act of March 1856. If the beginning of the term of Butt, the successor of Drewry was lawfully postponed, then the constitution required Drewry the incumbent to continue to discharge its duties. There is nothing *in the

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constitution to make this case an exception from the general terms of that instrument; and we are not justified in interpolating at the end of section 23, article 6, an addition to this effect, "but if the qualification of a successor in the office of sheriff shall be postponed by the action of the general assembly, then the sheriff incumbent shall not continue to discharge the duties of his office beyond his term of two years."

It has been said that the act of March 1856, § 2, is in violation of article 4, section 16 of the constitution, which is in these words: "No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended by reference to its title; but the act revived or amended shall be re-enacted and published at length." It may be difficult to declare the effect of this provision, if at any time hereafter an act of assembly shall be found in conflict therewith; it is enough for the purposes of this case to say that no such conflict exists therein; the act is in reference to a single object, to wit, county organization. The constitution itself, article 6, § 30, treats the organization of counties as one object, under the head of "county officers"; and amongst these are named "a sheriff" and "commissioners of the revenue." A large and important part of the duties of either office is performed in co-operation with the other. If it should be held that the common duties, so far as they are devolved on commissioners, must be prescribed by one series of laws, and so far as devolved on the sheriff, in another series of laws, we should fall upon the inconvenience guarded against by the second clause of article 4, § 16; that is, the inconvenience of referring to different laws for a connected reading of the law on one subject. It is said, moreover, that the law in question is in conflict with the second clause of article 4, § 16, which is in these words: "Nor shall any law be
9 revived or amended by *reference to its title, but the act revived or amended shall be re-enacted and published at length." The act in question does not revive any law whatever; nor does it amend any law: it neither revives nor amends any law by reference to its title, but is complete in itself, and perfectly intelligible, without reference to any thing beyond its own terms. By section 18 of the act of March 1856, all laws in conflict therewith are repealed.

In the events which have happened, touching the succession to the sheriffalty in Norfolk county, it must be said that the act of March 1856 was an ineffectual attempt to fill the office from July 1, 1856 to January 1, 1857; Drewry failed to give the bond required, and no other provision was made, but the subject was left to the operation of a general provision of the constitution.

I have thus, in deference to the learned counsel who argued the case, considered the several objections to the act of March 1856, on the ground of its alleged unconstitutionality; but I have not been able to perceive how their clients could be relieved if the act should be put out of the case; the provision of the law of April 22d, 1852, in force when Drewry was elected and inducted into office, fixed his term of two years from July 1, 1854, to July 1856; the constitution prolonged it until a successor qualified; which in our case was January 1st, 1857. Their bond bound them for Drewry's official acts whilst in office.

The record does not show for what amount the defendants here are liable. As the court below decided that they were not liable at all for Drewry's default, they were not concerned to contest the question as to the amount of that default, nor is its amount shown by the record.

The judgment should be reversed with costs, and the cause remanded for the
10 purpose of having the amount *of Drewry's default ascertained, and of rendering a judgment according to law.

ALLEN, P., and DANIEL and LEE, Js., concurred in the opinion of Samuels, J.

MONCURE, J., dissented.

Judgment reversed.

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11 *Davis v. Christian & als.*

January Term, 1859, Richmond.

1. **Partnerships—Terminated by Death of One Partner—How Continued.**—Though, as a general rule, a partnership, whether for a definite or indefinite period, is terminated by the death of one of the partners: yet it may be continued longer by express agreement between the partners, or under the provisions of the will of the deceased partner, with the consent of the surviving partner. But in the latter case, if the testator merely direct that the partnership be continued after his death, the responsibility of his estate will be limited to the funds already embarked in the trade: Though he may make it cover his whole estate, if he chooses so to direct.

2. **Same—Direction in Will of Deceased Partner to Sell Property to Carry on Business—Effect.**—Testator directs his partnership with C to be continued if C will consent to it, and gives him full power over his interest in the partnership for carrying it on; and also authorizes his executors to sell all his estate to enable C to carry on the business to greater advantage, or to pay the debts which may be due and owing from the partnership at any time during its continuance. The effect of this provision was not to give the executors a mere discretion to sell the real estate or not at their pleasure during the continuance of the partnership, but to create a trust in favor of creditors of the partnership.

3. **Same—Partnership Realty—Nature of.**†—Real estate may, in equity, be converted out and out into personalty by the agreement of the partners, or

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*JUDGE SAMUELS died on the 5th day of January, and the vacancy occasioned by his death, was not filled until near the end of the May term.

†**Partnerships—Partnership Realty—Nature of.**—The principal case lays down the rule, that real estate

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the manner in which it is conveyed to them. So real estate bought with partnership effects for partnership purposes, though conveyed to the individual partners, is thereby converted into personalty, at least to the extent that may be necessary for the purpose of paying the debts of the partnership, and adjusting the accounts between the partners: QUÆRE: If it is converted to any further extent, or out and out.

4. **Same—Conversion of Realty—How Conveyed.**‡—But every such conversion of real estate into personalty, whether express or implied, complete or partial, is equitable only; and the property can only be conveyed as real estate, and by each partner, in order to pass the whole to the grantee.

5. **Executors—Powers of—Right of Survivor to Execute.**—It seems that a power given to executors by name, if the will does not point to a joint exercise of it, may be executed by the survivor.

12 *6. **Same—Discretion in Exercising a Power—Survival of Power.**—A power given to executors will survive, though a discretion is given to them in regard to the exercise of the power.

7. **Same—Discretionary Power to Sell—Purchasers—Application of Purchase Money.**§—Where a discretionary power to sell is given to executors, a purchaser from them, if he acted *bona fide*, will not be affected by the manner in which they exercised their discretion. And if the power is to sell for the payment of debts generally, the purchaser is not bound to see to the application of the purchase money.

8. **Lis Pendens—When Applies.**—The doctrine of *lis pendens* only applies where there is a suit to affect the property purchased, and can have no effect upon it unless a decree may be made in the suit to affect it, nor until such decree is made.

9. **Pendente Lite Purchaser—Facts in Record of Suit at Time of Purchase—Effect.**¶—A purchaser having constructive or actual notice of a pending suit, can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed at the time of his purchase, would have informed him. If these facts inform him that the vendor is committing a fraud in making the sale, he becomes a party to the fraud. But he cannot be charged with the knowledge of facts afterwards brought into the case.

10. **Breach of Trust by Executors—Purchasers for Rights and Liabilities.**—To convict a purchaser of a fraudulent participation in a breach of trust by an executor having authority to sell, the evidence of notice of the fraudulent intent on the part of the executor, ought to be very strong. The purchaser has a right to presume, in the absence of all direct or plain proof to the contrary, that the executor is exercising his power fairly and faithfully, in conformity to his duty.

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may, in equity be converted out and out into personalty by the agreement of the partners, or the manner in which it is conveyed to them. It is also laid down that real estate bought with partnership effects for partnership purposes, though conveyed to the individual partners, is thereby converted into personalty. The principal case is cited and followed for the above proposition, in Cunningham v. Ward, 30 W. Va. 579, 5 S. E. Rep. 650. See discussion in 4 Va. Law Reg. 312, where the principal case is cited. The principal case leaves it as a *quære* whether real estate purchased for partnership purposes with partnership funds is converted into personalty for any other purposes than paying the debts of the partnership and adjusting the accounts between the partners, but in Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325, and Deering v. Kerfoot, 89 Va. 491, 16 S. E. Rep. 671, it is held that the realty is so far considered as personalty that the widow of the deceased partner is not entitled to dower therein, but only to her distributive share. See, further on the subject of Conversion, Diggs v. Brown, 78 Va. 292; Pierce v. Trigg, 10 Leigh 406; Hardy v. Norfolk M'f'g Co., 80 Va. 404; Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654, and *note*; 2 Min. Inst. (4th Ed.) 139; Brooke v. Washington, 8 Gratt. 248, 56 Am. Dec. 142, and *note*; Hancock v. Talley, Va. Law J. 1881, p. 583, vol. 1, Va. Dec. p. —.

‡**Same—Conversion of Realty—How Conveyed.**—In Zane v. Sawtell, 11 W. Va. 50, the court said: "Real estate bought with partnership effects, for partnership purposes, is, though conveyed to the partners individually impressed with the character of personalty; yet such property is effectually conveyed by a deed executed by the partners describing it as real estate. *Davis v. Christian, 15 Gratt. 11.* I cannot see why the grantor might not convey land which he had thus impressed with the character of personalty by a deed describing it still as land. Such a deed ought not to be regarded as ineffectual because in it the grantor failed to recite that the land had been previously impressed with the character of personalty. It was so expressly held in the case of Siter, Price & Co. v. McClanachan, 2 Gratt. 280." See also, Cunningham v. Ward, 30 W. Va. 579, 5 S. E. Rep. 650, citing the principal case.

At the time of the death of Josephus B. Colton, which happened between the 15th day of August 1829, the date of his will, and the 3d day of October 1831, when it was recorded, he and his brother in law Henry Clarke were, and for several years before had been, engaged in mercantile

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§**Executors—Power Given to Sell Property for Payment of Debts Generally—Rights of Purchasers.**—Where the executor has power to sell for the payment of debts generally, the purchaser is not bound to see to the application of the purchase money; he has a right to presume in the absence of all direct or plain proof to the contrary that the executor is exercising his power fairly and faithfully, in conformity to his duty. For the above proposition the principal case is cited with approval in the following cases: Jones v. Clark, 25 Gratt. 642, and *note*; Brockenbrough v. Turner, 78 Va. 449: Woodwine v. Woodrum, 19 W. Va. 73, 77. See generally, monographic *note* on "Executors and Administrators."

¶**Pendente Lite Purchasers—Facts in Record at Time of Purchase—Effect.**—In Stout v. Philippi M'f'g, etc., Co., 41 W. Va. 345, 23 S. E. Rep. 573, it was said: "Next, can fraud be imputed to the Douglasses? Likely not, as an actual, mental fraud in them; but in law they are chargeable with fraud, because, being *pendente lite* purchasers, they are chargeable with everything alleged in the bill. If the facts in the record tell a *pendente lite* purchaser that his vendor committed fraud, he becomes a party to the fraud. *Davis v. Christian, 15 Gratt. 12, point 9.* He has notice of facts disclosed by the record. Benn. Lis Pend. § 92; Arnold v. Casner, 22 W. Va. 444, point 7."

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business in the city of Richmond, carried on in a house on E street, which had been bought with the funds and for the purposes of the partnership, and is the subject of controversy in this case. The firm was chiefly engaged in the dry goods business. But it was also engaged in selling paper on commission, to a large amount, chiefly if not entirely for D. & J. Ames of Springfield, Massachusetts. Josephus B. Colton left a widow, Abby Colton, who was a sister of Henry Clarke, and three children,
13 to *wit: Jane Eliza, Hannah Maria and Sarah Ann, all of which children were infants of tender years. His will, which was dated and recorded as aforesaid, contains, among others, the following clauses:

"1st. It is my will and desire that all my just debts, both individually and as a partner of the firm of Colton & Clarke of the city of Richmond, be paid; and for that purpose I do hereby subject all my property real and personal, and give full authority to my executors herein after named to sell and convey any and all of my estate real and personal, if necessary, for that purpose."

"4th. It is furthermore my will and desire, if the said Henry Clarke will consent thereto, that the business now carried on under the firm of Colton & Clarke shall be continued under the said name by the said Henry Clarke for the joint and equal benefit of himself and my estate so long as he and my wife Abby Colton shall desire and consent thereto—and to that end that all my property vested in the business remain under the control of the said Henry Clarke for that purpose, to be sold and disposed of and new purchases made in like manner as if I were in full life, and the partnership were continued. And should it at any time, in the opinion of my executors herein after named, be deemed necessary by them to sell any or all of the real estate now held jointly by me and the said Henry Clarke, or by me individually, or jointly with any other person, to enable the said Henry Clarke to prosecute to greater advantage the said business, or to pay the debts which may be due and owing from the same at any time during the continuance of the said business, I do hereby desire and fully authorize my said executors herein after named to sell and convey the same in fee simple for that purpose.

"5th. If at any time my wife Abby Colton or said Henry Clarke shall deter-
14 mine to close the said business, *I will and desire that the proceeds of such business and all my estate real and personal, be divided among my said wife and my three daughters Jane Eliza, Hannah Maria and Sarah Ann, as follows, to wit: one-third thereof to my wife, and her heirs and assigns, and the residue to be equally divided between my said daughters and their heirs and assigns.

"6th. If upon the marriage or coming of age of any one or all my said daughters, or at any time after, she or they shall require her or their proportion of my estate to be paid unto her or them, it is my desire that it be done, and the business so far as she or they may be concerned, to cease, but to continue as to those not requiring it, until the marriage or coming of age of all of them, when such an arrangement may be made by all parties as shall suit them.

"7th. I will and desire that so long as my said children or any one of them shall remain unmarried or are under age, that my wife keep them, or such as are unmarried or under age, with her, and that the support of my wife and children, so as aforesaid living together, whether of age or not, be furnished and provided from the business so as aforesaid to be conducted by the said Henry Clarke, so long as the same shall be so conducted, and a joint charge made of the same to my estate, and not to each of them separately."

"10th. I hereby appoint my wife Abby Colton and my brother in law Henry Clarke executors to this my last will and testament; and it is my desire that no security be demanded or required of them or either of them in that capacity."

Abby Colton and Henry Clarke qualified as executrix and executor of the will, giving a joint bond as such without security.

After the death of J. B. Colton, the business which had been carried on under the firm of Colton & Clarke, was continued under the same name by Henry Clarke,
15 *in pursuance of the provisions of the said will. At the close of the year 1834, the stock of dry goods of the firm of Colton & Clarke was sold out by them at auction; and they never did any dry goods business after that time, except that they were in the habit of purchasing and selling a few pieces of broadcloth occasionally. But they continued to sell goods on commission, mostly paper for printing and writing purposes, and especially paper consigned to them by D. & J. Ames aforesaid.

In October 1837 Hannah M., one of the three children of J. B. Colton, intermarried with Patrick H. Fitzhugh. They had issue but one child, which died in July 1839. Shortly thereafter Fitzhugh and wife instituted a suit in chancery in the late Circuit superior court of law and chancery for the county of Henrico and city of Richmond, for the purpose of having their interest in the estate real and personal of the said J. B. Colton, decreed to them. Henry Clarke and Abby Colton, as executor and executrix of J. B. Colton, and in their own right, and Jane Eliza and Sarah Ann Colton were made defendants to the suit. Not long after the institution of the suit, the plaintiff Hannah M. Fitzhugh and the defendants Jane Eliza, Sarah Ann and Abby Colton, all died; to wit: the said Hannah M. in December 1839, aged nineteen years; Jane Eliza in December 1840, aged 22 years and 5 months; Sarah Ann in September 1841, aged 18 years and 1 month; and Abby Colton in May 1843. Before the death of Abby Colton, to wit: in January 1843, she filed her answer to the bill. She

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left a will, which bears date on the 26th day of December 1842, and was recorded on the 13th day of June 1843. It contains, among other clauses, the following:

"Thirdly. It is my will and I do hereby direct that as soon as practicable after my decease, having a just regard to the interests of all concerned, the business
16 *now conducted in the city of Richmond under the firm of Colton & Clarke, be brought to a close. And for that purpose I do hereby authorize, empower and direct my executors hereinafter named to sell, transfer, assign and convey on such terms and in such manner as they may deem most advisable, all my right, title and interest in and to the real and personal property which shall belong to the firm of Colton & Clarke, and shall constitute a portion of the funds of said firm at the time of my said decease; and also to sell or otherwise dispose of all the real and personal property other than the slaves hereinafter named, which I shall stand seized or possessed of at the time of my death, either in my own individual right or conjointly with any other person whomsoever, and to invest the proceeds arising from the sale or disposition of such property real or personal in other productive real estate, or in government stocks of the United States or the state of Virginia, or in both the one and the other."

Henry Clarke and William J. Clarke, executors named in the will, qualified as such, but without giving security; the will directing that none should be required of them.

Henry Clarke also filed an answer to the bill. An order of account seems to have been made in the cause, but the date of it does not appear. After the deaths of the plaintiff Hannah M. Fitzhugh and the defendants Abby, Jane E. and Sarah A. Colton as aforesaid, an amended bill was filed to revive the suit in the name of Patrick H. Fitzhugh, in his own right, and as administrator of his wife Hannah M., as plaintiff, and the following named persons as defendants, viz: Henry Clarke in his own right, and as surviving executor of and trustee under the will of J. B. Colton, Henry and William J. Clarke, as executors of Abby Colton, the personal representatives of Eliza J. and Sarah A. Colton, when any should be appointed. and John J.
17 Shuble *and Elizabeth J. his wife, she being next of kin and heir at law of Sarah A. Colton on the father's side. Henry Clarke also filed an answer to the amended bill.

Commissioner Shore having executed the order of account aforesaid and returned a report thereof, and an exception having been taken thereto by William J. Clarke, executor of Abby Colton, the cause came on to be heard on the 8th day of July 1851, when the court sustained the said exception so far as to withhold for the present any decree against the executor of Abby Colton, confirmed the report as to the defendant Henry Clarke, and decreed that he should pay to Richard A. Christian, assignee of the plaintiff Patrick H. Fitzhugh, administrator of Hannah M. Fitzhugh, eight thousand two hundred and thirty dollars and fifty cents, with interest on seven thousand seven hundred and sixty-seven dollars from the 31st day of December 1849 until paid, reserving liberty to the plaintiff or his said assignee to apply for relief thereafter, as to the executors of Abby Colton, in case the decree against Henry Clarke should prove unavailing.

Before the decree was rendered, to wit, on the 27th day of February 1846, the tenement on E street in the city of Richmond, in which Colton & Clarke had carried on their business, and which had been bought with the funds, and for the purposes of the partnership as aforesaid, was sold and conveyed to Benjamin Davis for nine thousand dollars, by deed of that date executed by Henry Clarke and Mary M. his wife, in their own right, the same Henry Clarke as surviving executor of Josephus B. Colton, the same Henry Clarke and William J. Clarke as executor of Abby Colton, and the same Henry Clarke as surviving partner of the said firm of Colton & Clarke. The receipt of the purchase money was acknowledged in the deed. The deed contained a covenant of general warranty. And as an additional security a bond of indem-
18 nity *bearing the same date with the deed, was executed by Henry and William J. Clarke and Nathaniel C. Crenshaw, to secure Davis, and especially to indemnify him against any claim or demand of Patrick H. Fitzhugh or Shuble and wife, or any person claiming under them, or either of them.

In August 1851 the suit, in which was rendered the decree appealed from in this case, was instituted by Richard A. Christian, assignee of P. H. Fitzhugh, &c., to impeach and set aside, as fraudulent and void, the deed which had been executed to Davis as aforesaid. Davis, the two Clarkes and other proper parties were made defendants to the suit. The plaintiff in his bill, among other things, avers that Colton & Clarke, in the lifetime of Colton, carried on a dry goods business in a tenement on E street in the city of Richmond, purchased by them with the profits of the partnership, for partnership purposes; that Clarke continued after Colton's death to carry on the business in the same tenement, with Abby Colton's consent, until the close of the year 1834, during which time the business was prosperously conducted; that it not having been necessary to pay any debts of the concern of Colton & Clarke or of Colton, or to prosecute the business to greater advantage, to make sale of any of the real estate of the testator, none of it was sold during all the period aforesaid for which it continued. That at the close of 1834, with the common consent of Henry Clarke and Abby Colton, the business was discontinued, and Clarke sold off at public auction the whole stock of goods of the concern, and never after that purchased any more; that this

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cessation of the business was open and notorious, and well known in the city of Richmond and to the public generally; for Clarke thereafter embarked in other totally different business, and among other things, in coal mining and shipping coal in the county of Chesterfield, which
19 *turned out disastrously. But that he was still allowed by Abby Colton his coexecutor (her daughters being infants living under the protection of their mother, and thus having no voice or control in the matter), to retain the control and management of the whole estate of Colton, and in flagrant violation of the duties and obligation of both, to pervert the funds of the estate of Colton and of the concern into these new and unauthorized channels of employment and speculation until, before the death of Abby Colton, much of the estate and of the partnership funds had been by Clarke squandered and misspent; and he himself had become insolvent, as was then well and publicly known; nor had Abby Colton, at her death, wherewithal to make good the default of Clarke, she having no estate other than what she was entitled to under the will of her husband. The plaintiff then (after referring to the marriage of Fitzhugh and wife, the birth and death of the only child of the marriage, the suit instituted by Fitzhugh and wife as aforesaid, and till pending, the assignment by Fitzhugh of all his interest in the estate of Colton to the said Richard A. Christian, the successive deaths of Hannah M. Fitzhugh and Jane Eliza, Sarah Ann and Abby Colton, the revival of the said suit in the names of the personal representatives of the said decedents respectively and of Shuble and wife, in her right as next of kin and heir at law ex parte paterna of the said Sarah Ann, the decree recently rendered therein as aforesaid, and the fact that no decree had been made therein, in regard to the real estate of Colton, although Shuble and wife and Christian as assignee aforesaid, had been and still were pressing for a decree which should adjudge and assign them their rights respectively in the premises), charges that after the death of Abby Colton, and after the institution of the suit of Fitzhugh v. Clarke, and while the same was in the full course of prose-
20 cution, *and after the deaths of said Ann Eliza and Sarah Jane, and many years after the concern of Colton & Clarke had closed, Henry Clarke, without the slightest pretence that any debt existed, due either from the estate of Colton or from said concern, to pay which his real estate should be sold, but with a design to pay a private personal debt contracted by him long after the business of Colton & Clarke had been closed, and to place the proceeds of sale under the control and to the personal use of the said Henry Clarke, fraudulently combined and confederated with Benjamin Davis and William J. Clarke joint executor with Henry Clarke of Abby Colton, to sell, and did sell the tenement on E street to Davis, who paid the purchase money to or for the use of Henry Clarke, he the said Davis and said Henry and William J. Clarke then and there well knowing all the facts stated in the bill, which rendered the sale of the testator's interest in the tenement unnecessary, improper and illegal, and that the money was to be paid to or for the personal use of Henry Clarke, well knowing the large indebtedness of Henry Clarke to the estate of Colton, and well knowing the pendency and object of the suit of Fitzhugh v. Clarke, the Clarkes being actually parties to it, and Davis having preparatory to the purchase aforesaid, employed counsel to investigate the state of the title to said tenement, who became fully acquainted with the terms of Colton's will, and the pendency and objects of said suit, and advised him thereof; in consequence of which, Davis obtained from Henry Clarke a bond of indemnity as aforesaid: And then, to consummate their joint fraud, Henry Clarke professing to act in his own right and as surviving partner and executor of Colton, and he and William J. Clarke, as executors of Abby Colton, united in conveying the said tenement to Davis. The plaintiff then prays that the sale may be declared fraudulent and void and the deed set aside,
21 *that an account of rents and profits and all other proper accounts may be taken, and for a discovery and general relief.

The defendant Davis filed his answer; in which he admits that he did purchase the said tenement and paid therefor the sum of nine thousand dollars in cash, and receive a conveyance, of which he exhibits a copy. He also admits that he had heard there was some cloud over the title of a portion of the property, by reason of some claim to it by P. H. Fitzhugh and Shuble and wife; against which claims he required and obtained a bond of indemnity, of which also he exhibits a copy. He says he may have heard before his purchase of the pendency of the said suit, upon the original bill, but he cannot affirm distinctly that he had or had not. He does not admit that any fraud was practiced by the surviving partner, Henry Clarke; but protests that if any such fraud was practiced, the respondent had no participation in it; knew nothing of it, and is in no manner responsible for it. He insists, that whether the said tenement be regarded as real or personal estate, as individual or partnership property, or whether it was sold for the payment of a debt of the partnerhip or not, the deed under which he claims conferred upon him a perfect title, and that he was not bound to see to the application of the purchase money. But in fact, he says the property was sold for and the purchase money applied to the payment of a debt of the partnership. He says that Colton & Clarke, at the time of Colton's death, was engaged, among other things, in a commission business with D. & J. Ames, and were largely indebted on account thereof: that after his death the business was continued under the

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authority of his will; and in the course of the said dealing, and for the purpose of discharging the debt due to D. & J. Ames, it was necessary that Colton & Clarke should procure large discounts, which
22 *they did by the aid of Davenport & Allen, who became their endorsers; and to secure them against loss by their endorsements, Henry Clarke and Abby Colton, in their own right and as executor and executrix of J. B. Colton, executed a deed of trust on the said tenement. That at the date of the sale to the respondent the debt to D. & J. Ames amounted to at least nine thousand dollars; and that on the 17th of March 1846 the respondent's check for nine thousand dollars, the price of said property, was passed by Henry Clarke to Davenport & Allen, and the amount received by them at the bank. The answer contains other statements, which, however, it is unnecessary to notice.

Besides the deeds before mentioned, the defendant Davis also exhibited a copy of the deed from Tate and wife to Colton & Clarke for the tenement in question, a copy of J. B. Colton's will, a copy of Abby Colton's will, and a copy from the books of Colton & Clarke, showing the state at different times of the account of D. & J. Ames for sales of paper made on their account by Colton & Clarke; from which it appears that the account was rendered eighteen times between July 10, 1829, and May 1, 1844, inclusive; that the amount varied in that period between seven thousand three hundred and twenty-six dollars and eighteen cents, the minimum, and seventeen thousand seven hundred and forty-two dollars and seventy-eight cents, the maximum; the amount due on the former day being the minimum, on the latter eight thousand three hundred and twenty-eight dollars and ninety-four cents, and on the 14th of April 1843, which was about the period of Abby Colton's death, eleven thousand eight hundred and fifty-seven dollars and sixty-five cents.

The plaintiff filed as exhibit copies of portions of the record of the suit of Fitzhugh v. Clarke, which have been before referred to.

No other answer was filed than that
23 of Davis, and *one for the infant defendants, to which answers the plaintiff replied generally. As to all the other defendants, the bill was taken for confessed.

Four depositions were taken in the case; two on behalf of the plaintiff, and two on behalf of the defendant Davis.

D. H. Reed, examined on behalf of the defendant, proved, among other things, that he lived with Colton & Clarke as bookkeeper from the 18th of October 1836 to the 1st of May 1848. Their business was selling goods on commission, mostly paper for printing and writing purposes; which was consigned to them almost entirely by D. & J. Ames. Witness kept the books of Colton & Clarke, and did most of the writing in them while he was in their employment. He made the statement from the books, which is filed as an exhibit by the defendant Davis as aforesaid. The purchase money for the tenement sold to Davis was received by Davenport, Allen & Co., through some private agreement, in consequence of a deed of trust having been made upon the property for their benefit, which had not been recorded. The debt to Davenport, Allen & Co. was created in this way: Colton & Clarke were in the habit of giving to D. & J. Ames, on account of balances due them for sales of paper, notes or acceptances, payable in New York. To meet the payment of such notes and acceptances, they were in the habit of obtaining from Davenport, Allen & Co. their drafts on the house of I. Davenport & Co. of New York, for which drafts Colton & Clarke gave in exchange their negotiable notes, payable in Richmond. At the time of the sale of the house, the amount of such notes held by Davenport, Allen & Co. constituted the debt referred to above. This course was pursued, because the drafts spoken of could be readily discounted. When witness left the employment of Colton & Clarke there
24 was a balance still standing on *their books to the credit of D. & J. Ames, of about four thousand dollars.

On cross examination, the witness proved that no dry goods business was done by Colton & Clarke after he went into their employment, except that they were in the habit of purchasing and selling a few pieces of broadcloth occasionally. There were debts and credits on the books to the firm of Pleasants & Clarke, of which Henry Clarke was a member, and which was engaged in the business of buying, growing and selling mulberry trees (principally morus multicaulis), and raising silk worms. There were similar entries on said books to the firm of A. & A. Wooldridge & Co., of which Henry Clarke was also a member, and which was engaged in the mining and selling of pit coal. The estate and effects of that concern were sold out by trustees. Certain lots opposite Rocketts, called the Coalyard island, were purchased at said sale by and in the name of Henry Clarke, for between nine and ten thousand dollars. They were sold by witness as trustee, in 1848, for between twenty-three and twenty-four hundred dollars. When witness lived with Colton & Clarke, they were part owners of two schooners.

William Sinton, examined on behalf of the plaintiff, proved, that he kept the books of Colton & Clarke in 1826, 1827 and 1828. No change took place in their business prior to Colton's death in September 1829. They engaged in no speculations, and were doing a safe and profitable business, having frequently purchased real estate out of the profits of the concern. Witness struck a balance sheet of the books in 1828, and thought each of the partners then worth from twenty to twenty-five thousand dollars, exclusive of bad and doubtful debts. They were in the habit of doing business very cautiously, and not of contracting

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debts and leaving them long unpaid.
25 The tenement *in controversy was purchased by Colton & Clarke out of the profits of their business. Henry Clarke sold out the dry goods of Colton & Clarke at auction at the close of 1834, which was considered by every body as a final close of the dry goods business of that concern: and they never did any dry goods business after that time. Henry Clarke and William J. Clarke have both taken the insolvent oath. Henry Clarke, after Colton's death, engaged in coal mining in Chesterfield, and in speculating in morus multicaulis trees and in vessels, and in 1842 or 1843 became so much embarrassed, that it was pretty generally known about Richmond.

D. H. Reed, re-examined on behalf of the plaintiff, proved, that counsel employed by defendant Davis investigated the title to the property before the conclusion of the purchase; and in consequence of this investigation, the bond of indemnity aforesaid was required and given.

The deed of trust for the benefit of Davenport, Allen & Co., before referred to, was executed in 1845. It was not recorded by agreement between them and Henry Clarke, because he thought it would injure the credit of Colton & Clarke to have it recorded. It was in consequence of this deed that Davenport, Allen & Co. received the purchase money of the property. The debt to Davenport, Allen & Co. commenced after 1840.

Isaac Davenport, examined in behalf of the defendant Davis, proved, that on the 16th of March 1846 Henry Clarke paid Davenport, Allen & Co., Davis' check for nine thousand dollars. They had a deed of trust on the tenement in controversy to secure a debt due to them by Colton & Clarke. It was executed by Henry Clarke, and witness thinks, but is not certain, by Abby Colton also. Thinks it was given a year or more before the payment of the nine thou-
26 sand dollars. *When given, Henry Clarke requested that it should not be put upon record, unless something should occur to render it necessary; and therefore it was not put upon record, but retained by Davenport, Allen & Co. until the payment of the nine thousand dollars, and then delivered to Henry Clarke. A portion of the debt to Davenport, Allen & Co. was created three or four years before the payment of the nine thousand dollars: at one time it amounted to ten thousand dollars. It amounted to between seven thousand six hundred dollars and seven thousand seven hundred dollars when the nine thousand dollars were paid. It was for notes issued at various times and for different sums, by Davenport, Allen & Co. to Colton & Clarke for the accommodation of the latter, and discounted at bank. When they were given, witness had seen no notice of dissolution of the firm of Colton & Clarke, and believes it was understood by the mercantile community and the banks that the firm was still in existence. They kept a store on Main street in Richmond, and dealt in paper and some other goods. Henry Clarke used the name of Colton & Clarke in all business transactions with Davenport, Allen & Co., during the period aforesaid.

On the 25th of January 1855 the cause came on to be heard, and the court, being of opinion that the tenement in controversy was partnership assets of Colton & Clarke, and that at the time of the sale the partnership was dissolved, and Henry Clarke was a large debtor to the firm, and made the sale in fraudulent violation of his duty as surviving partner, of which Davis, when he purchased the tenement, had notice, and that the deed to him therefor is, as to the plaintiff and the legatees of the will of J. B. Colton, fraudulent and void, decreed that the said deed be set aside and annulled. And the plaintiff and the other legatees of J. B. Colton being willing and con-
27 senting *to receive of the said Davis, if he shall so elect, in full discharge of their claims against him for the property and its profits, the value of the property at the time he acquired it, with interest thereon from that time, and to take as such value the said sum of nine thousand dollars, and to dispense with any account of its value and the profits thereof, the court further decreed that upon the payment by the said Davis of the said sum of money and interest into bank to the credit of the cause, and filing a proper certificate of such payment, he should be forever acquitted, as against the plaintiff and the said legatees, in his title and possession of said property, and as to them discharged of all claim for the same and its profits. But unless the said Davis should fully comply with the terms aforesaid within sixty days after being served with a copy of the order, the court further decreed that the property should be sold at public auction, by a commissioner appointed for the purpose.

From this decree the defendant Davis applied for and obtained an appeal.

William Green and Lyons, for the appellant, insisted:

1st. That the doctrine of lis pendens did not apply to the purchaser in this case. That it only applied where the pending suit was a suit to subject the property, and there was a decree in favor of the claimant; and the only effect of the lis pendens was to make the purchaser take the property subject to the decree. They referred to Newman v. Chapman, 2 Rand. 93; French v. Loyal Company, 5 Leigh 627; Beame's Orders in Chancery 7; Brightman v. Brightman, 1 Rhode Isl. R. 112. And they referred to the record in the first case to show that the bill did not claim to subject the property; and that the only decree was a personal decree against Clarke.

2d. That though the house and lot
28 purchased by *Davis was paid for out of the partnership funds, and was used for partnership purposes, it having been conveyed to Josephus Colton and Henry Clarke individually, it was not partnership property as to third persons dealing

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with one of the partners. Ridgway, Budd & Co.'s Appeal, 15 Penn. R. 177; Deloney v. Hutcheson, 2 Rand. 183. That as to partners real estate is held to be personal only so far as is necessary to give each partner an equality in the partnership; but as to a deceased partner, it descends to his heirs and not to his administrator. That Judge Tucker is not sustained by the authorities he cites, in saying in Wheatley's heirs v. Calhoun, 12 Leigh 264, that the realty is converted for all purposes into personal estate. They referred to Story Part. § 92, 93; Stuart v. Bute, 11 Ves. R. 665; Hart's devisees v. Hawkins' heirs, 3 Bibb's R. 502; Yeatman v. Woods, 6 Yerg. R. 20; Black v. Black, 15 Georgia R. 445; Buchan v. Sumner, 2 Barb. Ch. R. 165; Buckley v. Buckley, 11 Barb. S. C. R. 43; Anderson & Wilkins v. Tomkins & al., 1 Brock. R. 456, 463; Piott v. Oliver, 3 McLean's R. 28; Carrington's heirs v. Brent, 1 Id. 175; Preston v. Tublin, 1 Vern. 286. And they insisted that this being so, Davis was at least entitled under the deeds from Henry Clarke, the executor of Josephus B. Colton and the executors of Abby Colton, to the one moiety belonging to Clarke and to seven-ninths of the other moiety, of the house and lot; and therefore it was error to make the sale dependent on the payment of nine thousand dollars, which the plaintiff admitted was the full value of the property.

3d. That the partnership of Colton & Clarke terminated with the death of Colton, and the rights of the parties in the property were then fixed. That a new partnership was not then formed, but Clarke carried on the business, and he incurred the risk, vested with a trust by Colton, by which Colton's estate was to
29 *share the profits and losses as far as his property would go; but that Clarke's liabilities might extend much further. That partners are joint tenants with the jus accressendi at law and equity, subject to account to the representatives of the deceased partner; but until he is called to account, the deceased partner's representative is not entitled to any particular interest in any particular chose. Clarke, therefore, had in him, until called to account, the whole interest in the property, and could sell to a purchaser without notice, who might hold it as such purchaser. That Davis was a bona fide purchaser for value without notice of any violation of his trust by Henry Clarke, or of his insolvency, the account not having been taken when the purchase was made; that Davis was not bound to see to the application of the purchase money; and that in fact it was applied to the payment of a debt of Colton & Clarke.

R. T. Daniel, for the appellees. Whether the house and lot in controversy is to be considered real estate, or a part of the social effects of Colton & Clarke, is an important question in this case. If social effects, Fitzhugh has the absolute interest in his wife's share, and is entitled to come upon this property to have his debt paid; and if that debt covers the whole value, Clarke had nothing in the property, and could convey nothing to Davis. If it was real estate, Fitzhugh would have but a tenancy by the curtesy in two-ninths of it.

It is not material whether the old partnership continued after Colton's death, or a new one was formed, or there was no partnership existing. The will of Colton gave power to Clarke to carry on the business as if there was a partnership and Colton was alive; and directs all the property therein to remain there. It is this power under which he is to manage and dispose of the partnership property, and not the
30 power *under the will to sell property not then a part of the social effects. This house and lot was bought with partnership effects, and used for partnership purposes at the time of Colton's death, and therefore it was to be kept in the business. For authority for such a business the court is referred to Burwell v. Mandeville's ex'or, 2 How. U. S. R. 560, 576; Pitkin v. Pitkin, 7 Conn. R. 307.

Whatever may be the conflict of opinion elsewhere upon the question whether property such as this is real or personal estate, in Virginia, it is settled by the decisions of this court that it is personal estate to all purposes. Brooke v. Washington, 8 Gratt. 248. And this seems now to be the opinion in England. Bissett Part. ch. 2, p. 26–33. At the date of the decree in Fitzhugh v. Clarke, this was the only partnership property that remained. If we suppose every thing else connected with that partnership closed up, Clarke would be entitled to one moiety, Mrs. Colton to three-ninths of the other moiety, Fitzhugh to two-ninths, and each of the other two children to the same; and Fitzhugh would be a creditor of the firm to the amount of his decree. For this sum Clarke was liable, and Mr. Colton as his coexecutrix and surety, and indeed as his partner and assistant in all his acts, would be liable with and for him. Story Part. ch. 1, § 1 to 6; Collyer Part. ch. 1, § 16 to 19, 44 to 50. The will directed that on the marriage of a daughter she was to have her share of both principal and profits; and in 1837 Fitzhugh married one of them and demanded his wife's interest, which was refused.

Then how does Davis stand? He is a purchaser with actual notice of the matters of the suit, the breach of his trust by Clarke, his waste of Colton's estate, and his insolvency; and the will of Colton gave him notice of the trust. Burwell v. Mandeville's ex'or, 2 How. U. S. R. 560; Dowman v. Rust, 6 Rand. 557;
31 *Frost v. Beekman, 1 John. Ch. R. 288, 302; Murray v. Ballou, Id. 566. On the part of Davis there was an actual participation in the misapplication of the fund. The debt due to Ames at the dissolution of the partnership had been paid off, and yet he sets up another debt to the same parties subsequently contracted.

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It is admitted that in order to affect a pendente lite purchaser there must be a decree; not a decree for the thing itself, but a decree which affects the title. In this case, however, it is not a question of implied notice, but of actual full information. Before he purchased he had the title examined, and knew how the property was held by Davis; the suit and its objects were all known to him; and he was obliged to know the mala fides of Clarke and his utter insolvency.

MONCURE, J. Let us first enquire, what interest the appellant Davis has in the tenement in controversy, regarding it as real estate, unaffected by any partnership, or by the power of sale contained in Josephus B. Colton's will.

He is certainly entitled to the undivided moiety of Henry Clarke. He is also entitled to the interest of Abby Colton in the other moiety. By her will she empowered her executors to sell all her real estate and invest the proceeds of sale in other productive real estate, or in government stocks. The execution of this power devolved on Henry Clarke and William J. Clarke, her only qualified and acting executors. They duly executed the power by joining in the sale and conveyance to Davis. He was not bound to see to the application of the purchase money. If it was misapplied with his participation or knowledge, he might be liable, as for a fraud, to persons claiming under her will, but to no other person. So far as this case is concerned, Davis must be considered as entitled to her interest in the property. What was that
32 *interest? She was entitled under the will of J. B. Colton her husband to one-third or three-ninths of his moiety. And she became entitled, by the deaths of their three children in her lifetime, to four of the remaining six-ninths, as one of the heirs at law of said children, subject only to any interest of P. H. Fitzhugh as tenant by the curtesy of his wife Hannah Maria's two-ninths. Whether he had such a seizin of the said two-ninths during the coverture as to give him any such interest, it is needless to enquire. Abby Colton's interest in the property, then, was seven-ninths of a moiety, subject only as aforesaid. And, in the view we are now taking of the case, Davis acquired by the sale and conveyance to him an absolute estate in the entire property, except two-ninths of a moiety, to which John J. Shuble and Elizabeth J. his wife were entitled in her right as collateral heir at law, ex parte paterna of Sarah Ann, the survivor of the said three children, who died under age; and except any interest of P. H. Fitzhugh as tenant by the curtesy of two other ninths as aforesaid. In that view of the case, the decree is certainly erroneous in directing a sale of the property, unless the appellant should pay the whole amount of the purchase money and interest into bank.

But let us now consider the case in connection with the partnership of Colton & Clarke, and the power of sale created by J. B. Colton's will.

It is a general rule, that a partnership, whether of definite or indefinite continuance by the terms of its creation, is dissolved by the death of one of the partners. It may be continued longer by express agreement between the partners, or under the provisions of the will of the deceased partner, and with the consent of the surviving partner. In the latter case, however, the testator's assets are not generally liable under all circumstances for the debts of the continued partnership.
33 *The case of Hankey v. Hammock, before Lord Kenyon, when master of the rolls, reported in a note to 3 Madd. R. 148, so far as it may be thought a decision to that effect, has been overruled by subsequent cases, and especially by Lord Eldon in Ex parte Garland, 10 Ves. R. 110. See also Ex parte Richardson, 3 Madd. R. 138, 157; Thompson v. Andrews, 1 Myl. & Keene 116, 6 Cond. Eng. Ch. R. 525; Pitkin v. Pitkin, 7 Conn. R. 307, and Burwell v. Mandeville's ex'or, 2 How. U. S. R. 560. If the testator merely direct that the partnership be continued after his death, his responsibility will be limited to the funds already embarked in the trade. But he may extend his responsibility further, and make it cover his whole estate if he chooses to do so. It has been said, however, "that nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion, from the mainfest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will, or distributing the residue of his estate, without in effect saying, at the same time, that the payments may all be recalled, if the trade should become unsuccessful or ruinous." 2 How. U. S. R. 577.

In this case, the testator plainly manifested his intention, not only that the partnership should be continued after his death, and his property already vested in the business remain so invested, but that all his real estate should be liable for all debts contracted in the business, and his executors should be fully authorized to sell and convey the said estate, to enable the surviving partner to prosecute the said business to greater advantage, or to pay the said debts. The clauses of the
34 *will which relate to the partnership, are the 1st, 4th, 5th, 6th and 7th, which are in these words: [the judge here read them].

By the 10th clause, he appointed his wife Abby Colton, and his brother in law and surviving partner Henry Clarke, his executors, and desired that no security should be required of them as such.

It will be observed that the reason ab inconvenienti, so forcibly assigned by Lord

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Eldon in Ex parte Garland, and by Judge Story in Burwell v. Mandeville's executor, for not holding the general assets of a deceased partner liable for the debts of a partnership, continued under the provisions of his will, does not apply to this case; inasmuch as the estate was directed, to be kept together during the continuance of the partnership and no legatee could receive her portion of the estate without at the same time dissolving the partnership as to such portion, and exempting it from future liability.

The effect of the will was not to give to the executors a mere discretion to sell the real estate or not, at their pleasure, during the continuance of the partnership, but to create a trust; to subject the real estate to the risks of the business, and to give to creditors a right to look to it, if necessary, for the payment of their claims, whether during the continuance of the partnership or afterwards. The testator seems to have owned little or no personal estate which was not already embarked in the business, and intended that his whole real estate should be kept together to meet its wants and liabilities during its continuance; except that he gave to each child, on her marriage or coming of age, or at any time afterwards, a right to withdraw her portion of the estate from the business, which was then to cease as to her, but continue as to the rest. He relied exclusively on the profits of the business during its continuance for the support of his
35 *family, and directed that at its close the proceeds thereof and all his estate real and personal should be divided in certain proportions between his wife and children. The first clause of the will creates a charge for payment of debts due by the concern at the death of the testator: The fourth, for payment of debts which might arise in continuing the business after his death. The same reason exists for the charge in the one case as in the other.

In pursuance of the provisions of J. B. Colton's will, the business of the firm of Colton & Clarke was continued after his death, under the same name, by the surviving partner Clarke, with the consent of Abby Colton. According to those provisions, it was to be continued so long as he and she should desire and consent thereto. The parties differ as to the actual period of its continuance. It must have been determined at the death of Abby Colton in May 1843, if not before. The appellant contends that it was not determined before, and it appears from Abby Colton's will that she also was of that opinion. It is contended, on the other hand, that the partnership was determined at the end of 1834, when the dry goods of the concern were sold out at auction. But the firm was engaged at Colton's death, not only in the dry goods business, but also in an extensive agency for the sale of paper for D. & J. Ames of Massachusetts. That agency was part of the business which was authorized by Colton's will to be continued after his death; and it was accordingly so continued until the death of Abby Colton. Until that event, therefore, the partnership was not determined.

There has been much contrariety and fluctuation of opinion upon the question, whether and to what extent real estate bought with partnership funds for partnership purposes, is thereby converted into personalty. It may now be considered as
36 well settled *that real estate may, in equity, be converted out and out into personalty by the agreement of the partners or the manner in which it is conveyed to them. It may also be considered as well settled that real estate bought with partnership funds for partnership purposes is thereby, at least partially, converted into personalty, though it be conveyed to the partners in their individual names as joint tenants, and though there be no express agreement between them in regard to its conversion. It is converted into personalty to the extent that may be necessary for the purpose of paying the debts of the partnership and adjusting the accounts of the partners inter se. But whether converted to any further extent, or out and out, is a question which seems to be still unsettled and upon which there is much conflict of decision. It is well settled, however, that every such conversion, whether express or implied, complete or partial, is equitable only, and the property can only be conveyed as real estate. "Each partner (as has been said) is required, both at law and in equity, to join in every conveyance of real estate, in order to pass the entirety thereof to the grantee; and if one partner only execute it, whether it be in his own name or in that of the firm, the deed will not, ordinarily, convey any more than his own share or interest therein." This rule is "founded upon the nature of the property and the provisions of the common law applicable thereto." Story on Part. § 94.

The tenement in controversy was bought by Colton & Clarke with partnership funds for partnership purposes, and was used for such purposes always after its purchase, until the termination of the business; though it was conveyed to them in their individual names. It was therefore in equity, at least partially, converted into personalty. But it could only be conveyed to a purchaser by a deed executed by
37 them, or by those *authorized by them to sell and convey the same as real estate. Whatever may have been the interest of Colton in the subject, by his will he authorized his executors to sell and convey that interest. He directed that all his property vested in the business of Colton & Clarke should remain under the control of Clarke for the purpose of continuing the business, and to be sold, disposed of and new purchases made in like manner as if he were in full life and the partnership were continued. And should it at any time, in the opinion of his executors, be deemed necessary by them to sell any or all of the real estate held jointly by him and Clarke, or by him individually, or jointly with any

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other person, to enable Clarke to prosecute to greater advantage the said business, or to pay the debts which might be due and owing from the same at any time during its continuance; he desired and fully authorized his executors to sell and convey the same in fee simple for that purpose. This power of sale and conveyance is certainly broad enough to cover his interest in the tenement in controversy. The testator, certainly, could not have intended to withhold from his executors the power to sell and convey his interest in the real estate of the partnership, while he conferred upon them full authority to sell his individual estate, for the purpose of paying the debts of the partnership. The power of sale and disposition conferred on the surviving partner, is referable to the goods embarked in the business. The power of sale and conveyance conferred on the executors, is referable to the real estate, as well of the partnership as of the testator individually; both of which are embraced by the literal terms of the will, and the former is at least as much within the true intent and meaning thereof as the latter.

The executors of J. B. Colton, then, were fully empowered by his will to sell and
38 convey his real estate, *including his interest in the tenement in controversy, for the purpose of paying the debts incurred in continuing the business of Colton & Clarke. This power did not cease at the death of Abby Colton, but then devolved on the surviving executor, Henry Clarke. It is laid down in Sug. on Pow. 144, as a principle of the common law, that where a power is given to "executors," and the will does not point to a joint exercise of it, even a single surviving executor may execute it. The power being given to the executors ratione officii, as the office survives, so may the power. He says that where the power is given to them nominatim, although in the character of executors, it is at least doubtful whether it will survive. Hargrave has maintained that in that case also, as the office survives, by parity of reason, so should the power. And Sugden says, that the liberality of modern times will probably induce the courts to hold that the power survives in every case where it is given to executors. Id. 2 Wms. on Ex. 626. This view is confirmed by the act of assembly, 1 Rev. Code, ch. 104, § 52, which seems to regard a surviving executor as being invested with the power in every such case. 3 Lom. Dig. 275 and '6, marg. In this case the power is given to the executors, not nominatim, but by their official designation only, and clearly survived. That a discretion is given to the executors in regard to the exercise of the power, did not prevent it from surviving. See Brown v. Armistead, 6 Rand. 594.

At the time, therefore, of the sale and conveyance to the appellant of the tenement in controversy, Henry Clarke, as surviving executor of J. B. Colton, had authority to sell his testator's interest therein for the purpose of paying the debts of the continued firm of Colton & Clarke. And the appellant maintains, that in fact the sale was made for that purpose, and the purchase money was applied accord-
39 ingly. The evidence *seems to sustain this position, to the extent at least of the greater part of the purchase money.

The facts on this subject appear briefly to be these: Colton & Clarke owed a large debt to D. & J. Ames, the balance of which, on the 14th of April 1843, about the period of Abby Colton's death, was eleven thousand eight hundred and fifty-seven dollars and sixty-five cents. It does not appear that there were any new dealings after her death between Henry Clarke and D. & J. Ames. Payments were made on account of this debt by Henry Clarke, from time to time, both before and after the death of Abby Colton. To obtain the means for making such payments, Henry Clarke exchanged the notes of Colton & Clarke with Davenport, Allen & Co. for their notes or drafts, which were discounted at bank. In this way Colton & Clarke became indebted to Davenport, Allen & Co. to the extent of ten thousand dollars; and to secure the debt a deed of trust was executed on the tenement in controversy; which, however, was not recorded, but was retained by Davenport, Allen & Co. until payment of the debt, and then returned to Henry Clarke. The balance due on account of that debt at the time of the sale of the tenement to the appellant, was seven thousand six or seven hundred dollars, and was discharged out of the purchase money; the appellant's check therefor (to wit, nine thousand dollars) having been paid by Henry Clarke on account of Colton & Clarke to Davenport, Allen & Co. It thus appears that, to the extent of that balance at least, the sale was made for the payment of a debt for which the property was liable, and the purchase money was duly applied. And though it does not appear that the residue of the purchase money was required for the payment of debts of the concern, yet the purchaser was not bound to see that only so much of the estate was sold as was necessary for the purposes of the trust. Sug. Vend. 835-6.

40 *But for whatever purpose the sale may have been made, or however the money may have been applied, the purchaser cannot be affected, if he acted bona fide. He was not to judge, at his peril, as to the necessity for a sale. He had no means of ascertaining such necessity. That question was properly referred by the testator to the opinion of his executors, who had the means of deciding it. For the correctness of that opinion, strangers who might become purchasers were not held by him responsible. To have so held them, would have defeated his purpose of having his real estate sold to advantage, if a sale of it should become necessary. Where a trust is for payment of debts generally, as in this case, a purchaser is not bound to see to the application of the purchase money; for he cannot be expected to see to the due

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observance of a trust so unlimited and undefined. Sug. Vend. 835, 838; Elliot v. Merryman, and the notes thereto, 1 Leading Ca. in Eq. 40, 65 Law Lib. 58.

The only ground, then, upon which, if any, the title of the purchaser can be affected in this case is, that he did not act bona fide; but participated in a fraudulent breach of trust committed by Henry Clarke, either in the sale of the property or the application of the purchase money. The appellant in his answer does not admit that any such breach of trust was committed; but if so, denies that he had any participation therein, or knowledge thereof. If the sale was made to pay a debt of Colton & Clarke, and the purchase money was so applied, then there was no such breach of trust. But let it be conceded, for the purposes of this case, that a breach of trust existed; that the sale was improper, and the purchase money misapplied. And then the question is, Did the purchaser Davis participate in the breach of trust? If he did, it is only because he had notice of it at the time he made the purchase or paid the purchase money. Had he such notice?

41 *It is contended that he had; first, because the pendency of the suit of Fitzhugh v. Clarke was equivalent to notice, according to the doctrine of lis pendens; secondly, because he or his counsel actually read the record in that case, and was thus informed of the alleged breach of trust; and thirdly, because the other circumstances of the case, which were or ought to have been known to Davis when he made the purchase, were sufficient to show that Clarke was committing a breach of trust.

As to the doctrine of lis pendens, I do not think it can have any application to the case. If the suit of Fitzhugh v. Clarke be such a suit for specific property as the doctrine requires, there has yet been no decree in it for such property. A purchaser pending a suit for specific property from a defendant to the suit, takes the property subject to any decree which may be rendered for or against it in the suit. And there is generally no necessity for making him a defendant; but the plaintiff, after obtaining his decree, may enforce it against the property in the hands of the purchaser or his assigns. Unless and until such decree be rendered in the suit, the purchaser is unaffected by the doctrine of lis pendens.

But it is immaterial whether the doctrine applies to the case or not, as I think it sufficiently appears from the pleadings and the proofs that the appellant had actual notice of the suit when he made the purchase, and is chargeable with knowledge of all the facts of which the record in the suit, as it existed at that time, would have informed him. So that if it appeared from the facts of which he was thus informed, that the sale was fraudulent on the part of Henry Clarke, then, by making the purchase with such knowledge, he became a party to the fraud. And now the question arises, What information did the record afford, as it then existed?

42 *The purchase was made in February 1846. It does not appear when the bills, original or amended, were filed in the suit of Fitzhugh v. Clarke. We have but a meagre skeleton of the record of that suit embodied in the record of this. It appears that the original bill was filed between the 13th of July 1839, the day of the death of the child of Fitzhugh and wife, and the 25th of December 1839, the day of the wife's death; as she was a plaintiff in the suit, and the death of the child is mentioned in the bill. If so, the suit must have been negligently prosecuted; for the answers of Henry Clarke and Abby Colton to that bill were not filed before the 2d of January 1843, when they appear to have been sworn to—more than three years after the filing of the bill. Afterwards, and after Abby Colton and all her children had died, an amended bill was filed, to which Henry Clarke filed an answer, which was sworn to on the 12th of June 1844. An order of account was afterwards made in the suit, but at what precise time does not appear. It is not copied in the record, and we can only infer what it was from the report of the commissioner. That report bears date on the 30th of May 1850—more than four years after the said purchase; and shows that the execution of the order of account was not commenced until the 23d of October 1846 (the date of the commissioner's notice to the parties), which was eight months after the purchase. In determining, therefore, what information the purchaser could have derived from the record of that suit, we must throw out of view the commissioner's report and the accounts returned therewith, and look only to the bills and answers. What facts did they disclose?

For some time after the intermarriage of Fitzhugh and wife, on the 25th of October 1837, he seems to have acquiesced in the continuance of the partnership. But shortly before his wife's death on

43 the 25th of December *1839, he brought the suit of Fitzhugh v. Clarke, for the purpose of obtaining her proportion of the estate of J. B. Colton, under the 6th clause of the will. That was the only object of the suit. The 6th clause does not provide for a termination of the business when any child should require her part; but only that the business should cease as to such child, and be continued as to the rest. The bill, while it requires the plaintiff's part of the estate, is perfectly consistent with a continuance of the business as to the rest. It charges that Fitzhugh had made repeated applications to Clarke to have his portion of the estate delivered to him, "wishing to have the means of advancing himself in business." But it makes no complaint of any waste of the estate or mismanagement of the business by Clarke, and asks for no injunction nor for the appointment of a receiver. It does not pretend that there had ever been any cessation of the business by a public sale of the stock of dry goods, or otherwise; but on the contrary, admits that the partnership had continued until the in-

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stitution of the suit, and was still in existence, and prays for an account of its continuance down to that time. It mentions the tenement in controversy as part of the real state of Colton & Clarke, and states that their business was that of dry goods merchants, and was prosperous, and that a large amount of money appeared by the books to have been due to them at Colton's death. The answer of Clarke to the original bill admits that the business of the firm was principally that of dry goods merchants, and was prosperous, but to what extent, could only be ascertained by a fair settlement of accounts, &c.; and that under the powers given in the will and with the consent of Abby Colton, he had continued and still continued to conduct the business of the copartnership for the joint benefit of himself and the estate of J. B. Colton.

44 It states that he had, *in all respects, honestly and faithfully endeavored to comply with the wishes of his testator, as expressed in his will, and was ready to submit the books of the concern, which had always been kept with the utmost exactness, to the examination of any commissioner who might be appointed for the purpose, &c.; that in conducting the business of Colton & Clarke, he had deemed it most prudent for the last four or five years to restrict that business, and in part to invest the debts and money in stocks of various descriptions; that in one instance he purchased for the concern a piece of property opposite Rocketts, called the Coalyard island, which, with the improvements thereon, cost ten thousand and fifty-five dollars; and that these stocks and real property, as well as all the other property of the concern, in consequence of the universal depression existing at the time, would, if forced into market, produce heavy and irreparable loss, which would fall, one-half on the respondent, and the other half on the estate of his testator. Abby Colton, in her answer, states, that she had taken no active part in the management of her testator's estate, having left it to the care and judgment of Clarke her co-executor, in whom she always had, and still continued to have the most perfect confidence; and that the business of Colton & Clarke had been, and still was continued, with her consent. The amended bill was filed mainly with the view of reviving the suit against the proper parties after the death of Mrs. Colton and her daughters. It takes the ground (no doubt in consequence of the death of Fitzhugh's wife, whereby he had become entitled to her personal estate absolutely, and to her real estate, at most only, for life), that a valuable portion of the real estate, including the tenement in controversy, had been paid for with partnership funds, and bought and always used for partnership purposes; and, if it is to be regarded as personal

45 property, claims *his wife's portion thereof as her administrator. It makes no complaint of waste of the assets, or mismanagement of the business of the concern, any more than did the original bill; but charges that all the estate of J. B. Colton ever since his death had been and still was in Clarke's possession under the trusts of Colton's will. Clarke in his answer to the amended bill admits that a part of the real estate, including the tenement in controversy, had been paid for with partnership funds, and bought and used for partnership purposes, but insists that as to the complainant, it should be regarded as real and not as personal estate. He says he is advised that the complainant, never having, during the coverture, reduced into possession any portion of the real estate to which his late wife may ultimately have been entitled, had no claim as tenant by the curtesy to such portion; and as regards the personal estate proper, he charges that complainant had already been paid his wife's full share thereof.

I have thus stated, in substance, all the material facts disclosed by the record of the suit of Fitzhugh v. Clarke, as it existed at the time of the appellant's purchase; and I certainly see nothing in them to inform him that the sale was unnecessary or improper, in discharge of the trust created by Colton's will, or was fraudulently made for the private purposes of Clarke. If there had been any waste or mismanagement of the estate of Colton, or of the assets of Colton & Clarke, or any well grounded apprehension thereof, the complainant, on showing the fact, might have obtained an injunction and had a receiver appointed. But there was no allegation of any such fact; and, so far as appeared from the record, it was not only the right but the duty of Clarke to continue to execute the trusts of Colton's will, by selling his real estate whenever deemed necessary by him for the payment of the debts of Colton &

46 Clarke. Green v. Slayter, *4 John. Ch. R. 38. It was neither the object nor the effect of that suit to take the execution of the trust out of the hands of the trustee and transfer it to the court.

Then, was there any thing in the other circumstances of the case, of which Davis had or ought to have had any knowledge at the time of his purchase, to inform him of any fraud or breach of trust on the part of Clarke?

The evidence of notice ought certainly to be very strong to convict a purchaser of a fraudulent participation in a breach of trust in such a case. Confidence being placed in the trustee "by the person who had the sole right to dispose of the property at his will (as was said by Marshall, C. J., in Garnett v. Macon, &c., 2 Brock. R. 185, 231), no other can question the correctness of his proceeding, or can be justifiable in suspecting any intention to violate the trust. He has no right to suspect that the person who has been selected by the testator for its execution, will violate the trust reposed in him, and no collusion between him and the trustee ought to be implied from equivocal acts." "If the executor sells to a person who knows that there are no debts, or that

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all the debts are paid, and that the sale is not a fair execution of the trust, the purchaser may take the property subject to the trust. 2 P. Wms. R. 148, 150. So too, if the executor sells at such undervalue as to indicate fraud, or for payment of his own debt. Crane v. Drake, 2 Vern. R. 616; Scott v. Tyler, 2 Bro. C. C. 430, 477; Andrew v. Wrigley, 4 Id. 125, 130; Hill v. Simpson, 7 Ves. R. 152, 167; Lowther v. Lowther, 13 Id. 95; McLeod v. Drummond, 17 Id. 153, 169. These cases proceed upon the principle that the executor does not sell in pursuance of his trust, but in violation of it, and that the purchaser knowing this fact, aids him in its execution, by making the contract. The purchaser is not
47 bound to make *any enquiry. The general power of the executor to sell protects him in buying; but if he buys with notice that the sale is a breach of trust, the property remains chargeable with it." Id. 238. Field v. Schieffelin, 7 John. Ch. R. 150, was the case of a sale by a guardian, of bond and mortgage belonging to his ward before the principal money had become payable. The purchaser was held not to be chargeable. This is a strong case, as it is "not in the ordinary course of the guardian's administration to sell the personal property of his ward." Id. 154. "The necessity or expediency of the measure (said Chancellor Kent) rested entirely in the judgment and discretion of the guardian. He was, as between him and the purchaser, the proper and exclusive judge of that expediency. It was not the duty or the business of the purchaser to enquire into the necessity of the assignment, or to see to the application of the purchase money. He had a right to presume, in the absence of all direct and plain proof to the contrary, that the guardian was exercising his power fairly and faithfully, in conformity with his duty." "There is no direct or positive evidence that the guardian has in truth misapplied or wasted the infant's money. It might be inferred from the acknowledged fact of his insolvency, and from the silence of the case; but when it becomes necessary, not only to establish the fact of breach of trust, but of a participation of the plaintiff in the fraud, we ought to have something more decisive than a presumption resting on such a basis. It is very possible, and consistent with every established fact in the case, that the money received by the guardian from the plaintiff, was duly invested in other property, in the name and for the benefit of the infant, and was left untouched amidst the waste and destruction of his own property. But if the presumption of a devastavit is to be admitted, there is no evidence
48 that the guardian *had any abuse of trust in contemplation when he made the assignment; or, if such were his intention at the time, there is no certain and sufficient proof that the plaintiff knew or had information of that intention, or of any purpose or design in the guardian inconsistent with his duty. The proof on the part of the infant is too lame and scanty to justify the conclusion of any breach of trust in the guardian, in which the plaintiff knowingly partook." Id. 153. See also, Dodson v. Simpson, 2 Rand. 294, in which the doctrine on this subject is clearly stated by Judge Green; also McLeod v. Drummond, decided first at the Rolls by Sir William Grant, 14 Ves. R. 352; and afterwards, on appeal, by Lord Eldon, 17 Id. 153; and other cases cited in the notes to Elliot v. Merryman, supra.

I am aware of no case which appears to be inconsistent with the doctrine as laid down by Chief Justice Marshall and Chancellor Kent, in the cases cited from 2 Brock. and 7 John. Ch. R. In Hill v. Simpson, 7 Ves. R. 152, the assignees of an executor were held liable on the ground of constructive fraud—in taking an assignment when, if they had examined the will, they would have seen that the executor was guilty of a breach of trust. In deciding the case, Sir William Grant said, "I do not impute to them direct fraud: but they acted rashly, incautiously, and without the common attention used in the ordinary course of business. It was gross negligence not to look at the will, under which alone a title could be given to them. It was not necessary to use any exertion to obtain information, but merely not to shut their eyes against the information which, without extraordinary neglect they could not avoid receiving." This decision rests on a familiar principle —see Sug. Vend. 1056, pl. 63. Graff v. Castleman, 5 Rand. 195, in which the authorities on the subject were reviewed very much at length by Judge Carr, was decided on the same principle which
49 *governed the case of Hill v. Simpson. An executor and trustee assigned a portion of the trust subject as a security for his own debt. The assignment referred to a deed of trust, which referred to the original deed, which referred to the will, where the whole trust was declared. The assignee was held, therefore, to have notice of the trust and of the breach of it, and to be a party to such breach.

In Jackson v. Updegraffe, 1 Rob. R. 107, the evidence clearly brought the case within the well settled principle there laid down, that parties dealing with an executor or trustee and co-operating with him in the misapplication of assets or trust funds, in violation of the duties of the executor, or in breach of the trust, cannot use such transactions as a defence against the claim of creditors, legatees or cestuis que trust. Id. 120. In Pinckard v. Woods, 8 Gratt. 140, bonds due to a decedent's estate, and payable to his administrator as such, were sold by him at a discount of eighteen or twenty per cent. to a person who knew that the condition of the estate did not require the sale. The purchaser was held accountable; and properly so.

Now, let us apply the doctrine thus settled to the facts of this case. The sale was made, as we have seen, in February 1846, less than three years after the termination

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of the partnership by the death of Abby Colton. It was made by one who had full power to make it for the payment of the debts of the partnership. It was made, apparently at least, for the payment of a debt of the partnership, secured by a deed of trust on the property, and the purchase money, or most of it, was accordingly applied to the payment of that debt. If that was not really a debt of the partnership, there is certainly no evidence in the record tending to prove that the purchaser knew the fact or had any reason to be-
50 lieve it; but the contrary. He *gave full value for the property, paid the purchase money in cash, and derived no benefit from its application. It was not the duty or business of the purchaser to enquire into the necessity or expediency of the sale, or to see to the application of the purchase money. He had a right to presume, in the absence of all direct or plain proof to the contrary, that the executor was exercising his power fairly and faithfully, in conformity with his duty. He had no right, it is true, to shut his eyes against information which, without extraordinary neglect, he could not avoid receiving. But where is the evidence that he did so? Where is the direct or plain proof, even that the executor committed a breach of trust in the sale of the property or the application of the proceeds, much less that the purchaser participated therein? Is it to be found in the facts that the executor engaged in various speculations on his own account, and involved the funds of the partnership therein; that in 1842 or 1843 he became so much embarrassed that it was generally known about Richmond; and that he ultimately (though at what time does not appear) took the oath of insolvency? Non constat that the appellant was informed of any of these facts when he made the purchase. But suppose he was informed of them; do they afford that direct or plain proof of fraud which is required in such cases? The fraud of the executor, if any, did not consist in his embarrassment and insolvency, but in the conversion of the property or its proceeds from the purposes of the trust to the individual uses of the executor. A knowledge by the appellant at the time of his purchase that such a fraudulent conversion was intended, would have implicated him in the fraud: but not a knowledge that the executor was engaged in hazardous speculations on his own account, or was embarrassed or insolvent. An embarrassed or even
51 an *insolvent man may be appointed an executor, and a grant to him of probate of the will cannot be refused on account of his poverty or insolvency. 1 Williams Ex'ors 119.

Insolvency of an executor happening after his appointment, is not, ipso facto, a vacation of his office nor a suspension of his powers: though it may be one among other reasons for a revocation or suspension of them by a court of competent jurisdiction. Until thus revoked or suspended, they may lawfully and properly be exercised and pass a good title to a bona fide purchaser.

But it is said that the appellant required and received an indemnifying bond; and that this fact shows that he knew he was acquiring a defective title, and, in connection with the other circumstances, is sufficient evidence of fraud on his part. I do not think so. I think it only serves to show his abundant caution. He was about to pay a large sum of money for the tenement in question, and to erect very costly improvements upon it; and prudence required that he should obtain all the security he could against any possible defect of title. He accordingly obtained a deed for the property, executed not only by Henry Clarke in his own right and as surviving executor of J. B. Colton, but also by him as surviving partner of Colton & Clarke, and by him and William J. Clarke as executors of Abby Colton. And to guard against the claim of Fitzhugh and of Shuble and wife, he obtained the indemnifying bond in question. He certainly did not intend to admit their claim by taking the bond, and this act of abundant caution on his part should not operate to his prejudice. It shows that he had heard of such claim, which fact indeed he expressly admits in his answer. But he had doubtless only heard of it as it
52 appeared in the suit of Fitzhugh *v. Clarke; and the nature of the claim asserted in that suit I have already sufficiently considered. In this feature of the case it is very much like that of Johnson v. Kennett, 3 Myl. & Keen 624, 10 Cond. Eng. Ch. R. 332. A testator had charged his real estate with the payment of his debts and legacies. His only son and heir at law, who was his executor, paid the debts out of the personal estate, and sold the real in lots to different purchasers, to whom he gave bonds of indemnity, some of which were conditioned for indemnifying the obligees against the legacies specially, and others were general bonds of indemnity. The suit was brought by the legatees against the executor and purchasers, &c. It was held by Lord Lyndhurst, that where an estate is charged generally with the payment of debts and legacies, and the debts have been paid but not the legacies, the purchaser will not be bound to see to the application of the purchase money, unless it be proved that he knew of the payment of the debts; and that the taking of the said bonds of indemnity did not raise the inference that the purchasers or any of them knew of such payment in that case.

I am therefore of opinion that the appellant acquired a good title to the tenement in controversy by the deed under which he claims. The property belonged to Colton & Clarke. The execution of the deed by Clarke and wife had the effect of conveying his interest; and its execution by him as surviving executor of Colton, had the effect of conveying the interest of the latter. If any thing else were necessary to confirm the title of the purchaser, it would be found in the execution of the deed by Clarke as surviving partner of Colton & Clarke, and

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by the executors of Abby Colton. The result of my opinion is that the decree be reversed with costs, and the bill dismissed as to the appellant with costs; but
53 without *prejudice to any relief to which the appellee Christian may be entitled against any party other than the appellant.

ALLEN, P., and LEE, J., concurred in the opinion of Moncure, J.

DANIEL, J., dissented.

Decree reversed.

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54 *Pulliam, &c. v. Aler.

January Term, 1859, Richmond.

1. **Attachments—May Be Issued Any Time before Return.***—An attachment may be issued under the first section of the Code, ch. 151, p. 600, after the action has been commenced, if it be done before the abatement of the suit by the return of the officer.†
2. **Same—Failure to Designate in Whose Possession the Property Is—Effect.**‡—An attachment is not defective because it does not designate any person in whose possession property or effects of the absent debtor may be found.
3. **Same—Service and Return of upon Garnishee Irregular—Waiver of Objection.**§—Though the service of an attachment upon garnishees, and the return thereon be irregular, yet if the garnishees appear to the action and defend it, without objecting to the irregularity, they cannot afterwards make the objection in the appellate court.
4. **Same—Garnishment—Case at Bar.**—Money is left with a person, who is a member of a firm, on a special deposit, and in his absence it is entered on the books of the firm to the credit of the depositor, and paid out by the firm for their own uses, they paying the depositor's checks upon it, by checks in their name upon the bank, and then an attachment is served upon the firm as garnishees in a suit against the depositor; the summons being served on the other member of the firm. The attachment binds the money in the hands of the firm.

A summons in an action of debt was issued from the clerk's office of the Circuit court of the city of Richmond, bearing date on the 16th day of September 1854, in the name of George Aler, plaintiff, against Thomas G. James, defendant. An attachment was also sued out by Aler, bearing the same date, which recites, that "whereas since the institution of a suit
55 *in the Circuit court of the city of Richmond, brought by George Aler, plaintiff, against Thomas G. James, defendant, to recover money for a claim, there has been filed in the clerk's office of the said court an affidavit that the plaintiff's claims amount to," &c. in the usual form. There does not appear to have been any written directions given to the officer as to the service of the attachment; but he returned it with the following endorsement:

The principal case is cited in Claflin v. Steenbock, 18 Gratt. 849, 866, and *note*; also, in Goodwyn v. Myers, 16 Gratt. 352. See monographic *note* on "Attachments" appended to Lancaster v. Wilson, 27 Gratt. 624.

***Attachments—May Be Issued Any Time before Return.**—In the first headnote of the principal case it is held that an attachment may be issued after the action has been commenced, if it be done before the abatement of the suit by the return of the officer. This is approved in Steele v. Harkness, 9 W. Va. 20, and Chapman v. Maitland, 22 W. Va. 343, both citing the principal case, but in these cases the attachment was issued after the return day of the process and therefore void.

†Code, ch. 151, § 1, p. 600. "When any suit is instituted for any debt, or for damages for breach of any contract, an affidavit stating the amount and justice of the claim, that there is present cause of action therefor, that the defendants or one of the defendants is not a resident of this state, and that the affiant believes he has estate or debts due him within the county or corporation in which the suit is, or that he is sued with a defendant residing therein, the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated."

‡**Same—Failure to Designate in Whose Possession Property Is—Effect.**—The principal case holds that, the failure to designate in whose possession the property may be found does not render the attachment defective. But in Robertson v. Hoge, 83 Va. 127, 1 S. E. Rep. 667, where the principal case is cited, the attachment was quashed and abated because the return of the officer did not show sufficient levy of the attachment.

§**Same—Service and Return of Irregular—Waiver of Objection.**—In Joseph v. Pyle, 2 W. Va. 451, the court said: "The first cause of error assigned is that the attachment, and the return of the officer thereon, are insufficient. There was no objection of this sort made in the court below, and as the garnishee appeared and denied his indebtedness on the merits of the case it is too late now to make the objection for the first time. *Pulliam, &c. v. Aler, 15 Gratt. 54.*"

See, in accord, Muire v. Falconer, 10 Gratt. 12, and *note*.

In Coda v. Thompson, 39 W. Va. 73, 19 S. E. Rep. 550, the court said: "It occurred to me at first that we might treat this order to the garnishee, not as process, in the legal sense, but as merely ancillary to the attachment, designed only to warn the garnishee and tie up the effects in his hands, and not to be tested by the strict rules governing process constituting the basis of judicial proceedings. But this theory will not bear reflection. As to the garnishee, it is the only process. Against him, it is the sole basis of judgment. The garnishment is a suit against him; process, in the legal sense, not pleading, and subject to a motion to quash for inherent defects in the order. Upon it may rest important litigation and trial of issues between the garnishee and the plaintiff. It is a suit against the garnishee. Drake, Attachm. § 451c; Wade, Attachm. §§ 333, 340; 8 Am. & Eng. Enc. Law 1100; Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252. The order to the garnishee to appear is indorsed on the attachment under section 5, c. 106, and the service of both the order of attachment and the order citing the garnishee to appear is the only mode of service on him under that section; and the order to the garnishee to appear must be regarded as part of the

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"Executed on Pulliam & Davis on the 16th day of September 1854, by delivering to David M. Pulliam, one of the firm of Pulliam & Davis, a true copy of the within writ; and I also explained its purport to him." This endorsement was signed by the officer.

The summons having been served upon the defendant James, there was a verdict and judgment against him at the May term 1855 of the court, for the sum of three thousand four hundred and one dollars and ninety-five cents, with interest thereon from the 15th of September 1854, subject to a credit for eleven hundred and fifty dollars, as of the 19th of September.

On the 13th of June 1855, being the same term of the court, the record says, "Came as well the plaintiff aforesaid as David M. Pulliam, a garnishee summoned by virtue of the attachment aforesaid, who being examined on oath, and it appearing on such examination that at the time of the service of the said attachment there was in the possession of the firm of Pulliam & Davis, of which he is a member, money belonging to said defendant sufficient to pay the amount of the judgment aforesaid, it was therefore ordered that the said Pulliam & Davis pay over to the said plaintiff the amount of said judgment."

Pulliam & Davis excepted to the opinion of the court; and their exception shows, that Davis as well as Pulliam was examined. The facts appeared to be, that the defendant James had deposited with
56 Davis, *before the attachment was served on Pulliam, the sum of four thousand one hundred and twenty dollars and sixty cents, to meet such drafts as might be drawn on him by James. That James had been in the habit of keeping an account with Davis individually, and that Davis had acted as his agent in buying slaves, and had frequently accepted and paid drafts drawn by James upon him out of the funds so deposited with him. That Davis kept an account of his own with James, with which the concern had nothing to do; Maury & Morton being his bankers. That Davis being about to leave Richmond for a week or two, he handed to B. W. Elmore, the clerk of Pulliam & Davis, the money of James in his hands, stating to him that it was the money of James, to be converted into current funds so as to save the discount upon it, said funds being uncurrent. That Elmore placed the money in the desk of Pulliam & Davis, and about a week after Davis left home, he credited James with the amount upon the books of Pulliam & Davis; and the money was passed off by him in the way of business after being so credited. Upon Davis' return, and before the money was paid out by Pulliam & Davis, Elmore informed him that the amount so received had been passed to the credit of James on the books of Pulliam & Davis, and that an attachment had been served upon D. M. Pulliam to attach the effects of James in the hands of Pulliam & Davis. Subsequently the sum put to James' credit on the books of Pulliam & Davis was paid out to James or upon his order, by checks upon the bank by the firm, by the direction of Davis.

Pulliam & Davis applied to this court for a supersedeas; which was allowed.

Crump, for the appellants.

August & Randolph, for the appellee.

57 *ALLEN, P. The defendant in error sued out on the 16th day of September 1854, a summons in debt against Thomas G. James, and on the same day issued an attachment against his estate, under the Code, ch. 151, § 1. The attachment recites, that "whereas since the institution of a suit," &c. "there has been filed in the clerk's office of the said court an affidavit." It is assigned as error, that this garnishee process appearing thus on its face to have been issued since the institution of the suit, was irregularly issued, and that it was the duty of the court before which it came ex officio to quash it.

The section of the Code referred to, was intended as a substitute for the foreign attachment authorized by the 1 Rev. Code, p. 474, ch. 123, § 1, against absent debtors having effects or lands within the state; and it provides, that "when any suit is instituted for any debt or for damages for breach of any contract on affidavit stating the amount and justice of the claim," &c. "the plaintiff may forthwith sue out of the clerk's office an attachment against the estate of the non-resident defendant for the amount so stated."

The second section of the act provides

order of attachment, which is certainly process. Hence, we must regard the garnishment order as process, and tested by the law relating to it as such. The language of JUDGE ALLEN in *Pulliam v. Aler*, 15 *Gratt.* 61, that the fact that the return of the sheriff was defective, in not showing that he summoned the garnishee to appear at a particular time, was unimportant, is unimportant in the decision of our case. The then existing attachment law simply required the plaintiff to designate a garnishee, and required the sheriff to summon him to appear at the first day of the next term, and did not require any summons by the clerk, as does our law. It was not process under the Virginia law, but it is under ours. And, as JUDGE ALLEN himself said, that was a defect merely in the officer's return of service, and was not a question of the illegality or validity of the garnishment process itself, whereas in this case it is purely a question of the validity of process.

"For these reasons, I reach the conclusion that the order to summon the garnishee is void, not simply irregular. Being void, the motion of the defendant to amend it so as to make it returnable to the May term was properly refused, because, while a process merely irregular may be, under some circumstances, amended, one wholly void is incapable of amendment. Kyles v. Ford, 2 Rand. (Va.) 1; Wade, Attachm. § 358; Drake, Attachm. § 184a; Burk v. Barnard, 4 Johns. 309; Kenworthy v. Peppiat, 6 E. C. L. 488; Middleton Paper Co. v. Rock River Paper Co., 19 Fed. 252; Durham v. Heaton, 81 Am. Dec. 275."

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for a distinct class of cases, and was intended as a substitution for bail for the defendant's appearance; and authorizes an attachment where the defendant is removing or intends to remove his estate, or any specific property sued for, on affidavit "at the time of, or after" the institution of the suit. Although the attachment in this case was issued under the first section of the act, the second section is referred to, and relied on for the purpose of showing that as the legislature expressly authorized an attachment after the institution of a suit in the second section, for the reasons there set forth, similar phraseology would have been used in the first section, if it had been the intention to authorize the attach-

58 ment to issue *after the institution of the suit, upon the affidavit of non-residence alone.

The intention of the legislature will be best ascertained by a reference to the provisions of the former law, for which the first and second sections of the Code before referred to, were intended to be substituted.

The first section, as has been remarked, comes in place of the act in 1 Rev. Code, p. 474, ch. 123, § 1, regulating proceedings against absent debtors.

The Code, p. 643, ch. 170, § 5, provided that process to commence a suit should be a writ commanding the officer to summon the defendant. By ch. 188, § 12, p. 716, the writ of capias ad satisfaciendum was prohibited, except in cases provided for in the preceding section; and as a substitution for the right to demand bail authorized by 1 Rev. Code, ch. 128, § 43, 44, 50, the Code, by the second section referred to, authorized the attachment there provided for.

Under the old law bail could be required under § 43, 44, by endorsement on the writ at the institution of the suit; and by § 50, where bail had not been originally required, the court at any time before final judgment, for good cause shown, could rule the defendant to give special bail.

It is thus apparent that the intention of the legislature was to make the new remedies commensurate with those for which they were substituted. That as by the former law provision was made for bail at any time before final judgment, whenever the exigency of the case rendered it necessary; so by the new rule, if after the suit was instituted, the contingency arose which rendered an attachment essential to the efficacy of any judgment in the case, the party was authorized on proper affidavit to sue it out. This provision in the second section related to matter generally arising after the institution of the suit, and

59 was not intended *to control the construction or limit the operation of the provision contained in the first section in relation to the fact of non-residence; which was the condition of things when the suit was instituted or before abatement by the return of non-residence. In the construction of the act in the Revised Code concerning absent debtors, it was held in Brien v. Pitman, 12 Leigh 379, that the admission of non-residence in an answer rendered the affidavit required by the law unnecessary; and in Moore, &c. v. Holt, 10 Gratt. 284, that it was not necessary that such affidavit of non-residence should be filed before process issued to constitute it, with the endorsement in the nature of an attachment, a lien when served. Under the present law, where the fact of non-residence exists, and the proceeding at law is substituted for the foreign attachment in equity, there can be no reason for a more narrow construction. No purpose of justice is subserved by requiring the affidavit to precede or be simultaneous with the summons. The objection of delay is obviated by the fact that the suit will be abated by the return of non-residence on the summons, unless the garnishee process is sued out before the return day. Nor do I conceive there is any thing in the words of the act imperatively requiring the restricted construction contended for. The word when does not necessarily refer to the instant of time spoken of: it frequently is used in a relative, instead of an absolute sense, referring not to the present, but to a different time; and means, according to the context, "whenever," "upon which," "in case," "if," &c.

Thus we have been referred to numerous instances in this Code, where it is used in the latter sense—"if," "in case," &c.

Code, p. 75, § 14, "When a vacancy occurs, it shall be filled," &c. Of course, when does not here mean at

60 *the same instant of time, but afterwards. It is used in the sense of "if."

Ibid. 109, § 8, it is used in the sense of "in case."

Ibid. 182, § 24, in the sense of "if."

Ibid. 182, § 26, "in case."

Many other instances were cited in argument, showing, as was remarked, that the use of this word in this relative or qualifying sense, seems to have been almost idiomatic with those charged with the preparation of the Code.

In p. 493, § 32, we have a phrase almost identical with the one under consideration: "When any such suit is instituted, the court shall cause publication to be made," &c. Of course it does not mean that publication shall be made at the instant of the institution of the suit.

I think the term was used in a similar sense in the section under consideration, and that in case the proper affidavit is made at any time before the abatement of the suit by the return of the officer, the provision of the law will be satisfied.

It is insisted in the second place, that the attachment was defective in not designating any person in whose hands money or effects of the absent debtor might be found. The provision in the Code, p. 602, § 7, that it shall be sufficiently levied in every case, by a service of a copy of such attachment

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on such persons as may be designated by the plaintiff in writing, or be known to the officer to be in possession of effects of or to be indebted to the defendant; and as to real estate, by such estate being mentioned and described by endorsement in such attachment, relates not to the form of the attachment and what it should set forth, but is merely directory to the officer as to the mode of service. He is to serve it on the persons designated by the plaintiff in writing, or known to the officer,

61 *and as to real estate, by mentioning and describing it by endorsement on the attachment, without regard to the manner in which he acquired his information. The attachment is sufficient when it appears upon its face that a suit has been instituted and an affidavit filed in due time, conforming to the first section.

It is further objected, that the return is defective in failing to summon the garnishee to appear at any particular day or term, as provided for by the Code, p. 603, § 9; and that furthermore, instead of serving it on each of the garnishees personally, the return is that he executed it on Pulliam & Davis on the 16th of September 1854, by delivering to D. M. Pulliam, one of the firm of Pulliam & Davis, a true copy of the writ, and explained its purport to him.

These objections relate to the regularity of the service of the process, and not to the legality and validity of the process itself. In the case of Mantz v. Hendley, 2 Hen. & Munf. 309, where it was held the court ought to quash the attachment ex officio, it appeared by the warrant itself that it had been granted upon an affidavit setting out as the law then was, no sufficient reason for an attachment. The defect was intrinsic in the warrant; being radically defective in point of law as showing no reason for the attachment, the court could give no judgment on it, notwithstanding the objection had not been taken at the first appearance, but the party had pleaded to issue. The principle is similar to the rule acted upon in Ross v. Milne & wife, 12 Leigh 204, where it was held, that upon a declaration which showed that the plaintiff had no right of action, and on the contrary, that the right of action was in another, a verdict being found for the plaintiff, the statute of jeofails did not apply, and the defect was not cured.

In this case, both parties upon whom the attachment was returned executed, ap-

62 peared and made no *objection to the mode in which the process was executed or returned. If made at a proper time, the objection might have been obviated by an amended return. The object of the process was to give notice and to restrain the garnishees after such notice, from parting with the attached effects. If they had appeared and moved to quash because the process had been irregularly executed or returned, such an appearance would not have been an appearance to the action. Wynn v. Wyatt's adm'x, 11 Leigh 584. But in this case they made no such motion. By appearing to the action and going to trial on the merits, they dispensed with a more formal service or return, waived any objection to the alleged irregularity, and cannot now raise the objection for the first time in the appellate court. Cunningham v. Mitchell, 4 Rand. 189; Poling v. Johnson, 2 Rob. R. 255.

On the merits the question would seem to be free from doubt. Although it was proved that the absent debtor had made a special deposit of the money with Davis in his individual character and not as a member of the firm of Pulliam & Davis, that Davis had been in the habit of keeping an account with the absent debtor, had acted as his agent in buying slaves, and had accepted and paid drafts drawn by the absent debtor on him out of funds so deposited, and that he handed over the funds of the absent debtor to the clerk and book-keeper of the firm to be converted into current funds as opportunity offered, and did not give any direction for raising an account therefor between the absent debtor and the firm; it was further proved that the funds so handed over to said clerk and book-keeper, were afterwards and before the service of the attachment credited to the absent debtor on the books of the firm, and the money was passed off by the clerk in the way of business, after being so credited. It further

63 appears from the account filed between the *absent debtor and the firm, that the former is charged and the latter credited with two sums paid out of the money so deposited before the date of the attachment; and it was proved that the money for which the firm has been rendered liable was paid out to the absent debtor or upon his order, by checks on the bank drawn by the firm by order of said Davis; and that the same was so paid out after service of said attachment on Pulliam, and personal notice to said Davis that an attachment had been served on Pulliam to attach the effects of the absent debtor in the hands of said firm.

From the facts in evidence it is clear that the money had ceased to be a special deposit of specific funds in the hands of Davis. It had been credited on the books of the firm, and used by the firm in the way of business. The specific funds could no longer be followed, and the absent debtor had a right to recover from the firm the funds so used for the benefit of the firm, regarding the firm as his debtor. The firm so treated the matter both before and after the service of the attachment. The absent debtor was credited with the money in account with the firm, and debited with money paid for him by the firm. Being thus the debtors of the non-resident when the attachment was served and notice given as aforesaid, and having waived all objection to the regularity of the service by appearing to the action, any payments made to the absent debtor after what they conceded was sufficient service and notice, were improperly made, and the firm was properly held responsible for

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the amount so paid to the attaching creditor to the extent of his claim.

I think the judgment should be affirmed.

The other judges concurred in the opinion of Allen, P.

Judgment affirmed.

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64 *Enders' Ex'ors v. Burch.

January Term, 1859, Richmond.

1. **Office Judgments—When Become Final.***—If the term of the Circuit court lasts more than fifteen days, all office judgments in which no writ of enquiry is ordered become final judgments on the fifteenth day: and cannot be afterwards set aside by the court.†

2. **Same—Issuance of Execution on—Effect.**—When a court authorizes executions to issue upon judgments recovered during the term, the judgments become final from the time when execution may issue, and cannot afterwards be set aside by the court.

3. **Same—When Supersedeas Lies to Judgment Setting Aside.**‡—A court having set aside an office judgment and the execution which had issued upon it after the fifteenth day of the term, and permitted the defendant to plead, the plaintiff may have a *supersedeas* from this order; and though that part of the order setting aside the judgment is interlocutory, the appellate court will reverse the whole order.

On the 24th day of September 1855 a summons was issued in the Circuit court of the city of Richmond, in the name of John Enders and William Palmer, executor of John Enders deceased, against Thomas C. Burch and Thomas T. Johnson, in an action of debt on two notes in writing; which summons was returnable to October rules, and was returned duly executed. At October rules the declaration was filed and a conditional judgment entered against the defendants. At November rules the conditional judgment was confirmed. The cause was placed upon the office judgment docket of the succeeding term, and was called in the regular proceedings of the court. And on the 27th day of November 1855, being the fifteenth day of the term, the office judgment not having been set
65 *aside, final judgment was entered in court accordingly. After that day and during the same term a general order was made allowing executions to issue on judgments and decrees of that term after ten days from their date. Afterwards, to wit, on the 22d day of December 1855, an execution of fieri facias was issued upon the said judgment. The execution having been levied upon the property of the defendant Burch, he appeared in court during the same term, to wit, on the 8th day of March 1856, and moved the court to set aside the office judgment made final in the cause as aforesaid, and to quash the execution issued thereon, and also to allow him to plead to the action; and in support of his motion, introduced his own affidavit and the state-

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*__Office Judgments—When Become Final.__—For the proposition that an office judgment, in which there is no order of enquiry, becomes final on the last day of the term or the 15th day thereof, whichever may happen first, the principal case is cited and followed in Creigh v. Hedrick, 5 W. Va. 142; Alderson v. Gwinn, 3 W. Va. 231. See, in accord, Lazzell v. Mapel, 1 W. Va. 43; McVeigh v. Bank of Old Dominion, 76 Va. 267; Code of 1887, sec. 3237.

In Wickes v. B. & O. R. R. Co., 14 W. Va. 165, the court said: "According to my judgment in the construction of said sixth section, when the court adjourned on the said 15th day of June, that term of the court was ended *quoad* the judgment in this case, as much as though the court had adjourned until the first day of the next term, instead of adjourning to the 10th day of July, 1876. See, as bearing upon this subject, *Enders' Ex'ors v. Burch*, *15 Gratt. 64*, and especially the opinion of the court delivered therein by JUDGE MONCURE."

In Hunter v. Snyder, 11 W. Va. 204, 209, it is said that the cases of Enders v. Burch, 15 Gratt. 64, Alderson v. Gwinn, 3 W. Va. 231, and Lazzell v. Mapel, 1 W. Va. 43, as to when office judgments become final are not authority in the decision of the present case. They were decided under Code of Va. 1860, sec. 44, but since then the Code of 1869, of this state has made material changes in the 44th section; and the 46th section corresponding to the 44th section requires that the plaintiff file an affidavit stating the amount of his claim, and that it is quite obvious that an office judgment cannot, under the said section, become a final judgment until such affidavit has been filed.

†See JUDGE MONCURE'S opinion for the provisions of the statutes, Code, ch. 171, § 44, 45, p. 652; ch. 177, § 21, p. 674.

‡__Same—When Supersedeas Lies to Judgment Setting Aside.__—The rule laid down in the third headnote of the principal case that where the lower court set aside an office judgment and the execution which had issued upon it after the 15th day of the term and allowed the defendant to plead, the plaintiff may have a supersedeas from such order, was referred to in James River, etc., Co. v. Lee, 16 Gratt. 433, by MONCURE, J., the same judge who delivered the opinion in Enders v. Burch, 15 Gratt. 64, as possibly erroneous but the court in that case left the question undecided as it was not necessary in that case to decide the point. And the court was therefore of the opinion that a reargument of the question ought to be heard whenever it may come up for decision before a full court. Also, in Ballard v. Whitlock, 18 Gratt. 243, the question was left undecided and the argument against the corrections of that decision was left unnoticed.

In Baker v. Swineford, 97 Va. 115, 33 S. E. Rep. 542, it is said that what fell from the learned judge who delivered the opinion in the principal case as to the power of the courts, after the 15th day of the term, with respect to judgments upon which it permits executions to issue after 10 days from that date was an *obiter dictum*, entitled to great respect, but not binding as authority. The court finally decides that under section 3600 of the Code the court has authority to direct execution to issue upon judgments under the conditions therein set forth, but such judgments do not thereby become final so as to deprive the court, during the term, of the power to correct, or if need be, annul them, if erroneous.

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ment of his counsel (permitted by the plaintiffs to be filed without affidavit), tending to show that he had a legal defence to the action, but that the judgment was obtained against him by surprise. The plaintiffs objected to the motion, and introduced evidence tending to sustain their objections. Whereupon the court overruled the said objections and sustained the said motion, on certain conditions as to payment of costs and a trial of the cause, if desired by the plaintiffs during the same term: To which opinion and judgment of the court the plaintiffs excepted. After the order was made setting aside the judgment and quashing the execution, and on the same day, it appears that the defendant Burch, with the leave of the court, pleaded nil debet, and also filed a special plea; upon which pleas issues were thereupon made up. No other order was thereafter made in the cause; but to the said order setting aside the judgment and quashing the execution as aforesaid, the plaintiffs applied to this court for a supersedeas; which was awarded.

Gregory, for the appellants.
Young, for the appellee.

66 *MONCURE, J. It is a rule of the common law, that during the term wherein any judicial act is done the record remains in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term as the judges shall direct; but when that term is past, then the record is in the roll and admits of no alteration, averment or proof to the contrary. 3 Tho. Co. Lit. 323, 1 Rob. Pr. 638 (old). The consequence of this rule, until altered by statute as herein after mentioned, was that no execution could be issued on a judgment until the end of the term at which it was rendered; at least, unless directed by the court to be issued at an earlier period, for special cause. By the act of 1 Rev. Code 1819, p. 508, § 79, it was enacted, that "all judgments by default obtained in the office for want of appearance or plea, in which no writ of enquiry shall be awarded, and which shall not be set aside on some day of the next succeeding term; and all non-suits and dismissions obtained in the office, and not so set aside, shall be considered as final judgments of the last day of the term; and executions may issue thereupon accordingly." However long the term might last, such office judgments did not become final until the last day thereof; and no executions could issue thereon, even by the express order of the court, until the end of the term.

Such was the state of the law on the 6th day of March 1834, when an act was passed reciting, that "whereas the protracted session of the Circuit superior court of Henrico, on account of the chancery business thereof, subjects parties who have obtained judgments on the common law side of the said court, to considerable inconvenience, from the delay of issuing executions on their said judgments until the close of the court," and enacting, "that it shall be lawful for the judge of the said court,

67 by an order to be entered *on the records of said court, on the sixteenth juridical day after the said court shall have commenced its session for the trial of civil causes, at each term thereof, to direct that execution may issue on judgments rendered on or before the said sixteenth day of said term, and that all office judgments, non-suits or dismissions obtained in the office and not set aside, on or before the sixteenth day of the said term, shall be considered as final judgments of the said sixteenth day, and executions may issue thereupon accordingly: provided, that nothing herein contained shall deprive the court of the right heretofore exercised, of directing executions to issue at an earlier period, for special cause." Sess. Acts 1833-4, p. 69, ch. 46, § 2.

On the 15th day of March 1836, an act was passed containing a similar provision in regard to the Circuit superior court of law and chancery for the county of Spotsylvania, except that it adopts the fifteenth instead of the sixteenth juridical day of the term. Acts 1835-6, p. 36, ch. 50, § 3. By section 10 of that act, a change was made of the said act of March 6th, 1834, substituting the twenty-fourth for the sixteenth day of the term in regard to the county of Henrico.

Thus stood the law when the present Code was enacted, which applies to this case, and contains the following provisions on the subject:

P. 652, ch. 171, § 44. "Every judgment entered in the office in a case wherein there is no order for an enquiry of damages, and every non-suit or dismission entered therein shall, if not previously set aside, become a final judgment, if the case be in the General or a Circuit court, of the last day of the next term, or the fifteenth day thereof (whichever shall happen first); and if it be in a County or Corporation court, of the last day of the next quarterly term, and have the same effect by lien or otherwise as a judgment rendered in the court at such term," &c.

68 *§ 45. "If a defendant against whom judgment is entered in the office shall, before it becomes final, appear and plead to issue, it shall be set aside, unless an order for enquiry of damages has been executed; in which case it shall not be set aside without good cause. Any such issue may be tried at the same term, unless the defendant show good cause for a continuance."

P. 674, ch. 177, § 21. "Any court, after the fifteenth day of its term, may make a general order allowing executions to issue on judgments and decrees, after ten days from their date, although the term at which they are rendered be not ended. For special cause it may, in any particular case, except the same from such order, or allow an execution thereon at an earlier period."

Under these provisions of the Code, the fifteenth day of a term of a Circuit court which consists of more than fifteen days, is, in effect, the last day of the term as to

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cases on the office judgment docket in which there is no order for an enquiry of damages, and in which the office judgment shall not have been set aside on or before that day. The office judgment in such cases becomes as final, to all intents and purposes, on that day, as if it were in fact the last day of the term. The court has no more power over it on a subsequent day of the term than at a subsequent term, and a motion to set it aside would be just as much coram non judice in the one case as the other. It has all the properties of a final judgment. An execution may forthwith be issued upon it, without any order of court, general or special, for that purpose. It can be corrected, set aside or reversed, only by proceedings in error in the same or a higher court. If the defendant has been taken by surprise, and has just ground for relief against the judgment, he can obtain it only in a court of equity.

That this is the true construction of
69 the law, is *plainly indicated both by its letter and its spirit. The law expressly declares, that every judgment entered in the office, &c., shall "become a final judgment of the last day of the next term, or the fifteenth day thereof, whichever shall happen first;" thus putting the two days upon precisely the same footing in regard to office judgments which become final on one or the other. And it further expressly declares, that such judgment shall "have the same effect, by lien or otherwise, as a judgment rendered in the court at such term." The act of March 6, 1834, in which, as we have seen, the provisions of the Code on the same subject have their origin, expressly declared that office judgments, &c., not set aside on or before the sixteenth day of the term, "shall be considered as final judgments, of the said sixteenth day, and executions may issue thereupon accordingly." Thus using the same language which had been used in 1 Rev. Code 1819, p. 508, § 79, which declared that office judgments, &c., not set aside during the term, "shall be considered as final judgments of the last day of the term, and executions may issue thereupon accordingly." It would be difficult to place a different construction upon the same words occurring in these two laws in pari materia. There can be no doubt about the construction of the act of 1819, and it would seem there ought to be none about the construction of that of 1834, or of the provisions of the Code.

Again: The preamble of the act of 1834 sheds light upon the meaning of the legislature, and supports the above construction. It recites the mischief designed to be remedied by that act, to wit, the great inconvenience to which parties were subjected by the protracted session of the Circuit superior court of Henrico, on account of the chancery business thereof, from the delay of issuing executions on their judgments until the close of the court.

70 *This construction not only conforms to the letter and spirit of the law, but is reasonable and convenient also. The first fifteen days of a term of a Circuit court consisting of a greater number of days, certainly afford ample time for setting aside office judgments upon plain bonds or notes in writing, and much more than is generally afforded for that purpose, as the terms of the Circuit courts are rarely of so great length. They are usually longer in some counties and corporations; and especially in the city of Richmond, where, as appears from this record, a term is sometimes of more than three months' duration. Would it be reasonable or convenient that an office judgment, which becomes final on the fifteenth day of the term, and on which an execution may immediately thereafter be issued, should be liable to be set aside on motion at any time during the term, however long it may be continued? Is it not much more reasonable and convenient that the defendant in such case should be concluded of all relief against the judgment, except by a proceeding in error or in equity? In the former case, the plaintiff might be unjustly deprived of the lien of his judgment and execution, without any indemnity whatever; whereas in the latter, the lien of the judgment, so far as he may be entitled to it, is preserved to him, and he is generally indemnified against ultimate loss, by a supersedeas or an injunction bond.

This case affords a striking illustration of the inconvenience and injury which might result from the former course. Here the office judgment became final on the 27th of November 1855. The execution issued on the 22d of December, and went into the sheriff's hands on the 18th of January, and was levied: And not until the 8th day of March following, more than three months after the final judgment, was a motion made to set it aside, on the ground of surprise!

71 *But it is said that the legislature, in making office judgments final on the fifteenth day of a term if not set aside on or before that day, only intended to place them upon the same footing with judgments rendered in court; and that as the latter may be set aside on motion, for good cause shown, on any subsequent day of the term at which they are rendered, so may the former. If this were true, it would only show an incongruity in the law. But the legislature has guarded against such an incongruity, by providing that any court, after the fifteenth day of its term, may make a general order allowing executions to issue on judgments and decrees after ten days from their date, although the term at which they are rendered be not ended. Code, p. 674, § 21. The effect of this provision, and the general order which may be made in pursuance of it, is to make all judgments rendered in court final whenever execution is capable of being issued thereon, although the term at which they were rendered be not ended. A capacity to issue execution on a judgment at law implies its finality, unless there be something to repel the implication in the terms of the law which gives the capacity. There is nothing to

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repel it in the terms of the law in question. Judgments rendered in court, which thus become final after ten days from their date, then possess all the attributes of finality, and stand on the same footing with office judgments after they become final on the fifteenth day of the term, as aforesaid. In neither case has the court, as a court of original jurisdiction, any power over its judgments after they have thus become final.

I am therefore of opinion that the Circuit court had no power to make the order of the 8th day of March 1856, setting aside the office judgment made final in this case on the 27th day of November 1855, and that the said order is void.

72 *But it may be said that if the order be void, there can be no occasion to reverse it, and at all events, that the order being interlocutory and not final, the supersedeas thereto has been prematurely and improvidently awarded, and must therefore be dismissed.

There might be some force in this objection, if the order had merely been to set aside the judgment. But it proceeded further, and quashed the execution: And though the court had no power, as a court of original jurisdiction, over the judgment, it had such power over the execution. A court must see to the execution of its judgments, and may order an execution to be issued, or quash one which has been issued. This is its judicial power, which of course it must exercise properly, and its orders in the exercise thereof are subject to the revision of an appellate court. The order to quash the execution in this case, being within the judicial power of the court, is an obstruction which the plaintiffs are entitled to have removed out of their way, in order that they may have execution of their judgment. And they are not bound to wait for that purpose until the case upon the order to set aside the judgment is finally disposed of in the court below. The order quashing the execution is a final order, and the supersedeas thereto was not prematurely awarded. This court therefore has jurisdiction of the case. And the order to set aside the judgment and quash the execution being one entire order, and the quashing of the execution being in consequence of the order to set aside the judgment, this court can properly, I think, revise and reverse the entire order, notwithstanding the interlocutory character of a part of it which is void.

The view which I have taken of the case renders it unnecessary if not improper to express an opinion upon the question, whether the defendant in error made out such a case in the court below as would have entitled him to have the judg-

73 ment set aside if that court had *had jurisdiction to make the order for that purpose. If he is entitled to be relieved against the judgment on the grounds relied on by him in the court below, he can obtain such relief only in a court of equity.

I am therefore of opinion that the said order of the 8th of March 1856 is erroneous, and ought to be reversed with costs, and that the motion of the said defendant in error ought to be dismissed with costs.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

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74 *Ham v. Ham.

January Term, 1859, Richmond.

Guardian and Ward—Termination of Guardianship—Election of Infant.*—A County court having regularly appointed a guardian for an infant under fourteen years of age, the infant after he attains that age has not the right, at his mere election, to have his guardian thus appointed displaced, and a new one of his own nomination substituted.†

On the 26th of October 1854 William Ham was appointed by the County court of Elizabeth City guardian of Jacob Ham, an infant then under the age of fourteen years; and he qualified and gave security as such guardian. On the 16th of January 1857 Jacob Ham attained the age of fourteen years; and in October of that year he by his next friend moved the court to be allowed to nominate his grand father James Philips as his guardian to be appointed by the court. There was a rule upon William Ham to show cause why his powers as guardian should not be revoked. And upon the hearing of the motion the County court refused to revoke the powers of William Ham and confirm the nomination of the infant: And thereupon Jacob Ham appealed to the Circuit court of Elizabeth City.

In March 1858 the case was heard in the Circuit court, when the order of the County court was reversed; and Jacob Ham was permitted to nominate his own guardian; and he thereupon nominated James Philips, who was appointed by the court; and qualified as guardian. To this opinion of the court William Ham excepted; and the court certified, that upon the hearing of the appeal, it was both proved and admitted

75 *by the parties, that William Ham was a good and unexceptionable guardian, and had demeaned himself in all things as such. And that James Philips, the grand father of said infant, whom Jacob Ham proposed and nominated as his guardian, was a good and unexceptionable man, and as well qualified as William to be guardian of Jacob Ham. But the court was of opinion, that when an infant to whom a guardian has been appointed while he was under fourteen years of age, arrives at that age, he has the right, without assigning any reason therefor, or showing any

*The principal case is cited in Burdett v. Cain, 8 W. Va. 285.

See monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

†See JUDGE DANIEL'S opinion, for the provisions of the statute, Code, ch. 127, p. 533.

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cause, to displace said guardian and elect another, and that it is the duty of the court to confirm such election. From this order of the Circuit court William Ham obtained a supersedeas.

Bowden, for the appellant.
Cosnahan, for the appellee.

DANIEL, J. It appears from the record, that upon the hearing of the case before the Circuit court, it was both proved, and admitted by the parties, that the appellant was a good and unexceptionable guardian, and had demeaned himself as such in all things; and also, that Philips, the grandfather of the infant appellee, whom the said appellee proposed and nominated as his guardian, was a good and unexceptionable man, and as well qualified as the appellant to be guardian of the said appellee. And the record discloses no fact showing or suggesting a reason why the said appellee desired the change which he asked the court to make. The single issue, therefore, which was presented for the decision of the Circuit court, and which is now to be settled here, is, whether a minor, for whom a guardian has been regularly appointed by a County court under the provisions of the Code of 1849, whilst he was within the age of fourteen years, on attaining to
76 *that age, has the right, at his mere election, to have his guardian thus appointed displaced, and a new one, of his nomination, substituted.

That the provisions of the Code on the subject do not, in terms, give or save to the minor such a right, is obvious. By the 1st section of chapter 127, p. 533, power is given to every father, by his last will and testament, to appoint a guardian for his child for such time, during its infancy, as he shall direct. And by the third section, the Circuit, County or Corporation court of any county or corporation in which any minor resides, or, if he be a resident out of the state in which he has any estate; is authorized to appoint a guardian for him, unless he have a guardian appointed as aforesaid by his father. The fourth section then proceeds to declare, that "if the minor is under the age of fourteen years, the court may nominate and appoint his guardian: if he is above that age, he may, in the presence of the court, or in writing acknowledged before a justice, nominate his own guardian, who, if approved by the court, shall be appointed accordingly."

Of the six sections of the chapter concerning the appointment of guardians, the three just cited alone have any bearing on the question. Of the remaining sections, the seventh, eighth, ninth and tenth relate to the powers and duties of guardians, and the eleventh and twelfth concern the power of the chancery courts over the relation of guardian and ward, and declare how infants may sue. And of these, the seventh alone demands present notice. That section declares, that "every guardian who shall be appointed as aforesaid, and give bond when it is required, shall have the custody of his ward, and the possession, care and management of his estate, real and personal; and out of the proceeds of such estate shall provide for his maintenance and education. But the father of the minor, if living; and in case of his death, the mother,
77 *while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor, and to the care of his education. And unless the guardian shall sooner die, be removed, or resign his trust (which the court that appointed him may allow him to do), he shall continue in office until the minor, being a male, shall attain the age of twenty-one years; or being a female, shall attain that age or marry; or in the case of a testamentary guardianship, until the termination of the period limited therefor."

The power of the court, by which a guardian has been appointed, to revoke his powers and appoint a new guardian in his place, is conferred by the 11th and 13th sections of chapter 132 of the Code, p. 550. The former of these sections (amongst other things) declares, that the court, under the order of which any fiduciary derives his authority, "may, whenever from any cause it appears proper, revoke and annul his powers;" and the latter provides, that "after the date of any order revoking and annulling the powers of any fiduciary, the court in which he qualified shall exercise such jurisdiction, either by appointing an administrator de bonis non, or a new guardian, or otherwise, as it could have exercised if the said fiduciary had died at that date."

It is obvious, that the right given to the minor to nominate his guardian, by the 4th section of chapter 127, extends, in terms, to the case only where, there being no incumbent in the office under an appointment by the court, or by the will of the father, the court is about to appoint a guardian. In such case, if the minor be under the age of fourteen years, the court appoints one of its own selection. But if the minor is above the age of fourteen years, he has the right to nominate his own guardian, who, if approved by the court (that is, I apprehend, if a fit and proper person, worthy to be approved by the court), is to receive the appointment.

78 *It is equally clear, that there is nothing in the 7th section of said chapter which points to the arrival of the ward at the age of fourteen years as the limitation of the guardian's office, or which can be relied on, in terms, as conferring upon the ward the right, on attaining to that age, to change his guardian. And I cannot see that the argument in favor of the right, derives any support from the provisions of the 11th and 13th sections of chapter 132 (cited at the bar and already referred to), giving to the court making the appointment the power to revoke and annul the powers of the guardian, and appoint a new one, when from any cause it appears proper to such court so to do.

To suppose such a right to be embraced within the provisions of these sections,

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seems to me necessarily to impute to the legislature a very awkward and immethodical way of legislating upon the subject. For whilst the legislature knew that the right had been extensively recognized and acted upon in the practice of our County courts, they also knew that the laws by which it was supposed to be conferred, were in a confused and unsettled state. In this condition of things, it is difficult to suppose that if the legislature intended to give or save to the ward such a right, they would have omitted all mention of it whilst engaged in fixing the term of the guardian's office, and have left it to be deduced from the power given to the court to revoke the powers of the guardian, for cause. In this connection, it is to be observed too, that the right claimed is one which is, in its very nature, positive, peremptory, decisive; and in a Code systematically arranged, we should hardly expect to find the exhibition of such a right classed as a reason for judicial action with causes whose sufficiency is to be determined by the sense of propriety and discretion of the court. And indeed, I take it, that it is in no degree the office of the provision under consideration to ascertain or define the rights of the
79 ward. The power of the court *to revoke the powers of the fiduciary, for proper cause, is conferred as a means of protecting rights already ascertained, and enforcing the performance of duties already prescribed, and cannot be looked to as the source from whence to deduce any right in the ward which the law has not elsewhere already declared or recognized.

We have already shown that there is no express recognition of the existence of the right in question in that part of the Code where (if any where) we should naturally expect to find it. Not only so, but to my mind, the denial of the right involved in the terms of the 7th section of chapter 127 falls very little (if at all) short, in conclusiveness, of a declaration in totidem verbis that henceforth the ward shall have no such right.

The liability of the guardian to be removed from office is, in terms, attached as well to a guardian appointed by the will of the father as to one appointed by the court; and the declaration that (unless removed) a guardian appointed by the court shall continue in office until the minor, being a male, shall attain the age of twenty-one years, is equally explicit with the declaration that the testamentary guardian shall continue in office until the termination of the period limited therefor in the will by which he is appointed. The evidence of an intent in the legislature to deny the right in question, contained in a declaration that the court may appoint a guardian, and that when appointed he is to continue in office until the ward attains the age of twenty-one years, is just as conclusive as that contained in the declaration that the father may by his will appoint a guardian, who is to continue in office until the termination of the period limited in the will. In the case of a guardian appointed by will, the right in question, unless expressly provided for, is, I apprehend, without
80 doubt superseded. *Such is the well settled effect ascribed to the statute, 12 Cha. 2, c. 24, from which the provision of ours, allowing the appointment of a guardian by will, is substantially taken. Thomas' Coke 181, note; 2 Kent's Comm. 235. What room is then left for the argument that the same consequence does not flow from the appointment of a guardian by the court?

The legislative provisions under which the practice of the County courts, already mentioned, grew up, were, in several most essential particulars, wholly different from the provisions of the Code under consideration. There was no statute declaring that a guardian appointed by the court should continue in office till the ward arrived at the age of twenty-one years. Indeed, neither in the act of 1819, nor in the acts of 1785 and 1792, was any authority, in terms, conferred upon the County courts to make original appointments of guardians, as had been done in the act of 1748. And in the 1st section of the act of 1785 (12 Hen. Stat. 195), in the 2d section of the act of 1792 (1 Stat. at large, N. S. 104), and in the 4th section of the act of 1819 (1 Rev. Code 406), power was given to the Chancery courts "to require security from any guardian in socage." Notwithstanding this indirect recognition of the existence of the guardianship in socage, by the legislature, and omission to declare any authority in the County courts to make original appointments of guardians, a practice prevailed in the County courts of making such appointments; and this, without any regard to the rights of the persons entitled to such appointments according to the laws of the guardianship in socage: though the right of the ward, founded in the same laws, to terminate the guardianship on arriving at the age of fourteen years, was (from a supposed analogy doubtless) still recognized and respected. The revisors, in their report
(653-4), call the attention of the legis-
81 lature to this state of *things, and to the doubts which existed, on the one hand, as to whether, since the abolishing of all feudal tenures by our act of 1779, guardianship in socage could with propriety (notwithstanding the implied recognition before adverted to) be said to exist in Virginia; and the other, as to whether the County courts had not usurped authority in undertaking to make original appointments; and conclude by saying, that in order, if possible, to remove all ambiguity in the law, they had thought it best "to omit any reference to the guardianship in socage, to retain the provision of the act of 1748, and define the powers and duties of guardians."

The law (with some immaterial alterations) has been enacted as reported by the revisors; and, as we have seen, after giving to the father the right to appoint a guardian for his child by his will, it vests

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the Circuit and County courts with full power to appoint guardians for all minors who have not testamentary guardians; declares that the guardian appointed by will shall continue in office till the termination of the period limited in the will, and that the guardian appointed by the court shall continue in office till the ward arrives at the age of twenty-one years; omits any reference to the guardianship in socage; and whilst it gives to the guardian the possession, care and management of the ward's estate, real and personal, omits the provisions of the acts of 1794 and 1819, which, in giving to guardians the power to make leases, declared that the same should not exceed the period when the ward should arrive at the age of fourteen years.

I can see nothing on the face of the law, or in the history of the circumstances preceding and attending its passage, from which to conclude that it was the purpose of the legislature to give or save to the ward the right claimed in this case.

82 On the contrary, the *intention to deny the existence of the right is plainly to be deduced, not only from the language of the law, where it has spoken on the subject, but also from the obvious purpose and meaning of its silence where it should have spoken, if it had intended to recognize or save the right.

Upon the whole, it seems to me that the order of the Circuit court is erroneous; and I am for reversing it and affirming that of the County court.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

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83 *Iaege, &c. v. Bossieux.

January Term, 1859, Richmond.

1. **Mechanics' Liens—Limitation of Action—Decree for Installments Not Due.***—Under the statute, Code, ch. 119, § 2, p. 510, creating the mechanic's lien upon the building, the suit may be brought within six months from the time the building is finished, to enforce the lien as to the installments of the contract price due; and though some of them are not due and payable at the time the suit is commenced, the court may in its decree provide for them.†

2. **Same—Assignment of—Rights of Assignee.**‡—The contract and lien under the statute may be assigned, and the assignee may enforce the lien in the same mode that the mechanic might do it.

3. **Contract to Build House—Approval of Referees—Conclusiveness of—Case at Bar.**§—By the contract for building a house, the builder is to furnish the materials and to build the house in a workmanlike manner, and the price is to be fixed by referees chosen by the parties. Soon after the work is finished, it is valued and the price fixed; but afterwards defects become apparent by the shrinking of the timber, showing that the work was executed in a very defective and unworkmanlike manner. The valuation does not conclude the owner of the house; but he is entitled to compensation for the defects; and in a suit by the assignee of the builder to enforce the lien for the price for building the house, the owner will only be required to pay what the building was really worth.

***Mechanics' Liens—Decree for Installments Not Due.**—In Trustees Franklin St. Church v. Davis, 85 Va. 197, 7 S. E. Rep. 245, suit was brought to enforce a mechanic's lien before the installments which were sought to be collected became due, and the court held that the suit was prematurely brought, distinguishing it from the principal case which holds in its first headnote that where suit is brought to enforce a mechanic's lien after the first installment is due decrees for the subsequent installments, as they subsequently fall due, may be rendered in the same suit.

†Code, ch. 119, § 2, p. 510. "If a person owning or having an interest in land, in a city or town, shall by a writing signed by him, contract with another to pay him money for erecting or repairing any building, or the appurtenances of any building on such land, there shall be a lien for such money on the whole interest of the said person in such land, from the time that the said writing is duly admitted to record in the county or corporation wherein the said land lies. But the said lien shall not be in force more than six months from the time when the money, or the last installment of the money to be paid under such contract, shall become payable, unless a suit in equity to enforce the lien shall have been commenced within the said six months. If in such suit the lien be established, the court shall order a sale of such interest in the land, to satisfy the money which ought to be paid under such contract."

‡**Same—Assignment of—Rights of Assignee.**—The principal case is authority for the proposition that where a perfected mechanic's lien under the statute is assigned, the assignee may enforce the lien in the same mode that the mechanic might do it, and in Bristol Iron & Steel Co. v. Thomas, 93 Va. 403, 25 S. E. Rep. 110, citing the principal case, the court goes further and holds that the assignee may perfect the inchoate lien which existed for the benefit of his assignor.

§**Contract to Build House—Approval of Referees—Conclusiveness of.**—In Carroll County v. Collier, 22 Gratt. 311, and *note*, the plaintiff contracted to build a jail for the said county. The work shortly after its completion was examined by commissioners of the court, who reported that the building had been completed according to the contract. This report was entered of record. When sued for the amount promised to be paid for the work, the defendant put in a special plea alleging that the work had been defectively constructed and the plaintiff joined issue on the plea. The defendant introduced a witness to sustain the defence and the plaintiff objected and offered the order as an estoppel. The court held, citing the principal case, that the plaintiff having taken issue on the plea the order could not operate as an estoppel when offered in evidence. See, in accord, Hayes v. Va. Mut., etc., Assn., 76 Va. 225. But in Despard v. County of Pleasants, 23 W. Va. 324, whose facts are similar to the case above and where issue was joined on the plea of non-assumpsit, the court held: "In this action, the defendant filed specifications of sets-off and payments, but gave no notice of any claim for damages on account of any defect in the repairs. It did not assert or offer to prove that there was any imposition, fraud, concealment or mistake in the accept-

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4. **Building Fund Company—Lien for Future Advances—Mechanic's Lien—Priority.**—A building fund company agrees to advance to one of its members money to build a house on a lot owned by him, and advances a part of the money and takes a lien upon the lot and the buildings which may be erected upon it, to secure the advances made
84 and to be *made. The member then makes a contract for the building of a house on the lot, with a mechanic who, to raise money faster than it can be gotten from the company, assigns the contract to a person who undertakes to advance the money; and the contract is recorded, so as to create the mechanic's lien. After the contract is recorded, the company advances money from time to time, as it had agreed to do, which is paid to the assignee in part satisfaction of his advances to the mechanic, with a knowledge on his part, that it comes from the company, and that the company claims priority of lien upon the property. The company is entitled to priority over the mechanic's lien, for its advances made after the contract was recorded, as well as for its advances made before.

5. **Judicial Sales—Priority of Liens.**—Before decreeing a sale of the house and lot, the court should determine the priorities as between the building fund company and the assignee of the mechanic's lien. And it is error merely to decree a sale and direct the proceeds to be brought into court.

6. **Deeds of Trust—Wife Joining with Husband in—Dower—Equity of Redemption.**¶—The wife of the grantor in the deed of trust to secure the building fund company, having joined in that deed, the property should be sold out and out, and first applied to the payment of the debt due to the company. But she has a contingent dower interest in the equity of redemption, and being a party in the suit, and therefore bound by the decree in the cause, the court should make a proper provision to compensate that interest out of the surplus proceeds of sale, if any, before any part of it is paid over to the assignee of the building contract.

7. **Referees—Copy of Valuation—Waiver of Objection to.**—A copy of the valuation of the referees, is filed with the bill, and though noticed in the answer, is not objected to. It is received by the commissioner who settles the accounts, as evidence, and no call is made for the original before him: but there is an exception without date, endorsed upon it as being but a copy. The exception either came too late, or was waived by the party.

Lewis Iaege being the owner of a lot of ground in the city of Richmond, on which he desired to erect a small dwelling-house, at a cost of some six hundred or six hundred and fifty dollars, and holding also five shares in the Richmond building fund company, he applied to that company for the loan of a sum of money for the purpose of erecting such a dwelling. The company agreed to lend him the money, upon the terms prescribed in their articles and by-laws, by which the money was to be advanced from time to time as the house progressed,
85 and the whole was to be *secured by a deed of trust on the property. The company advanced Iaege one hundred and twenty dollars, and he and his wife, by a deed bearing date the 20th day of August 1852, duly recorded, conveyed the lot and buildings then or which might be put upon it, for the purpose of securing this sum and

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ance of the work by the court. If it had offered such proof in connection with the testimony excluded by the court, I am inclined to think it would have been admissible under the plea of non-assumpsit and that said order of acceptance would not have operated as an estoppel even if so formally pleaded. Iaege v. Bossieux, 15 Gratt. 83, 99; Carroll County v. Collier, 22 Gratt. 302. But, having failed to assert or offer to show that there was any imposition or fraud on the part of the plaintiff, or mistake upon the part of the county court in accepting said repairs, I do not think the circuit court erred in excluding the testimony offered by the defendant to prove that the work had not been done according to the specifications set forth in the contract with the plaintiff."

Judicial Sales—Priority of Liens.—The 5th headnote of the principal case holds in substance that it is error to decree the sale of lands before ascertaining the priority of liens thereon. For the above proposition the principal case is cited in the following cases: Horton v. Bond, 28 Gratt. 815, and *note*: Crawford v. Weller, 23 Gratt. 835, and *note*: Anderson v. Nagle, 12 W. Va. 113; Washington, A. & G. R. Co. v. Alexandria & W. R. Co., 19 Gratt. 617, and *note*: Lipscombe v. Rogers, 20 Gratt. 658, and *note*: Tracey v. Shumate, 22 W. Va. 500.

See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

But in Pairo v. Bethell, 75 Va. 831, it is said: "The court might, perhaps, in the exercise of a sound discretion, direct an issue or issues under circumstances which would warrant such direction in a regular chancery suit; and so, if the case required it, we see no good reason why there might not be a reference to a commissioner to make inquiries and take and state accounts. Such reference might be necessary in many cases involving conflict of liens, disputed titles and like matters; such, for instance, as the case of Iaege v. Bossieux, 15 Gratt. 83. But there was no necessity for the reference asked for in the present case, as the questions litigated were simple and easy of solution by the judge, as the sequel showed, without the aid of a commissioner, nor was there any necessity for an issue or issues to be tried by a jury."

¶**Deeds of Trust—Wife Joining with Husband in—Dower—Equity of Redemption.**—For the proposition that where the wife of the grantor in a deed of trust, to secure a building fund company, joined in that deed, the property should be sold out and out, and first applied to the debt due the company, but since the wife has a contingent dower interest in the equity of redemption, the court should make a proper provision to compensate that interest out of the proceeds, the principal case is quoted with approval in Holden v. Boggess, 20 W. Va. 79, 85, 86, but this case criticises the principal case as to the way in which the dower interest should be secured to the wife; holding that if the wife survives the husband and the dower interest becomes consummate, the same in a suit in equity by her is a charge upon the land in the hands of the purchaser. See principal case reported in 76 Am. Dec. 189, and *note*. See monographic *note* on "Deeds of Trust."

Mechanics' Liens.—On the subject of Mechanics' Liens, see discussion in 2 Va. Law Reg. 489, where the principal case is cited: also, U. S. Blowpipe Co. v. Spencer, 40 W. Va. 705, 21 S. E. Rep. 769.

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any further sums which might be lent him for the purposes aforesaid.

Having made the arrangement with the Building fund company for getting the money, Iaege then contracted with William H. Martin, a carpenter, for building the house; but Martin being very much embarrassed, and fearing that his creditors might disturb him if they knew he had the contract for building the house, the name of John Warthen was substituted for his in the written agreement. This agreement, which bears date the 28th day of September 1852, provides that Warthen shall build a house of a given description, "the work to be executed in a workmanlike manner," and when completed, it was to be valued by referees chosen by the parties, and the value of the building so fixed was to be the price thereof. When the roof was upon the building, Iaege was to pay to Warthen two hundred and fifty dollars; and when the building was completed he was to pay two hundred and fifty dollars more; and the residue was to be paid within twelve months from the date of the completion of the building, by equal monthly payments, bearing interest from that date.

As Martin had no money, and required it to enable him to carry on the work faster than Iaege could get it from the Building fund company, an arrangement was made by him with Louis J. Bossieux, who undertook to advance the money; and the contract was assigned to him by Warthen: and on the 29th of September 1852 it was admitted to record in the clerk's office of the Hustings court of the city of Richmond, upon the acknowledgment of Iaege and Warthen.

86 *Martin seems to have proceeded forthwith to build the house; and referees having been chosen as provided in the agreement, they on the 25th of February 1853 made out their estimate, and valued the building at eight hundred and eighty-six dollars and eighty-six cents. Of this sum, Iaege had paid, during the progress of the work, or in March 1852, six hundred dollars. To make these payments, it was known to the parties that he was to receive and did receive money upon loan from the Building fund company; and in addition to the sum of one hundred and twenty dollars received by him before the execution of his deed of trust, after that deed was executed and after the contract between himself and Warthen had been assigned to Bossieux and recorded, he received from the company the further sum of four hundred and sixty-one dollars; which was paid to Bossieux, with the knowledge on his part that it was obtained from the company.

On the 12th day of September 1853 Louis J. Bossieux instituted a suit in equity in the Circuit court of the city of Richmond, against Lewis Iaege and his wife, the Richmond building fund company, and the trustees in the deed to secure the company before mentioned. In his bill he sets out the contract, its assignment to him, and the record thereof, the completion of the building, the appointment of the referees, and their valuation; of which he exhibited a copy, and the payments made by Iaege. He says there is still due to him near three hundred dollars, which Iaege had failed to pay; and he insists that his contract having been recorded, he has a lien upon the property under the statute, Code, ch. 119, § 2, p. 510. He refers to the deed of trust to secure the Building fund company; and says that the company claims a prior lien upon the property; and asks for a sale of the property for the payment of his claim; and for general relief.

87 *Iaege answered the bill at great length. He says that he made the contract with Martin who did the work; that before making the contract he told Martin that he could not pay more than six hundred or six hundred and fifty dollars for the house, and that he would not build at all if it could not be done for that amount; and that Martin assured him it would not cost more. He declares that he never intended to give a lien upon the property by the record of the contract, and was ignorant that such would be its effect. He insists that the contract has been violated, in that the work has not been done in a workmanlike manner; that the materials used were not suitable and properly seasoned; the door panels are split, the facings warped, the chimney piece shrunk, and various defects that could not be so well discovered when the work was valued by the referees, have since become strikingly apparent as the work has become seasoned: And he insists that he has already paid fully as much as the work is worth.

The trustees of the Building fund company also answered, insisting upon their prior lien for the amount they had lent to Iaege; charging that the plaintiff and Martin knew that Iaege was to get the money from the company to build the house, and to give the lien to secure it; and that the plaintiff, when he received the money from the company, was informed that the company claimed a priority of lien for the money so paid to him.

In March 1854 the court made an order in the cause, directing a commissioner to report, first, the amount due from Iaege to the Building fund company at the date of the recordation of the contract with Warthen: second, whether the company had advanced to Iaege any sums of money to the satisfaction of said builder's contract, after the contract was recorded: and if so, how much, and to whom such advances

88 *were made: third, the balance due to the plaintiff: fourth, the value of the real estate in the trust deed mentioned, in its improved condition. And in June 1854 the commissioner reported, that at the date of the recordation of the building contract the Building fund company had advanced to Iaege one hundred and twenty dollars, of which he had repaid, in monthly installments, twenty dollars: that after the recordation of the contract the company had paid, or advanced, on the of December,

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to L. J. Bossieux and John Warthen two hundred and thirty-two dollars; and in March 1853 to the same parties two hundred and twenty-nine dollars—equal to four hundred and sixty-one dollars: and that there was due from Iaege to Bossieux two hundred and eighty-six dollars and eighty-six cents. On the fourth subject referred, the commissioner returned the depositions of two witnesses, and says, one of them values the property at from six to seven hundred dollars, and the other from six to six hundred and fifty dollars. The balance reported to be due to Bossieux was based on the valuation of the referees, a copy of which was before the commissioner, and seems not then to have been excepted to; though afterwards an exception without date was endorsed upon it.

Several witnesses were examined as to the materials and workmanship of the building; the substance of which is stated in the opinion of Judge Lee. The allegations in the answer on that point, seem to be fully sustained.

The cause came on to be further heard on the 27th of November 1855, when, there having been no exception to the commissioner's report, it was confirmed; and it was decreed, that unless within ninety days Iaege or some one for him paid to the plaintiff the sum of two hundred and eighty-six dollars and eighty-six cents, with interest from the 25th of Feb-
89 ruary *1853 until paid, and his costs, a commissioner should proceed to sell the house and lot, in the mode and on the terms stated in the decree, and deposit the proceeds in the Bank of Virginia to the credit of the cause, and report his proceedings to the court. From this decree Iaege and the Richmond building fund company applied for and obtained an appeal to this court.

B. B. Minor, for the appellants, insisted: 1st. That the suit was instituted before the right of action had arisen. The payments over the sums provided to be paid during the progress of the work and on its completion, were to be paid in twelve months from the time the building was finished, in equal monthly installments. The whole of this residue was not due until the 25th of February 1854, and when this suit was instituted, had not become payable. And the statute, Code, ch. 119, § 2, p. 510, provides, that the builder's lien shall not continue more than six months from the completion of the building, unless a suit in equity to enforce the lien shall have been commenced within the said six months. He referred to Kinney v. Hudnut, 2 Scamm. R. 472; Jones v. Alexander, 10 Smedes & Marsh. R. 627; Thaxter v. Williams, 14 Pick. R. 9; Heck v. Skener, 4 Serg. & Rawle R. 249; Delahay v. Clement, 3 Scamm. R. 201; Pryor v. White, 16 B. Monr. R. 605; Bartlett v. Kingan, 19 Penn. R. 341; Patrick v. Ballentine, 22 Missouri R. 143; Hoover v. Wheeler, 23 Miss. R. 314; McCallan v. Smith, 11 Cush. R. 238.

2d. That the building contract was not recorded with the intention to create a lien on the property, nor with the knowledge on the part of Iaege that it would have that effect; and therefore no lien was created by it. Hutchison & wife v. Rust, 2 Gratt. 394; Alexander & Co. v. Newton, Id. 266; Blessing's adm'r v.
90 *Beatty, 1 Rob. R. 287; Pullen v. Mullen & wife, 12 Leigh 434, 440; 2 Rob. old Pr. 214.

3d. That the balance reported to be due to Bossieux is erroneous: First, because there was no legal proof of the valuation of the referees, there being only what purported to be a copy of that valuation, and that excepted to. But second, because the proofs are conclusive to show that the house was not built in a workmanlike manner, but that both the materials and the workmanship were very inferior, and were full of defects, which could not be seen or discovered when the valuation was made soon after the completion of the work, and in the winter. That Iaege was therefore not concluded by the valuation of the referees, but had a right to an abatement of the estimated price, and should be charged only what the house was really worth. He referred to Heck v. Skener, 4 Serg. & Rawle R. 249; Chitty Contr. 450-51, 574-75; Cawthorn v. Courtney, 6 Gratt. 381; Warren v. Harris, 2 Gilm. R. 307.

4th. That the Building fund company were entitled to a prior lien for the whole amount of their advances: that the parties had full knowledge that the contract for the building was to be carried out on Iaege's part, and could only be carried out by him, by means of the money to be advanced by the company on the security of the house and lot; and Bossieux himself received the money from the company, with the full knowledge that they claimed to have the prior lien for all their advances, and without then disputing their claim. He referred to 1 Story's Equ. Jur. § 401, 417; 2 Id. § 1257, and note; Cox v. Romine, 9 Gratt. 27.

5th. That the building contract was not assignable so as to give the assignee the mechanic's lien. The statute gives the lien to the person who has done the work, but not to his assignee. Sess. Acts 1842-3, p. 53; Code, ch. 119, § 2, p. 510; Bot-
91 tomly v. Grace *Church, 2 Calif. R. 90; Greene v. Ely, 2 Green's (Iowa) R. 508; Hilliard v. Allen, 4 Cush. R. 532; Logan v. Dunlap, 3 Scamm. R. 189. And there is no lien for money advanced for erecting the building. Godefroy v. Caldwell, 2 Calif. R. 489; Steam Boat D. H. White v. Levy, 10 Ark. R. 411; Lawson & als. v. Higgins, 1 Mich. R. 225; Shotwell v. Kilgore, 26 Miss. R. 125; Holmes v. Shands, Id. 639; Edgar v. Salisbury, 17 Missouri R. 271.

6th. The sale of the property is decreed, without any provision for the widow's right of dower in the equity of redemption, after satisfying the lien of the Building fund company, in which she joined. That equity of redemption includes the buildings

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put upon the lot. Shaeffer v. Weed, 3 Gilm. R. 511; English v. Foote, 8 Smedes & Marsh. R. 444; Selph v. Howland, 23 Miss. R. 264; Thirby v. Tead, 13 Metc. R. 149. And the sale is also decreed without first adjusting the proprieties of the liens; which this court has held to be error. Cole's adm'r v. McRae, 6 Rand. 644; Buchanan v. Clark, 10 Gratt. 16.

Morson, for the appellee: Upon the first point made by the appellants' counsel, to show the right of an assignee to sue in equity to enforce a lien, referred to Hanna v. Wilson, 3 Gratt. 243; Winn v. Bowles, 6 Munf. 23; 2 Story's Equ. Jur. § 1040, 1250. And to show that the assignee may sue before all the installments are due, he referred to 3 Rob. Pr. 361, 362; Paul v. Dod, 2 Man. Gr. & Scott 800; Mussen v. Price, 4 East's R. 147; 2 Parsons' Cont. 486, note k; Hanna v. Mills, 21 Wend. R. 90; 1 Story's Equ. Jur. § 64 k, 67, 68, 457; 2 Id. § 717 a, 718. And he insisted that the provision in the statute referred to, was only intended to prevent delay in enforcing the lien.

2d. That though Iaege swears he did not intend to give a lien by the record of
92 the building contract, *there is no proof of the fact; but the contract was recorded on his acknowledgment; and Bossieux refused to lend the money unless the contract was recorded.

3d. He insisted, that the value of the building was ascertained in the mode prescribed in the contract, and there was no suggestion that the referees had not acted honestly in making their valuation; and the parties were concluded by that valuation. Kidwell v. The Baltimore & Ohio R. R. Co., 11 Gratt. 676. That the exception to the copy of the valuation was without date, and was obviously taken after the report of the commissioner had been returned. That copy was filed with the bill as an exhibit; and though referred to by Iaege in his answer, was not objected to.

4th. The Building fund company is not postponed absolutely to Bossieux. The amount due the company when the contract was recorded is held to have priority. According to the general rule, Bossieux is next entitled, and then the company for the money advanced after the contract was recorded. But the decree does not postpone the company to this extent, but simply directs the sale, and that the money be deposited in bank; and the question of priority may be hereafter adjusted. And this is the usual practice; it not being common to settle the priorities in the decree directing the sale.

5th. There is nothing in the cases cited on the other side to sustain the proposition that the assignee of the contract is not entitled to the lien; nor is there any thing in the statute to authorize the proposition. It would be most injurious to the mechanic if it were so, as it would lessen the value of the lien to him, by precluding its use in raising money to enable him to execute the work.

6th. The deed to secure the Building fund company, conveyed the dower interest
93 of Mrs. Iaege; and *the whole property was therefore properly decreed to be sold. She had but a contingent interest in the equity of redemption, and was only entitled to have her interest secured out of the balance of the purchase money; and as she is a party in the suit, that could have been and can yet be done.

LEE, J. The jurisdiction of this court in this case is, I think, clear and unquestionable. Assuming that the matter in controversy is merely pecuniary, it is not confined to the amount claimed by the appellee but embraces also the amounts claimed by the Building fund company and for which as they allege they are entitled to priority of payment out of the proceeds of the subject. These alone exceed the sum necessary to give the jurisdiction.

There is as little doubt, I think, of the jurisdiction of the court of equity in the matter of the bill. Its jurisdiction is denied by the counsel for the appellant upon his construction of our act creating the "mechanic's lien," Code, ch. 119, § 2, p. 510; and if his construction were correct, there would be grave doubt of the right of a party claiming as assignee of such a contract as that which is the foundation of the appellee's demand, to come into equity to obtain payment of such of the installments as had become due merely upon the ground that he was assignee. But I do not think the construction contended for is correct. The act first declares that there shall be a lien for the money agreed to be paid upon a contract for erecting or repairing any building, &c., from the time that the same is duly admitted to record, and then provides that "the said lien shall not be in force more than six months from the time when the money or the last installment of the money, to be paid under such contract, shall become payable, unless a suit in equity to enforce the lien shall have been com-
94 menced within *the said six months." The object of this provision was to prescribe a limitation to suits to enforce such a lien by specifying a period after which they might not be brought but not one before which they might not be commenced. It intended to give the mechanic the right to assert the lien for all the installments whenever due (where the contract price was payable in installments) provided he commenced his suit before the expiration of the six months after the last installment became due, but not to prevent him from proceeding for previous installments before the last became payable. His right to sue for these depends on general principles and is not restricted by the act; and no one has ever questioned that a party who has a debt due by bond payable in installments and secured by a lien on real estate may maintain covenant, or file his bill to enforce his lien as soon as any one installment becomes payable, whatever may be the doubt as to the right to maintain debt until all of the installments shall have become due. And

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where such a bill has been filed another installment shall become due pending the suit, the uniform practice, never questioned so far as I know, has been to decree payment of all the installments that shall have fallen due up to the time of the decree, and if there be any to become due thereafter to provide that the party may come in on the foot of the decree to obtain satisfaction of the same out of the surplus proceeds, if any there should prove to be. To this practice I can see no well founded objection. It would be useless and occasion unnecessary costs and delay to require the party to commence a new suit or even file a supplemental bill whenever another installment shall fall due; and the defendant in making his defence as to the first installment may if he please make it to any or all of the others or may obtain leave to do so in proper time afterwards.

95 *I have examined the cases cited by the counsel on this point but have seen in them no reason to doubt the correctness of my construction of the statute. The cases apparently most resembling this case are those of Kinney v. Hudnut, 2 Scamm. R. 472; Pryor v. White, 16 B. Mon. R. 605; Bartlett v. Kingan, 7 Harris Penn. R. 341; McClallan v. Smith, 11 Cush. R. 238; and Jones v. Alexander, 10 Smedes & Marsh. R. 627. But they were upon statutes differing in some respects from ours, and they do not touch the particular point made here. The case of Kinney v. Hudnut merely decides that under the statute of Illinois, there can be no cause of action until the contract is completed and payment is due. In that case there was no special contract as to the time when the work was to be paid for. In Bartlett v. Kingan, the claim was for work done and bricks furnished on an entire contract for the erection of a house, and it was held that under the Pennsylvania statute, the six months' limitation commenced to run from the completion of the contract, and that the party was in time if his claim was filed within that period after the last quantity of bricks was furnished and laid. Here the demand was for an entire sum due in whole upon the completion of the contract. In Pryor v. White, it appears that under the Kentucky statute the lien is to be enforced by bill filed within one year from the completion of the work, and that the party in that case had taken notes for the work some of which would not fall due until after the year: and it was held that as he had thus by his voluntary act placed himself in a position which rendered him unable to bring a suit to enforce the lien as to them within the year, he was to be regarded as having virtually waived it. Jones v. Alexander was a case under the Mississippi statute which required the suit to be brought within twelve months from the time the money was to be paid in

96 order to secure the *lien. The plaintiff had furnished lumber to the defendant for a house in 1844, the proper time of payment for which was the 1st of January 1845; and in May 1845 he had taken the defendant's note for the amount payable one day after date, but the petition to enforce the lien was not filed until April 1846. It was held that the party could not deviate from the original contract and extend the time when according to it the lien would attach, and as the petition had not been filed within twelve month from the time when payment was to be made, it could not be maintained. In McClallan v. Smith, which was a case under the Massachusetts statute, the contract was to do the work during the season ensuring its date, which was the 30th of May 1845; the contractor did part of the work in 1845 but did not complete it until May 1846, and the property having been conveyed to others, he sought to enforce his lien against them. It was held that although he would have been entitled to compensation for the work he did during the season of 1845, because his failure to complete the building was occasioned not by his default but by that of the owner in furnishing materials, and to have his lien enforced to that extent if he had commenced his suit in due time; yet as he had not filed his petition within six months from the time when the amount due for the work done in 1845 would have been payable according to an equitable adjustment under the contract, his lien was lost and the land discharged of the incumbrance: the court being of opinion that the work done after the season in 1845 was to be regarded as done under a subsequent parol agreement, which did not continue the former lien nor create a new one.

Thus it shall be perceived, as I think, that these cases all differ in their distinctive features from our case and give but little aid in settling the true construction of our act. Nor have I seen any sufficient

97 *reason for applying a different rule to the lien which it creates from that which obtains in other cases of lien for money payable in installments. I think the party could come into equity to enforce the lien as soon as either installment became due, and that when he did so, the court could properly make provision for the others. In this view it is unnecessary to enter into the doctrine of assignments for the purpose of determining how far without such lien, the appellee could have maintained himself in that court upon the footing of his assignment alone.

But the counsel for the appellants goes still further and insists that there never was a lien at all because the contract was not acknowledged by Iaege and admitted to record for the purpose of creating a lien, nor did he know that such would be the effect. Or if it must be held that there is a lien, that it is not assignable and consequently the appellee has no footing in court to enforce it for his benefit.

Nothing is said in the act about the intention with which the contract is admitted to record, nor is any certificate required of the purpose for which it may be acknowledged or recorded. The appellee, it appears, who was to advance the money refused to

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do so unless the contract was recorded, and to overcome this difficulty, Iaege went to the clerk's office and acknowledged it for that purpose. No fraud or imposition is alleged to have been practiced upon him, and his ignorance of the legal consequences of recording the contract cannot prevent the lien from having effect. Otherwise it would be a fraud upon the appellee who has advanced his money upon the faith of the rights thereby acquired. I think it clear therefore that the party must be deemed when he acknowledged the contract and assented to its being recorded, to have known that it would create a lien or at least
98 that *he was content to abide by all the legal effects and legitimate consequences of its being so recorded.

Nor do I think that the position taken by the counsel that such a lien is not assignable can be maintained. By the act of 1819 it is declared that assignments of all bonds, bills and promissory notes and other writings obligatory whatsoever, shall be valid; and that an assignee of any such, may thereupon maintain any action in his own name which the original obligee or payee might have brought. 1 Rev. Code 1819, p. 484, § 5. In the Code of 1849, the declaration that such assignments shall be valid is omitted, and it is simply provided that the assignee of any bond, note, or writing not negotiable, may maintain thereupon any action in his own name which the original obligee or payee might have brought; the revisors, I presume, supposing that to give the action to the assignee in his own name sufficiently affirmed the validity of the assignment without any express declaration to that effect. Code, ch. 144, § 14, p. 583. Now I see no reason why the assignee in this case could not maintain an action at law in his own name upon this contract. It seems to me to be fully embraced by the terms of description both in the Code of 1819 and that of 1849. But if this may be questioned, no reason is shown why it may not be regarded as assignable for value in equity. It is said and authorities have been cited to show, that such a statute is to be construed strictly, and it is contended that it is intended exclusively for the benefit of the builder and material-man. No case has been cited affirming that a contract under such a statute cannot be assigned. There is nothing in public policy or in the language or the policy of our act to forbid it; and if the statute be exclusively for the benefit of the builder and material-man it would certainly impair the value of his lien to declare
99 *it non-assignable. It might prejudice him by depriving him of credit which he might otherwise obtain to prosecute his undertaking, and thus also operate a disadvantage to the owner. Whilst the latter can in no respect be injured by the assignment, because the assignee takes the obligation subject to the same equity to which it was subject in the hands of the obligee and must allow all just discounts not only against himself but against the assignor before notice of the assignment.

I can perceive no reason for distinguishing between contracts of this character and other choses in action ex contractu in respect of the right to assign them. And it cannot be doubted that when the assignee takes the contract, he acquires with it the lien as a necessary incident.

I proceed next to consider the complaint made of the amount for which the decree was rendered.

By the contract the work about the house was to be executed in a workmanlike manner, whilst the proofs in the cause tend strongly to show that it was in fact executed in a very defective and unworkmanlike manner. It is proven that the doors were very much cracked (one of the witnesses says "cracked to pieces") and that they were too small from shrinking, were made of green or wet timber and that numerous holes were found in them; that the staircase had given way and the steps had sunk from a half to three-fourths of an inch below the skirting; that the wash-boards had left the floors or the floors had sunk from half an inch to an inch; that the mantles were badly executed and much shrunken; that the plastering was not well done, that the weather-boarding was very much split and shrunken for want of a sufficient lap and that the piazza in the rear was badly and improperly constructed. All the witnesses examined upon the subject agreed that the materials must have been
100 green *or unseasoned and that the work was not done in a workmanlike manner but was very defective; and they all think it was worth much less than was to be paid for it if executed in the manner required by the contract. It is true it was provided that the work when completed was to be valued by referees and the price was to be fixed by their valuation. But such a valuation would of necessity be based upon the condition in which the work appeared at the time it should be made, and it could not have been intended to deprive the party of the right to compensation for material defects in the work that were not discoverable at the time of the valuation but only became apparent afterwards. And as numerous and marked defects were subsequently disclosed the award of the referees as to the value of the work in its apparent condition at the time should not be held conclusive. It appears that the valuation was made by the referees immediately after the completion of the house in February 1853; the work was then just finished, freshly painted and plastered; every thing appeared right except perhaps the defective manner of the construction of the piazza in the rear, and it was not until after the materials used had become seasoned during the ensuing summer and fall that their defective character was exposed in the numerous flaws and defects which became strikingly apparent in various parts of the building, and thus invited attention as well to the materials themselves as to the manner in which they had been wrought.

If the price of the work had been fixed in the contract and the party had paid it im-

mediately on its completion, or if he had been sued and judgment recovered for the amount before the faulty and defective workmanship had discovered itself, it will scarcely be said that he would have been thereby deprived of the benefit of his contract for work done in a workmanlike
101 *manner, and of compensation for material defects which were subsequently disclosed. Nor can I think that the measurement and valuation made by the referees should under the circumstances of this case, have any greater effect.

The case of Kidwell v. The Balt. & Ohio R. R. Co., 11 Gratt. 676, has been cited by the counsel for the appellee upon this point; but it will be found I think upon examination to decide nothing incompatible with the conclusion I have arrived at in this case. That was a bill filed to obtain compensation for extra work and deficiencies in estimates of the value of work done, upon certain contracts for the construction of bridges on the line of the company's road. These contracts provided for monthly estimates to be made of the quantity, character and value of the work by an engineer designated, and when the work should be fully completed and accepted by the engineer, for a final estimate of the same, when the balance appearing to be due was to be paid to the contractor upon his executing a release of all demands against the company. There was a further provision that these estimates should be conclusive between the parties unless altered by the principal engineer to whom power was reserved to review the same and make alterations if he should choose to exercise it. The complaint on this branch of the case was that the estimates had all been made upon an improper and erroneous construction of the contracts, to the great prejudice of the contractor, and that he should not be bound by them on that account and also because of fraud and mistake imputed to the officers in effecting the contracts and making the estimates. The court held that neither fraud nor a mistake was made out in proof, and that in the absence of both, the final estimate of the engineer was conclusive between the parties. It was also held that whatever might be the true construc-
102 tion *of the contracts yet as the estimates had been made upon a particular construction of which the contractor was fully informed at the time and had received the monthly estimates based upon it without objection, he must be held to have acquiesced in that construction and to be bound by it; and that if he might have refused to abide by the final estimate, yet having made no objection to the engineer's proceeding to make it, and having attended upon him for that purpose and submitted his charges for the work done, he was concluded by the engineer's action. In this case the very matters sought to be controverted had been formally and directly submitted to and adjudicated by the referee, all the elements which should enter into his estimate were perfectly known at the time and the contractor by his acts and declarations, had acquiesced in the principles upon which he had attained his results. I can perceive nothing in this decision which touches the particular question in the case in judgment.

It is contended on behalf of the Building fund company that they were entitled to priority of payment out of the proceeds of the sale of the property, both as to the one hundred and twenty dollars advanced to Iaege before the building contract was recorded, and the four hundred and sixty-one dollars advanced and paid to the appellee afterwards; and on behalf of both the appellants it is insisted that the Circuit court should have so adjudicated before it directed a sale of the property.

The counsel for the appellee does not contest the priority claimed for the one hundred and twenty dollars, and he contends that upon the face of the commissioner's report and the decree of which it is the basis, this is impliedly conceded and should be regarded as sufficiently recognized: but he does contest the priority claimed as to the four hundred and sixty-one dollars paid after the building contract was recorded,
103 *and he argues that as the money arising from that sale was not disposed of by the decree but directed to be deposited in bank to the credit of the cause, the court could afterwards decide upon the priorities and thus no one would be prejudiced.

It is a well settled rule that where there are conflicting claims to priority of payment out of the proceeds of land about to be sold to satisfy the liens upon it, the court in order to prevent the danger of sacrificing the property by discouraging the creditors from bidding as they probably might if their right to satisfaction of their debts and the order in which they were to be paid out of the property, were previously ascertained, should declare the order of payment before it decrees the sale to be made. Cole's adm'r v. McRae, 6 Rand. 644; Buchanan v. Clark, &c., 10 Gratt. 164. It is therefore not sufficient that the court should direct the fund to be paid into court and should declare the priorities afterwards. The purpose for which it is done requires that it should precede the sale.

I do not see any thing in the report of the commissioner or the decree of the court confirming it which amounts to a declaration or recognition of the priority of the Building fund company even as to the one hundred and twenty dollars. The report simply states the facts, and the decree, after confirming the report, directs that if the balance stated to be due the appellee be not paid within ninety days with interest and costs, the property should be sold and the proceeds after paying the costs and expenses of the sale, paid into bank to the credit of the cause. Nothing is said in it in relation to either claim of the Building fund company, and the failure to adjudicate as to the order of payment is, I think, a material error in the decree.

As to the Building fund company's right to priority as to the one hundred and

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104 twenty dollars, no objection *is made, nor can its right to such priority as to the four hundred and sixty-one dollars, be successfully contested. When the company advanced the one hundred and twenty dollars to Iaege for and on account of the redemption of a share held by him in the stock of the company, they took from him a deed of trust upon the property to secure the payment of that sum as well as of any other sum or sums they might thereafter advance on account of the redemption of other shares. This arrangement was fully within the terms of the charter and the by-laws of the company, and was the mode in which the main object of the association was carried into effect, and it was well known to Martin, Warthen and the appellee at the time the contract for building the house was executed and when the same was assigned to the appellee. The deed of trust was duly admitted to record before the contract for building was entered into, and when it was made and assigned to the appellee, it was perfectly well known to all these parties that the principal part of the funds to be paid for the work was to come from the Building fund company and to be advanced by it on the security of the deed of trust which they had taken; and accordingly they required Iaege by the contract to give good security for the excess of the cost of the building above the five hundred dollars expected from the company. And when the money was paid to the appellee, he knew that it was paid by the company on the security of the deed of trust, and with the understanding on their part that they were to be indemnified in preference to any other claimant, and it was accepted and received by him in payment for materials furnished and work done upon the very property without objection and without protest as to the justness of the expectation with which it was paid. To permit the appellee now to repudiate his
105 *recognition of the priority of the company's claim would operate a virtual fraud upon them and would be most unjust and inequitable.

I think therefore the Building fund company is entitled to priority in payment of the proceeds of the property as well of the four hundred and sixty-one dollars advanced in redemption of stock as of the one hundred and twenty dollars advanced in that way at the time the deed of trust was executed.

There are two other points which perhaps should be briefly noticed.

An exception was taken to the paper offered as evidence of the measurement and valuation of the work by the referees because it purported to be a copy and not the original. This exception is without date and it does not appear when it was in fact taken. But the paper was filed as an exhibit with the bill and although the answers are very full and elaborate no objection is taken to the paper on that account nor is any call made in them for the original. The paper was also received by the commissioner as evidence, there was no call made for the production of the original before him nor does he report that any objection was made to the paper because it was but a copy. The exception therefore either came too late or must be regarded as having been waived by the parties, and it was properly disregarded by the Circuit court.

The remaining point relates to the contingent dower interest of the wife of the appellant Iaege in the property. It is said that this was not affected by the mechanic's lien, and that the court therefore should not have sold the entire estate, but only the interest of Iaege. That the mechanic's lien does not override the dower interest of the wife is very clear, and if any authority to the point were needed, it would be found in Shaeffer v. Weed, 3 Gilm. 511. But Mrs. Iaege had united with her husband in
106 the deed of trust for the *benefit of the Building fund company, and if a sale takes place it must be to raise the amount due the company as well as that due to the appellee. It would be proper therefore that the property should be sold out and out, but as the wife has a contingent dower interest in the equity of redemption and being a party to the cause, is to be bound by the decree, the court should make a proper provision to compensate that interest out of the surplus proceeds of sale, if any, after satisfying the amounts due the Building fund company before any part of the same shall be paid over to the appellee.

I am of opinion to reverse the decree and remand the cause for further proceedings.

The other judges concurred in the opinion of Lee, J.

The decree was as follows:

The court is of opinion that the Circuit court did not err in maintaining the jurisdiction of the court of equity to grant the relief prayed for by the bill, nor in disregarding the exception to the copy of the measurement and valuation of the referees filed as an exhibit with the bill, nor in holding the appellee entitled to a decree for all of the installments of the price of the work although part thereof only became due pending the cause. But the court is of opinion that before decreeing a sale of the property, the Circuit court should have directed an enquiry by a commissioner into the alleged defects in the work done in the execution of said contract which were disclosed and became apparent after the valuation made by the referees, and should have ascertained what would be a just compensation to the appellant Iaege for such defects, and should have caused the same when so ascertained to be accounted for out of the balance due the appellee if sufficient to satisfy the same, before any amount should be decreed to him on said contract.

107 *And the court is further of opinion that before decreeing a sale of the property, the Circuit court should have adjudicated the priority of payment out of the proceeds thereof as between the appellee and the Building fund company, and should

have declared the said company entitled to such priority both as to the one hundred dollars balance of what was paid before, as well as to the four hundred and sixty-one dollars paid after the said building contract was admitted to record.

And the court is further of opinion that it was proper the said property should have been decreed to be sold out and out, but that inasmuch as the wife of the said Iaege is entitled to a dower interest in the equity of redemption after satisfying the purposes of the deed of trust, and as she is a party to the cause the court should make a suitable provision for the preservation of such dower interest out of the surplus proceeds of sale after satisfying the demands of the Building fund company, before any part thereof should be paid over to the appellee.

Wherefore the court is of opinion that there is error in said decree.

Therefore reversed with costs and remanded with instructions further to proceed in the same according to the principles hereinbefore declared.

Decree reversed.

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108 *Clegg v. Lemessurier.

April Term, 1859, Richmond.

1. **Sealed Instruments—Scrolls—Failure to Recognize in Body of Instrument—Effect.***—A writing for a payment of money or other purpose, which is not required to be by deed, having a scroll at the foot thereof with the word "seal" written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument.

2. **Same—Same—Same—Evidence.**—Evidence *aliunde* is not admissible to prove that a scroll at the foot of a writing was intended as a seal.

This was an action of debt in the Circuit court of Petersburg, brought by Nathaniel Clegg against Peter Lemessurier. The first count was in the usual form upon two writings obligatory, of which profert was made. The second count stated that the defendant, by his certain writing subscribed by him, and to which he affixed a scroll by way of seal, of which profert was also made, promised, &c. The defendant craved oyer of the writings, and demurred to each count; and the court sustained the demurrer.

The first paper declared on was as follows:

Pittsboro' Jan'y 1st, 1835.

One day after date, I promise to pay to Nath'l Clegg or order, the sum of two hundred and seventy-seven dollars fifty-one cents. Valued received in lumber.

P. Lemessurier. [Seal.]

The second paper was substantially like the foregoing, and was for one hundred dollars.

There having been a judgment for the defendant, the plaintiff applied to this court for a supersedeas; which was allowed.

Joynes, for the appellant, reviewed
109 the authorities, *English and Amer-

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*Sealed Instruments—Scrolls—Failure to Recognize in Body of Instrument—Effect.—The principal case is authority for the proposition that, a writing for the payment of money or other purpose, which is not required to be by deed, having a scroll at the foot thereof with the word "seal" written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument and the fact that it was intended as a seal cannot be proved by evidence *aliunde*.

The following cases hold in accord with the principal case that, a scroll affixed by way of seal must be recognized in the body of the instrument: Baird v. Blaigrove, 1 Wash. 170; Austin v. Whitlock, 1 Munf. 487; Anderson v. Bullock, 4 Munf. 442; Jenkins v. Hurt, 2 Rand. 446; Peasley v. Boatwright, 2 Leigh 195; Turberville v. Bernard, 7 Leigh 302, and *note*; Cromwell v. Tate, 7 Leigh 301; Gover v. Chamberlain, 83 Va. 286, 5 S. E. Rep. 174; Thomas v. Linn, 40 W. Va. 127, 20 S. E. Rep. 880; Keller v. McHuffman, 15 W. Va. 78, 79, the last two citing the principal case.

In Bradley Salt Co. v. Norfolk Importing, etc., Co., 95 Va. 461, 28 S. E. Rep. 567, citing the principal case, it is held that an actual seal affixed to a contract for the sale of personal property must be recognized in the body of the contract in order to make it a sealed instrument.

But in those cases required by law to be under seal, as conveyances, etc., it may perhaps suffice to have a solemn recognition of the scroll as a seal at the time that the instrument is acknowledged or proved for registry but extrinsic evidence is in no case otherwise admissible to prove that a scroll at the foot of the writing was intended as a seal. 3 Min. Inst. (3rd Ed.) 345; 2 Min. Inst. (4th Ed.) 835; Parks v. Hewlett, 9 Leigh 511; Ashwell v. Ayres, 4 Gratt. 24 Clegg v. Lemessurier, 15 Gratt. 108.

See also, for the first part of the above proposition Cosner v. McCrum, 40 W. Va. 346, 21 S. E. Rep. 741, citing the principal case.

See Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347, where the copy of a paper purporting to be a deed of conveyance of real estate is offered in evidence as a deed, in an action of ejectment and the copy does not disclose anything in the way of scroll or device to show that the original was sealed, it was held, that the fact as to whether the original was a sealed instrument was under the circumstances a question of fact for the jury.

On the question of seals, see 1 Va. Law Reg. 518, 622, 3 Va. Law Reg. 282.

In Freeman v. Eacho, 79 Va. 45, trust property, a house and lot, was settled upon a married woman as her separate estate free from the liabilities of her husband, with power, by a writing under her hand and seal, attested by two witnesses, to direct the trustee to sell or encumber it. But in neither case was the writing under seal by which she directed the trustee to execute the two trust deeds by which the notes were secured. In each case the scroll was annexed to the signatures, but was not recognized as a seal in the body of the instrument. It was manifest, however, from all the surrounding circumstances that she intended to execute the power and that the omission to recognize the scroll in the body of the instrument was the result of mere inadvertence or mistake. The court held, citing Clegg v. Lemessurier, 15 Gratt. 108, that the instrument was not sealed but that it was a case of a defective execution of a power which a court of equity would remedy. See, in accord, Pollock v. Glassell, 2 Gratt. 439.

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ican, including our own; and deduced the following conclusions:

1st. That though previous to 28 Henry 8, it was necessary to recognize the seal in the body of the instrument, to constitute the writing a deed or bond, yet from that time to the present day it has been held that at the common law, such recognition of the seal was not necessary. He referred to Dyer's R. 196; Goddard's Case, 2 Coke's R. 5; 4 Comyn's Dig. Fait. 2 A; Wentworth's Executors 239; 1 Sheph. Touch. 55, 30 Law Libr.; Coke Litt. 7 a; 2 Thomas' Coke 243, marg.; 5 Bac. Abr. Obligation, C; Grellier v. Neale, Peake's Cas. 146; Fasset v. Brown, Id. 23; Lesher v. Levan, 2 Dall. R. 96; per Grant, M. R., in Burrowes v. Lock, 10 Ves. R. 473; Ball v. Taylor, 1 Car. & Payne R. 417, 11 Eng. C. L. R. 438; Ingram v. Hall, 1 Hayw. R. 193, and books cited there; 1 Phillips' Evi. 474; Tucker, P., in Cromwell v. Tate, 7 Leigh 301; Tucker and Parker, Js., in Parks v. Hewlett, 9 Leigh 511; Baldwin, J., in Pollock v. Glassell, 2 Gratt. 439.

2d. That a scroll was as valid as a seal as wax, if intended as such, independent of the statute. Jones v. Logwood, 1 Wash. 42; Buckner v. Mackay, 2 Leigh 488; Ingram v. Hall, 1 Hayw. R. 193; Relph v. Gist, 4 McCord's R. 267; McDill v. McDill, 1 Dall. R. 63; Long v. Ramsay, 1 Serg. & Rawle R. 72.

3d. That in none of the Virginia cases had the question come up on demurrer; or has the court rejected evidence tendered for the purpose of proving aliunde that a scroll was affixed by way of seal; and in no case has it been declared to be inadmissible. He referred to and analyzed the cases. Baird v. Blaigrove, 1 Wash. 170; Austin's adm'x v. Whitlock's ex'or, 1 Munf. 487; Anderson v. Bullock, 4 Munf. 442; Jenkins v. Hurt's comm'rs, 2 Rand. 446; Peasley v. Boatwright, 2 Leigh 195; Cromwell v. Tate, 7 Leigh 301. And he insisted that such evidence was clearly admissible, according
110 *to the cases of Parks v. Hewlett, 9 Leigh 511; Pollock v. Glassell, 2 Gratt. 439; and Ashwell v. Ayres, 4 Gratt. 283.

4th. That in eleven of the states of the Union, the affixing of a scroll is of itself sufficient evidence of its being intended as a seal; or other evidence either in the instrument or aliunde, is admissible to prove the intention and constitute it a sealed instrument. Ingram v. Hall, 1 Hayw. R. 193; Yarborough v. Monday, 2 Dev. R. 493, 3 Id. 420; Trasher v. Everhart, 3 Gill & John. R. 234; Relph v. Gist, 4 McCord's R. 267; Scruggs v. Brackin, 4 Yerg. R. 528; Bertrand v. Byrd, 4 Pike's R. 195; McRaven v. McGuire, 9 Smedes & Marsh. R. 34; English v. Helms, 4 Texas R. 228; Whitley v. Davis, 1 Swan's R. 333; Williams v. Greer, 12 Georgia R. 459; Hubbard v. Beckwith, 1 Bibb's R. 492; Taylor v. Glazer, 2 Serg. & Rawle R. 502; Vanblaricum v. Yeo, 1 Blackf. R. 50; Jeffery v. Underwood, 1 Pike's R. 108.

J. Alfred Jones, for the appellee, referred to the cases decided in this court, especially Cromwell v. Tate, 7 Leigh 301. He distinguished the cases of instruments for the payment of money, and cases which from their subject matter could only be executed by deeds duly recorded; and he insisted that the decisions upon the first class of instruments were unanimous, not only that the scroll was insufficient of itself to constitute the writing a sealed instrument, but also that proof aliunde to show the intention with which the scroll was annexed was inadmissible: And that he insisted was the reason why no cases can be found in Virginia in which such evidence was offered.

He insisted further, that the cases in Virginia which it is supposed have shaken the rule so long established, were cases of deeds where deeds were necessary to effect the object in view, and were in fact re-
111 corded. *They were Parks v. Hewlett, 9 Leigh 511; Pollock v. Glassell, 2 Gratt. 439; Ashwell v. Ayres, 4 Gratt. 283. That it was impossible to suppose that the judges who had so lately decided Cromwell v. Tate, intended to reverse that decision in Parks v. Hewlett, without giving the slightest intimation of their change of opinion; and in fact, Parker, J., says in his opinion in the last named case, that both Cabell and Carr stated there was no conflict between the cases. And in Pollock v. Glassell, Judge Baldwin is careful to distinguish between the two classes of instruments, and the law as applicable to each. And if Judge Tucker, in Cromwell v. Tate, thought the principle of stare decisis forbade the change of the rule at that time, with how much more force might he invoke the application of that principle, at this day, with the added weight of authority which that case gives to the rule.

LEE, J. The action in this case is founded upon a promise in writing simply for the payment of money. The writing is signed with the name of the maker at the end of which is a pair of brackets by way of scroll with the word "seal" written within them. The declaration consists of two counts, the first of which alleges a sealed instrument in the usual form, and the second avers that the paper writing was subscribed by the defendant and a scroll affixed by him thereto by way of seal. Profert was made in both counts, and the defendant having craved oyer, demurred to each count. The court sustained the demurrer to both and rendered final judgment for the defendant, and the case has been brought to this court by a supersedeas.

Two questions are raised upon these demurrers:

1. Is the scroll appearing affixed to the name of the maker of the instrument with the word "seal" written within it, such a recognition or expression that it
112 *was affixed by way of seal as will make the writing a sealed instrument?

2. Could the plaintiff be permitted to prove by evidence aliunde that the maker of

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the writing intended to adopt the scroll as a seal and thus make it a sealed instrument?

Whatever may be the decisions in some of the other states of the Union, I think scarce any counsel could be found in Virginia who speaking of the law at this day as settled in this state would answer the first of these questions in the affirmative. The contrary has been the doctrine universally accepted by the profession and is I think fully sustained by the decisions of this court. I refer to Baird v. Blaigrove's ex'or, 1 Wash. 170; Austin's adm'x v. Whitlock's ex'ors, 1 Munf. 487; Anderson v. Bullock, &c., 4 Munf. 442; Jenkins v. Hurt's commissioners, 2 Rand. 446; Peasley v. Boatwright, 2 Leigh 195; Turberville v. Bernard, 7 Leigh 302, n.; Cromwell v. Tate's ex'or, 7 Leigh 301. In all of these cases except the two first, it distinctly appears from the reports that scrolls were affixed to the instruments in question with the word "seal" or its equivalent written within each. The report of the two cases first named does not show certainly that the word "seal" or any equivalent was written within the scrolls; but I have taken occasion to examine the original records among the archives of this court and found that in Baird v. Blaigrove's ex'or, the word "seal" is written within each of the scrolls, and in Austin's adm'x v. Whitlock's ex'ors, the initials "L. S." are substituted for the word "seal" within the scroll, as in Anderson v. Bullock, importing of course exactly the same thing. I regard this therefore as no longer a question open to discussion in this state, and I will not stop to trace the rule up to its source or attempt now to vindicate its propriety and correctness.

113 *The remaining question is one more fairly perhaps the subject of discussion although I think in respect to an instrument like that in this case there would have been as little room for debate as upon the first question but for certain recent decisions to which I will presently refer more particularly and the remarks of some of the judges in delivering their opinions. For I think it impossible to read the cases above cited without seeing that the decision was rested upon the necessity of the recognition of the scroll in some form on the face of the instrument. In Baird v. Blaigrove's ex'or, Judge Pendleton speaking for the court says, "it is in no part of the instrument expressed to be sealed—the attestation is the same as in common simple contracts not under seal, nor does the declaration speak of it as being of that dignity—it is true there are scrolls annexed but it may nevertheless remain a matter of doubt whether they are to be considered as the seals of the parties." He does not however intimate that such doubt might be resolved by extrinsic evidence. In Austin's adm'x v. Whitlock's ex'ors, the paper was no where stated in its body, to have been sealed, it was attested in the manner appropriate to simple contracts and a consideration was stated in the writing. Held, that it did not appear upon its face to be a sealed instrument but rather the contrary. Judge Tucker says expressly that the omission of the word "seal" in the clause of attestation, precluded, in his opinion, all evidence dehors the instrument of the execution of it in any other manner than was expressed in the body of the instrument. And although Judge Roane does not say in terms that evidence dehors would not be admissible in such a case, yet in what he does say, I think he is plainly looking to the face of the writing itself for the circumstances which are to exalt the instrument into a specialty. In Anderson v. Bullock, &c., the circumstances which were regarded

114 as *evincing the character of the writing were such as appeared on its face, and while it is not said that evidence dehors was inadmissible only such as was intrinsic was alluded to as sufficing to constitute the writing a sealed instrument. In Jenkins v. Hurt's comm'rs, Judge Green speaking for the court, said that the paper in question was a simple contract and that the declaration should have claimed according to the legal effect of the contract. Manifestly, he regarded the character of the instrument as a question of law and considered that its legal effect was to be deduced from what appeared on its face. He could not have thought that it was a question of fact and intention to be left to a jury upon the evidence furnished by the face of the instrument and such evidence aliunde as might be offered. In Peasley v. Boatwright and Turberville v. Bernard, the question as to the character of the instrument, was plainly considered as a question of law to be determined by the court upon what appeared on its face. And in Cromwell v. Tate's ex'or the question was distinctly presented whether the scroll must be recognized as a seal in the body of the instrument in order to constitute it a deed. Judge Tucker delivering the unanimous opinion of the court, held that it was the settled law of Virginia that such recognition was necessary, and he alludes to the mischiefs that might be expected to ensue if the course of the court should be reversed and such recognition should be dispensed with. And although he thought the common law rule was different, yet he declared that he did not think it desirable to restore it and he referred to the abuses which the omission of the clause in cujus rei testimonium might introduce. He said that sealing was a part of the contract itself and that it was contrary to the analogies and principles of the law that an essential term or stipulation of a written contract should be made to depend wholly upon testimony dehors the instrument.

115 *After such a line of decisions ending in one so well considered and so direct to the point and in which all the judges of the court concurred, it might well be supposed that this question also was put to rest. But it is supposed that the doctrine of these cases, if it established the necessity of a recognition of the scroll in the

body of the instrument, has been wholly repudiated and overthrown by more recent cases; and the counsel refers to Parks v. Hewlett, 9 Leigh 511; Pollock v. Glassell, 2 Gratt. 439; and Ashwell v. Ayres, 4 Gratt. 283, as conclusively establishing that the sealing may be proved by evidence aliunde.

All of these cases may I think be readily distinguished from those we have been considering, however broad the language of some of the judges whose opinions are given may appear to be, and one may well concur in the result of each of those cases although he might not in all the views taken by the judges. In Parks v. Hewlett, the instrument in question from its very character was intended to be a deed because it was intended to emancipate a slave which could only be effected by deed; and in Ashwell v. Ayres the instrument was intended to be a conveyance of lands (in fee simple it may be inferred) which could only be by deed, and the former was wholly inoperative, and the latter, inoperative as to creditors and purchasers, until recorded upon proof or acknowledgment as the act requires. In the former case, the attestation clause expressed that it was signed, sealed and acknowledged in presence of the witnesses, and it was proved by two witnesses in court and admitted to record. In the latter, the instrument was acknowledged by the grantor and admitted to record; and it was doing no violence to the spirit or terms of the rule to say that in these cases, the recognition of the seal did sufficiently appear on the face of the instrument. See opinion of Judge Allen (speaking for
116 the court) in *Ashwell v. Ayres, 4 Gratt. 283. And as recording was essential to perfect the instruments for the purposes intended, it might be said without impropriety that this was part and parcel of the perfect deed and sufficiently manifested the recognition of the writing as a sealed instrument. The distinction then between instruments of this character which can only be effectual as deeds and a promise in writing simply for the payment of money which might be indifferently an obligation under seal or a promissory note, and as to which neither acknowledgment before witnesses or in court nor recording, was necessary, must be apparent.

It is true that Judge Parker in his opinion in Parks v. Hewlett seems strongly inclined to the views which he must have held when he decided the case of Cromwell v. Tate which was afterwards reversed and he uses various expressions which might embrace promissory notes as well as such instruments as that he was then considering; and he refers to the fact that in none of the previous cases relied on, was there any proof that the instrument had been actually sealed or scrolls annexed by way of seals. But it appears that he had not seen the opinion in the case of Cromwell v. Tate in which all the judges had concurred, and it is impossible to suppose that the same judges who had so recently decided that case intended to disturb the principles on which it rested as to cases of that kind. No allusion whatever is made by any judge who delivered an opinion to any change of views in any respect, and it is plain they regarded the case they were considering as belonging to a distinct class and indeed we are informed by Judge Parker that he had been assured by the judges who were present when Cromwell v. Tate was decided that there was nothing in their opinions affecting the question in the case of Parks v. Hewlett. Judge Brockenbrough and Judge Cabell considered the case as
117 clearly distinguishable *from all the previous cases, and Tucker, president, who had delivered the opinion of the court in Cromwell v. Tate, contented himself with concurring in the result to which Judge Parker had come, for the reason, no doubt that there were some views presented in Judge Parker's opinion which to some extent conflicted with the opinion in Cromwell v. Tate which had not been seen by Judge Parker when Parks v. Hewlett was decided.

Nor is the case of Pollock v. Glassell more difficult to be distinguished from cases like the present. That was the case of a testamentary paper executed by a wife under a power given her to dispose of the settled estate by gift or devise, under her hand and seal, attested by two or more witnesses. There was a scroll affixed to the name of the testatrix with the word "seal" written within it, though it was not recognized as a seal either in the body of the instrument or the clause of attestation. The court however distinguished between such an instrument and one purporting to be a contract. Judge Baldwin said that the question was not whether the instrument was "a sealed instrument with a view to its legal effects and consequences as such. The law does not require a will to be sealed, and it has precisely the same force and effect without as with a seal. The true question is whether in conformity with the power of appointment the testatrix did affix a seal to the paper, and that is a question of evidence." The judge continued "whether a paper be in law a sealed instrument or not, is a question applicable only to contracts. If it has a seal then it is a deed or specialty; if not, it is a simple contract only, and that is a question of law to be determined by inspection of the instrument." And a little further on he says "in contracts the presence or want of a seal makes a wide difference in the general character of the instrument and its legal effects and consequences."
118 * * * * * "But in a testamentary paper it has no bearing whatever upon the legal character or operation of the instrument: no solemnity of sealing could make it a specialty and the act of sealing can amount to nothing more than the performance of a condition."

I think it must be perceived upon an examination of the opinion that Judge Baldwin was distinguishing between a case in which the question was as to the true

character of the instrument and its legal effects and consequences, and that in which the act of sealing gave no new or different character to the instrument but amounted only to the performance of a condition, and the question therefore was one of evidence only. In the former case, he says, it is a question of law to be determined by inspection of the instrument and its distinctive character is to be determined by its intrinsic evidence; and he states that in such cases (that is of contracts) the decisions of this court had required that the substitution of a scroll for a seal should be recognized upon the face of the instrument. In the latter he thought evidence aliunde might be admitted, because whilst there were strong considerations of policy and convenience to recommend the exclusion of such evidence as a general rule in actions founded upon contract, there could be none applicable to a case like that then before the court. It is true according to the report of the case, the judge adds "and in no case has it yet been held that in the absence of such recognition evidence is inadmissible to prove that in fact the scroll was affixed to the instrument with intent that it should stand in place of a seal;" but I think either the word "inadmissible" was inadvertently written for "admissible," or that what was said was intended to apply only to cases like that then before the court in which the question was one of evidence as he had before explained and which was
119 not *within the decisions to which he had referred requiring the recognition to appear on the face of the instrument and which he thought recommended by strong considerations of policy and convenience. Those decisions necessarily or by the strongest implication, excluded all evidence dehors the instrument, and to suppose that he meant to affirm that extrinsic evidence had never been held inadmissible in cases like those referred to, would be, it seems to me, to impute to that eminent judge and accurate thinker, a virtual contradiction of the whole scope of his previous remarks.

Judge Baldwin in this opinion also distinguishes between cases like that of Parks v. Hewlett and Ashwell v. Ayres (decided some time afterwards) and the cases to which the decisions he had alluded to should apply; but there is nothing in the opinion when fairly construed and nothing in the case or in that of Parks v. Hewlett or that of Ashwell v. Ayres, which overthrows or in any material respect disturbs the rule established by the previous decisions of this court: and that rule I think may be thus stated; that in cases of contracts in writing like that in the present case which might have been intended to be, indifferently, simple contracts or sealed instruments and in which the question is as to the character of the instrument and its legal effects and consequences, the fact that a scroll may be affixed to the name of the maker with or without the word "seal" written within is not of itself such a recognition of the scroll for a seal as will make the writing a sealed instrument; and that evidence dehors the paper cannot be admitted for the purpose of showing that it was in fact intended to be such an instrument.

That many of our sister states have adopted a different rule, furnishes no sufficient reason in my judgment why we should reverse our course of decisions or change the rule they have prescribed. Con-
120 formity *of decisions in the different states of this Union is, doubtless, desirable and for its sake some concession might be made where no public inconvenience may be involved; but I think the mischiefs that would ensue from reversing our course (some of which are pointed out by Judge Tucker in Cromwell v. Tate) might be very extensive and serious, and would I am confident, be of far greater moment than the casual instances of hardship occurring in individual cases (such as those of which the counsel cites the present case as an illustration) which would be occasioned by our adhering to it. Let us then not change our rule. Jus nostrum magis quam alienum, servemus.

But if the matter were of first impression and free choice were offered between our rule and that adopted in the sister states, for myself, I will say that I am by no means prepared to give the preference to the latter. At this day the chief if not the only practical purpose that would be accomplished by adopting it would be to change the period of the bar of the statute of limitations from five years to twenty, by opening the door to parol testimony of the acts and declarations of the maker of the instrument at the time of executing it and afterwards, and thus trusting the proof of so very important a part of a written contract as sealing, in the language of Lord Coke "to the uncertain testimony of slippery memory." Countess of Rutland's Case, 5 Rep. 25. And very much the same policy which led to the passage of Lord Tenterden's act, and to its adoption into our Code, would prompt to a preference of the rule which would close the door to evidence of that character. The policy of that act was to prevent perjuries by requiring the promise that should revive a debt barred by the statute of limitations, to be in writing and signed by the party to be charged thereby; and the same policy would also be promoted by forbidding that so material an element of a con-
121 tract as *sealing which is to have the effect of removing the bar of the statute appearing from the face of the paper, should be proven at perhaps a distant day, out of the mouths of witnesses, and requiring that it should be shown by the paper itself.

I have only to add in conclusion that whether the objection is made on oyer and demurrer or on motion to exclude the paper at the trial, the principle as it seems to me is precisely the same. The counsel has argued that the present case differs from all that have preceded it in the fact that the

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questions are presented on demurrer; but I do not perceive how their solution is in any manner affected by the manner in which they are raised.

I think the Circuit court committed no error in sustaining the demurrers and am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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122 *Washington and New Orleans Telegraph Co. v. Hobson & Son.

April Term, 1859, Richmond.

(Absent ROBERTSON, J.*)

1. **Telegraph Companies—Line Extending through Several States—Objection to Jurisdiction of State Court—How Taken.**—In an action against a telegraph company, the line of which extends through several states, though it appears that some of the defendants live out of the state, this is not cause for arresting the judgment against the company: If it is good ground for objection to the jurisdiction of the state court, it must be taken by plea in abatement before the defendants plead in bar. Code, ch. 171, § 19, p. 648.†

2. **Appellate Practice—Bills of Exception—Verdict Contrary to Evidence—Failure to State Facts or Evidence—Effect.**‡—On an exception to an opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, if the exception states neither the facts proved nor the evidence introduced on the trial, nor refers to another bill of exceptions in which all the facts or evidence given on the trial is shown to be stated, the appellate court cannot review the judgment of the court below.

3. **Same—Same—Time of Taking Exceptions—Waiver.**§—It must appear from the record that a point decided by the court has been saved before the jury retires; though the exception may be pre-

*The case was argued before his election.

†Code, ch. 171, § 19, p. 648: "Where the declaration or bill shows on its face proper matter for the jurisdiction of the court, no exception for want of such jurisdiction shall be allowed, unless it be taken by plea in abatement, and the plea shall not be received after the defendant has demurred, pleaded in bar, or answered to the declaration or bill, nor after a rule to plead, or a conditional judgment or decree *nisi*."

‡**Appellate Practice—Bills of Exception—Verdict Contrary to Evidence—Failure to Certify Facts or Evidence—Effect.**—For the proposition that, on an exception to an opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, if the exception states neither the facts proved nor the evidence introduced on the trial nor refers to another bill of exceptions in which all the facts or evidence given on the trial is shown to be stated, the appellate court cannot review the judgment of the court below, the principal case is cited and followed in the following cases: Mann v. Bryant, 12 W. Va. 525; Adams v. Hays, 86 Va. 157, 9 S. E. Rep. 1019. See, in accord, Hunter v. Stewart, 23 W. Va. 549; McArter v. Grigsby, 84 Va. 159, 4 S. E. Rep. 369; Smith v. Walker, 1 Call 28; Edgell v. Conaway, 24 W. Va. 747; Willard v. Overseers, 9 Gratt. 139; Shrewsbury v. Miller, 10 W. Va. 115.

In McVeigh v. Allen, 29 Gratt. 594, citing the principal case, it is held that, where it does not appear that all the evidence given on the issue joined is stated in the bill of exceptions, an instruction to the jury that if they believe certain facts stated they must find for the plaintiff, the appellate court must reverse the judgment, on the ground that the facts are too imperfectly stated to enable the court to decide whether or not the instruction is correct.

§**Same—Same—Time of Taking Exceptions—Waiver.**—It must appear from the record that the point decided by the court had been saved before the jury retired; though the exception may be prepared, and may be signed by the court, either during the trial or after it is ended, during the same term. If this appears from the whole record, it is sufficient, though it is not expressly stated in the bill of exceptions; but if it does not so appear from the record, the appellate court cannot review the judgment of the court below upon the point. For the above proposition, the principal case is cited and followed in the following cases: Welty v. Campbell, 37 W. Va. 801, 803, 17 S. E. Rep. 314; Gilmer v. Sydenstricker, 42 W. Va. 54, 24 S. E. Rep. 567; Wustland v. Potterfield, 9 W. Va. 441; Cunningham v. Porterfield, 2 W. Va. 448; Wickes v. B. & O. R. Co., 14 W. Va. 165, 171; Danks v. Rodeheaver, 26 W. Va. 293; Core v. Marple, 24 W. Va. 355; Fawcett v. R. Co., 24 W. Va. 761; Hudgins v. Simon, 94 Va. 662, 27 S. E. Rep. 606; N. & W. R. Co. v. Anderson, 90 Va. 10, 17 S. E. Rep. 757; Town of Suffolk v. Parker, 79 Va. 665; Powell v. Tarry, 77 Va. 259, 261; Page v. Clopton, 30 Gratt. 429, and *note*; Bank v. Waddill, 31 Gratt. 477, and *note*; Peery v. Peery, 26 Gratt. 324, and *note*.

In Nadenbousch v. Sharer, 2 W. Va. 295, the principal case is cited and the rule as to the time of taking the exceptions is approved, but the case at bar seems to go further and hold that, where the exception is to the opinion of the court expressed in its charge to the jury after the evidence is closed, such exception may be taken at any time before the verdict is announced. Also, in Neill v. Rogers Bros. Produce Co., 38 W. Va. 228, 18 S. E. Rep. 563, the principal case upon the same point is approved but this case holds that, where the trial judge, during the progress thereof, in overruling objections to the admission of testimony, expresses an opinion as to the material facts in issue, in the presence and hearing of the jury, so prejudicial that the error cannot be cured otherwise than by granting the party injured thereby a new trial, in case the verdict is against him, notwithstanding such opinion was not objected to at the time it was so expressed, it may be taken advantage of on the hearing of a motion for a new trial, and if the motion is overruled, and proper exceptions taken, the judgment will be reversed, and a new trial awarded, for such error alone. See *foot-note* to Bull v. Com., 14 Gratt. 613.

In Va. Dev. Co. v. Rich Patch Iron Co., 98 Va. 704, 37 S. E. Rep. 280, it is held that after final judgment, and the adjournment of the term, the judge of the court has no power to sign bills of exception to rulings made during the term, even though by agreement of counsel and leave of the court entered of record during the term. See, in accord, Winston v. Giles, 27 Gratt. 537, and *note*. The principal case is cited in both of the above cases. See

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pared, and may be signed by the judge, either during the trial or after it is ended, during the same term. If this appears from the whole record, it is sufficient, though it is not expressly stated in the bill of exceptions: but if it does not so appear from the record, the appellate court cannot review the judgment of the court below upon the point.

4. **Telegraph Companies—Alteration of Message—Liability—Instructions.**—In an action against a telegraph company, for damages sustained by the plaintiffs by the alteration of a message
123 sent on their line, *whereby an order to the plaintiffs' factors in Mobile to buy five hundred bales of cotton, was altered to twenty-five hundred, but not charging negligence in the company, an instruction that the defendants are not responsible as common carriers but only as general agents, for such gross negligence as in law amounts to fraud, is not authorized by the pleadings; and properly refused.

5. **Same—Same—Measure of Damages—Case at Bar.**—In such case the factors having bought two thousand and seventy-eight bales of cotton before the mistake in the message was ascertained, if the company is liable to the plaintiffs for the damages arising from the alteration of the message, the commissions of the factors upon the purchase of the cotton are a part of the damages for which the company is liable: and the plaintiffs are not bound to accept any offer of the company to pay the damages, which excludes these commissions.

6. **Same—Same—Same—Same.**—In such case, if the company is liable to the plaintiffs for damages arising from the alteration of the message, the measure of these damages is what was lost on the sale at Mobile of the excess of the cotton above that ordered, or if not sold there, what would have been the loss on the sale of the cotton at Mobile in the condition and circumstances in which it was when the mistake was ascertained; including in such loss all the proper costs and charges thereon.

7. **Same—Same—Same—Same.**—When the mistake was ascertained a part of the cotton was on board of a ship to be sent to Liverpool; a part was under a contract of affreightment to the same place, but not on board. The whole should have been sold as it was at Mobile; and the plaintiffs having sent it to Liverpool and sold it there, the loss to the company is not to be increased by this act of the plaintiffs, but must be based upon an estimate of what it would have sold for, a part on ship-board and a part under contract of affreightment.

8. **Same—Same—Same—Same.**—If the plaintiffs sent the cotton to Liverpool for purposes of speculation, with the intention of taking to themselves the profits, if any, and in the event of a loss, visiting the loss on the company, they are not entitled to recover for any loss sustained upon it.

9. **Same—Same—Same—Same.**—But if the plaintiffs sent the cotton to Liverpool, not with a purpose of taking the profits, if any, but only to indemnify themselves out of the proceeds to the extent of the cost and the obligations incurred by them, they do not thereby lose their right to recover from the company the damages which they would have sustained if the cotton had been sold at Mobile.

10. **Same—Same—Same—Same.**—The plaintiffs, if they intended to hold the company responsible for the excess of the cotton purchased, should, as soon as they were apprised of the purchase, have notified the company of such intention; should have made a tender of such excess to the company on the condition of its paying the
124 price and all the charges incident *to the purchase: and also, that in case of its refusal to accept said tender and comply with its conditions, they would proceed to sell such excess at Mobile, and after crediting said company with the net profits, would look to it for the difference between the amount of such proceeds and the cost of the excess, including all proper charges: And upon the failure of the company, after notice, to accede to their offer, they should have proceeded accordingly.

This was an action on the case in the Circuit court of the city of Richmond, instituted by John C. Hobson & Son against the Washington and New Orleans Telegraph Company. The declaration alleged that the defendants sent messages for hire; that the plaintiffs wishing to send a message or order to a commercial house in Mobile for the purchase on their account of five hundred bales of cotton, on the 2d of March 1854 delivered to the defendants at the city of Richmond a message to Robert W. Smith & Co. at Mobile, to be by the defendants conveyed by telegraph to Smith & Co. and paid the defendants the sum demanded therefor. That by this message the plaintiffs directed Smith & Co. to purchase for the plaintiffs five hundred bales of cotton. That the defendants did not accurately convey and deliver the message, but altered the number five hundred to twenty-five hundred, and the same so altered the defendants delivered to Smith & Co. That by reason of the message so altered Smith & Co. bought for the plaintiffs two thousand and seventy-eight bales of cotton. That due notice was given to the defendants of the error in the message as delivered to Smith & Co. and of their purchase for the plaintiffs of fifteen hundred and seventy-eight bales of cotton more than the plaintiffs had authorized by their message delivered to the defendants; and the defendants were requested to relieve the plaintiffs of the excess of the purchase by paying the costs thereof and the charges and expenses attending the same, or that they would be held
125 bound for any loss or damage *on the sale thereof. That the defendants refused to assume the purchase and relieve the plaintiffs; and that upon a sale thereof by the plaintiffs the loss on the fifteen hundred and seventy-eight bales of cotton was

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generally, monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

But, see Acts of 1901, p. 186, amending § 3385 providing that: Any bill of exceptions may be tendered the judge and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon. See also, W. Va. Code 1899, ch. 131, § 9.

[**Telegraph Companies—Alteration of Message—Measure of Damages—Case at Bar.**—See the principal case cited in W. U. Tel. Co. v. Reynolds, 77 Va. 176, 187.

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ten thousand dollars. By reason whereof, the defendants became liable to pay to the plaintiffs the said sum, &c.

The defendants demurred to the declaration; but at the November term 1855 of the court, the demurrer was withdrawn, and the issue was made up on the plea of not guilty. The cause came on for trial on the 19th of November, and was adjourned to the 21st, when the jury found a verdict for the plaintiffs for seven thousand three hundred and forty-one dollars and forty-five cents, with interest thereon from the 26th of March 1855 till paid.

The defendants filed three bills of exception to rulings of the court. One was to the refusal of the court to give certain instructions asked for by the defendants, and to an instruction given by the court. Another was to the refusal of the court to grant them a new trial, which was asked on three grounds: 1st. That the verdict was contrary to the evidence: 2d. That the instructions given by the court were erroneous: 3d. On the ground of newly discovered evidence. The other exception was on the ground of the refusal of the court to arrest the verdict.

An objection was raised in this court, that it did not appear that the exception first above stated was taken before the jury retired to consider of their verdict. The facts on this point are stated by Judge Daniel in his opinion.

The evidence stated in the first bill of exceptions, are letters, and accounts rendered, which were admitted by the defendants as if regularly proved, interrogatories by both plaintiffs and defendants, and the answers thereto by a witness, inter-
126 rogatories by the *defendants, and the answers thereto by the plaintiffs, and an agreement of certain facts by the parties. It appears from this evidence, that on the 2d of March 1854 Hobson & Son sent a message from Richmond to Robert W. Smith & Co. at Mobile, by the Washington and New Orleans telegraph company's line, directing them to purchase for the Hobsons five hundred bales of cotton at or under nine cents. This message was altered on the route to twenty-five hundred bales; and owing to some injury to the wires between Macon in Georgia and Mobile, was not delivered at the latter place until the 9th of the month. On the 3d of March Hobson & Son wrote to Smith & Co. advising them of their dispatch of the previous day; but owing to a derangement in the mails, this letter was not received in Mobile until the 13th.

On the receipt of the telegraphic message Smith & Co. sent to the office to know whether it was correct, and received it again: And thereupon they purchased two thousand and seventy-eight bales of cotton before they were informed of the mistake.

On the 16th of March S. Mowry, jr., the president of the telegraph company, telegraphed from Macon to an agent of the company in Mobile, and directed him to say to Smith & Co. "if they hold the company liable for any damages on the two thousand bales of cotton, hold it until I get there or you hear from me. I leave here to-night for your place." Mowry arrived at Mobile prior to the 20th of the month; and in interviews between Smith & Co. and himself, he proposed to take the fifteen hundred and seventy-eight bales at its cost, exclusive of the commission of two and a half per cent. charged by Smith & Co. for the purchase of the cotton. This proposition Smith & Co. declined for their principals, but proposed to lose one-half of their commissions.

At the time these propositions were
127 made, Smith & *Co. had made a contract for the shipment of one thousand bales of the cotton to Liverpool, of which all but two hundred and sixteen bales were on board of the ship prior to the 18th of the month. On the 21st they wrote again to Mowry, and said, they had, since writing to him on the 20th, received a telegraph from Hobson & Son, by which they felt authorized to say that Hobson & Son would take the one thousand bales shipped to Liverpool, provided he would take the one thousand and seventy-eight bales at prime cost with Smith & Co.'s charges. Mowry declined to accept the propositions of Smith & Co. His note is dated March 21st.

The one thousand and seventy-eight bales were sold in Mobile, at a loss of but eighty-seven dollars and seventy-two cents; but the loss on the five hundred bales shipped to Liverpool exceeded seven thousand dollars.

It was admitted by the plaintiffs that Mowry was prepared to carry into effect his proposition to take the cotton if it had been accepted; and that the loss on the cotton shipped to Liverpool arose from a decline in the price. And the defendants contended, from the answers of the plaintiffs to interrogatories filed in the cause, that the plaintiffs shipped the cotton to Liverpool on their own account, intending, if there should be a profit thereon, to appropriate it to themselves.

When both the plaintiffs and defendants had introduced their evidence and rested their case, the defendants moved the court to instruct the jury as follows:

1. The jury are instructed, that the defendants are not in this action to be considered as held responsible as common carriers but as general agents, not responsible for damages, resulting from a mistake or misdelivery of a message, except in cases of such gross and culpable negligence as in law amounts to a fraud.

128 *2. If the jury shall believe, from the evidence in the cause, that S. Mowry in good faith offered to relieve the plaintiffs from all personal and remote loss, charges or damages, and when he made the said offer, proposed so to relieve and indemnify them for all losses, contingencies and resulting damages, by reason of the mistake in this message, at the time the said offer was so made, which was refused by their factors, the Messrs. Smith & Co. solely on account of the refusal of the said

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Mowry to pay to their factors their commissions, and for no other cause, then the said offer so made and refused destroyed all privity of action as between the plaintiffs and defendants, and left the question of commissions one to be settled between the said Smith & Co. and the defendants. And if the plaintiffs, by their said factors refusing to release them from their liabilities in consequence of the demand by their said factors for commissions of the said Mowry, sustained damages, remote or proximate, the said loss, in damages, was not in law proximate to the mistake in the delivery of the message, but immediately resulted from the refusal of the said factors (the Messrs. Smith & Co.) to release them from the contract of purchase; and they must find on the facts for the defendants in this action.

3. If the jury shall believe, from the evidence, that when the one thousand bales of cotton shipped by the factors of the plaintiffs to a foreign market, it was by them shipped on account and for the plaintiffs, with a view of taking advantage of the fluctuations in the market—and if they shall, from the evidence, further believe that a large profit instead of a loss had been realized on the quantity so shipped, the plaintiffs would not have and in point of fact did not intend to account to and with the defendants for the profits—then, in that case, they must find for the defendants.

The jury are further instructed, that
129 should they believe, *from the evidence, that if the entire quantity of cotton ordered had been by the factors of the plaintiffs sold in Mobile, that there would have been no greater loss than was sustained in the sale of the one thousand and seventy-eight bales—then, in that case, the measure of damages must be the ascertained loss, if any, on the said one thousand and seventy-eight bales—and any loss or damage sustained by the plaintiffs in consequence of the shipment of the cotton to Liverpool, after the offer of S. Mowry to indemnify the plaintiffs, was not in law proximate or referable to the acts of the defendant, but were referable to the unauthorized acts, so far as the defendants are concerned, of the plaintiffs.

And the plaintiffs moved the court to instruct the jury as follows:

If the jury believe, from the evidence, that the message of the plaintiffs directing a purchase of five hundred bales of cotton, was delivered to the defendants to be transmitted, and they undertook to transmit it for the hire of one dollar and seventy-nine cents, and said message was altered by the telegraph company during its transmission, to an order for the purchase of two thousand five hundred bales of cotton, and so delivered by the said company to the agents of the plaintiffs in Mobile as the message of said plaintiffs, and said agents in good faith, and relying on said message as the true and real message of the plaintiffs, purchased a larger quantity than five hundred bales, then, although between themselves and their said agents the plaintiffs recognized themselves as the purchasers of the cotton, and immediately informed the telegraph company of the mistake they had made in transmitting said message, and that they would be held responsible for any damage resulting from said mistake, and held the cotton only for the purpose of en-

forcing and securing that responsi-
130 bility, the defendants *are liable to the plaintiffs for any damages resulting from said mistake, and that the usual and proper commissions charged by said agents in Mobile for the purchase of cotton are to be considered as a part of the cost of the cotton, as much as that of weighing and brokerage, and the statement by the agents (Messrs. Smith & Co.), after their commissions had been earned by the purchase of the cotton, and after the defendants had refused to indemnify the plaintiffs for the amount of commission, that the said agents would not claim commission, unless the defendants were made liable, was not binding on the said Smith & Co. and did not impair the defendants' liability for the damage resulting from the alteration of the message.

And the court refused to give the instructions moved by the defendants, and to give the instruction moved by the plaintiffs; but instructed the jury that, if the jury believe from the evidence that the message of the plaintiffs, directing the purchase of five hundred bales of cotton, was delivered to the defendants to be transmitted, and they undertook to transmit it for the hire of one dollar and seventy-nine cents, and said message was altered by the negligence and mismanagement of the telegraph company, or its agents, during its transmission, to an order for the purchase of twenty-five hundred bales of cotton, and so delivered by the said company to the agents of the plaintiffs in Mobile as the true message of the said plaintiffs, and said agents, in good faith, and relying on said message as the true and real message of said plaintiffs, purchased a larger quantity than five hundred bales of cotton—then, although between themselves and their said agents the plaintiffs recognized themselves as the purchasers of the cotton, and immediately informed the telegraph company of the mistake they had made in transmitting said message, and that they would be
131 *held responsible for any damage resulting from said mistake, and held the cotton only for the purpose of enforcing and securing that responsibility—the defendants are liable to the plaintiffs for all damage sustained by the plaintiffs by reason of the said negligence, and the usual and proper commissions charged by said agents in Mobile for the purchase of said cotton, and paid by said plaintiffs, are to be considered as a part of the costs of said cotton, as much as the cost of weighing and brokerage.

To which opinion of the court refusing their said instructions, and giving the instructions aforesaid, the defendants excepted.

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Upon the finding of the verdict by the jury on the 21st of November, the record states, that thereupon the defendants moved the court to set it aside and grant them a new trial: And because the court was not advised of its judgment to be given in the premises, time was taken to consider thereof. Then follows the entry in the record in relation to the list of exceptions above stated.

On the 12th of February 1856, which was during the same term of the court, the court overruled the motion for a new trial. And thereupon the defendants moved the court to correct (arrest) its judgment upon the verdict: which motion was also overruled. And the defendants excepted on both grounds.

The bill of exceptions taken to the refusal to grant a new trial, did not set out either the facts proved or the evidence given on the trial, nor did it refer to the other bill of exceptions in which evidence was set out. The court having expressed no opinion upon the after-discovered evidence, it is unnecessary to state it.

The grounds of the motion in arrest of judgment, is that the state courts had no jurisdiction in the case, but that the suit should have been brought in the United States court. And this on the ground,
132 that *the defendants lived in various states, and that the line of the company extended through the several states from Washington to New Orleans, and could not be subjected to the jurisdiction of any one of the states through which messages were sent.

Upon the application of the defendants, this court granted a supersedeas to the judgment.

The case was elaborately argued by John H. Gilmer of Richmond and Curtis of Boston, for the appellants, and by Macfarland and Patton, for the appellees.

DANIEL, J. I think it is quite clear, that the Circuit court committed no error in overruling the motion to arrest the judgment. Had the fact, upon the assumption of which the motion was grounded, namely, that the parties defendant to the action "were residents of other and different states than Virginia," been fully proved, it would have presented no reason for arresting the judgment. No question of jurisdiction arising upon such supposed fact could be made, except by plea in abatement offered before the defendants had pleaded in bar. Code, ch. 171, § 19, p. 648.

It seems to me, also, free from serious doubt, that we are precluded, by the state of the record, from reviewing the action of the Circuit court in overruling the motion for a new trial, on the score of the verdict being contrary to the evidence. In the bill of exceptions to the judgment of the court overruling this motion, there is no certificate of the facts proved, or of the evidence given on the trial; the bill is silent as to the facts and evidence on which the verdict was founded, and makes no direct reference to the only bill of exceptions in which any portion of said facts or evidence is certified, namely, the bill of exceptions to the ruling of the court, refusing to
133 give certain instructions *prayed for by the plaintiffs in error, and giving other instructions. It is true, that in the first mentioned bill of exceptions, the motion to set aside the verdict is stated as being for the causes: "1st. That the verdict was contrary to the evidence: 2d. That the instructions given by the court were erroneous: And 3d. On newly discovered evidence." And it is argued, that as the only instructions of the court, of which mention is made in the cause, are contained in a bill of exceptions which has a certificate of the evidence on which the motions of the parties and the rulings of the court, in regard to the instructions, were founded, there arises a necessary implication of an intention to refer to said certificate as a means not only of testing the correctness of the rulings of the court in regard to the instructions, but of determining also whether the verdict was or was not contrary to the evidence. I do not perceive the necessity of such an implication; but, were we to concede that there was the implied reference contended for, I do not think the concession would be of any avail to the plaintiffs in error. By such a reference merely, the certificate of the evidence on which the instructions were asked, could not be substituted for the certificate of the facts or evidence in the cause, which it is necessary, for a party complaining of a verdict, to obtain, in order to have a judgment overruling his motion to set aside a verdict as contrary to the evidence, reviewed in an appellate court. In a bill of exceptions to the ruling of a court refusing to give instructions, it is only necessary for the exceptor to set out so much of the evidence, or to state the tendency of so much of the evidence as is essential to show the relevancy and applicability of the instructions to the case. To such an extent only does such a bill of exceptions generally undertake to give a history of the
134 proofs in the cause. *It may, and sometimes does set out fully all the evidence of either side, down to the period of the ruling of the court, objected to; yet, as instructions may be, and often are prayed for, and given or refused before the testimony is closed, such a bill of exceptions cannot, of itself merely, be relied on as a complete statement of all the facts or all the evidence on which the jury rendered their verdict. It could not be so relied on, even though it should in terms purport to be a statement of "all the evidence in the cause," as was the case in Brooke v. Young, 3 Rand. 16; for the reason stated by the court in that case, that "although the evidence stated in the bill might be all when it was sealed, there might be other important facts brought forward afterwards." For these reasons, the supposed implied reference to the certificate in question could not justify us in regarding it as a certificate

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of all the evidence in the cause. No reference could produce that effect which did not, in express terms, or by the clearest implication, show that such certificate was referred to and adopted, not merely as a statement of all the evidence given in at the time of its being made, but as a statement of all the evidence before the jury at the time of rendering the verdict.

The question which it would seem most proper to consider next, is, whether there is such a record of the exceptions of the plaintiffs in error to the ruling of the court in respect to the instructions, as warrants us to pass upon the propriety of such ruling. There are three papers sent to us as constituting parts of the record, which purport to be bills of exceptions taken by the plaintiffs in error to opinions of the court given against them in the cause, to wit, a bill of exceptions to the ruling of the court, refusing certain instructions and giving others (the one immediately under consideration); a bill of exceptions to
135 the opinion of the court *overruling the motion for a new trial, and a bill of exceptions to the judgment of the court overruling the motion in arrest of judgment.

The verdict of the jury was rendered on the 21st of November 1855. Immediately succeeding the entry of the verdict is the following: "And thereupon the defendants moved the court to set aside the said verdict and grant them a new trial herein. But because the court was not then advised of its judgment to be given in the premises, time was taken to consider thereof." Immediately succeeding this is a statement by the clerk as follows: "The following is a bill of exceptions to an opinion of the court given against the defendants aforesaid, on the said 21st day of November 1855, but which was not received by the clerk till the 12th day of February 1856." The bill of exceptions is then set out, commencing with the following caption: "Be it remembered, that on the trial of this cause, the counsel of the plaintiffs introduced the following evidence." The bill proceeds to set out certain written statements of the admissions of the parties, letters, accounts, interrogatories, and answers thereto; and after so doing, states "and here the plaintiffs rested their case." It proceeds then to recite that the defendants introduced certain evidence (setting it out) "and rested the case." "The counsel for the defendants (in the language of the bill) then moved the court to instruct the jury as follows." The instructions are set out, and the recital proceeds, "And the plaintiffs moved the court to instruct the jury as follows." The instructions are set out, "And the court (in the language of the recital) refused to give the instructions moved by the defendants and to give the instructions moved by the plaintiffs, but instructed the jury that." &c. After stating the instructions given by the court, the bill concludes, "To
136 which opinion of the court *refusing their said instructions, and giving the instructions aforesaid, the defendants except, and pray that this their bill of exceptions may be signed, sealed and reserved to them; which is done accordingly."

Immediately succeeding the bill of exceptions is the following entry: "And now at this day of the same term last mentioned, to wit, Tuesday the 12th day of February 1856 (being the same day and year first herein mentioned), came again the parties aforesaid, by their attorneys; and thereupon the court having maturely considered the motion of the defendants to set aside the verdict of the jury in this cause, and to grant them a new trial of the same, doth overrule the said motion. Whereupon the defendants moved the court to correct (which ought to be, doubtless, to arrest) its judgment upon the said verdict; which motion was also overruled."

The judgment is then given, and at the foot of it is the following: "Memorandum. The defendants aforesaid, by their attorney, this day excepted to two opinions of the court given against them, and tendered their bills of exception thereto: and also tendered a bill of exceptions to an opinion of the court given against them on the 21st day of November 1855: which bills were reserved, signed and sealed by the court, and ordered to be made parts of the record in said cause. And the two first mentioned of said bills are in the words and figures following, to wit." The bill of exceptions to the opinion of the court refusing to grant the new trial, and the bill of exceptions to the opinion overruling the motion in arrest of judgment, are then set forth.

It is proper to add here (what ought perhaps to have been stated before), that the transcript of the record is headed as follows: "Pleas before the Circuit court of the city of Richmond for the trial of
137 civil causes, *held at the state court-house in the said city, on Tuesday the twelfth day of February in the year one thousand eight hundred and fifty-six."

We judicially know that the November term of the Circuit court aforesaid might continue for such a space of time as would include the 21st day of November 1855, and 12th day of February 1856. We find no difficulty, therefore, in construing the involved and apparently self-contradictory entry following the bill of exceptions, as meaning to indicate that the day on which the final judgment was rendered, to wit, the 12th day of February 1856, was the same with that, as of which the transcript is entitled, that being "the same day and year first herein (that is, in the record) mentioned;" and that said day was a day of the term at which the verdict was rendered, the said term being "the same term last mentioned" in the record.

From this view of the record, it seems to me that there exists no valid objection to the bill of exceptions, growing out of the time of its being received, sealed and made a part of the record. According to our practice, it is not necessary that a bill of exceptions should be tendered immediately

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on the transpiring or happening of the action of the court to which a party excepts. It is true, that when the character of the exceptions is such that little delay is occasioned by the preparation of the bill of exceptions, it is sometimes immediately prepared and disposed of; and in such case, a memorandum of the transactions is usually made in the minutes of the proceedings of the day. But as in a great number, perhaps a majority of cases, serious delay and inconvenience would result from stopping the progress of the trial to prepare bills of exceptions to the rulings of the court, a practice, sanctioned by long usage, has prevailed, for the counsel desiring to except to any opinion of the court given against them on the trial, simply to
138 state *to the court that they intend to save the point, and ask the court to note the exception, and afterwards during the term to prepare the bill of exceptions, and tender it to the court for its signature. Such was the practice which prevailed under our law of 1819, which follows substantially the provisions of the statute of Westm. 2, 13 Edw. 1, ch. 31. I do not think that any such change in the law has been introduced by the 8th section of chapter 177 of the present Code, as requires us to declare that such a practice is no longer to be allowed. The bill of exceptions in question having been tendered and signed not only at the same term at which the verdict and judgment were rendered, but at the time of the rendering of the judgment, was, it seems to me, clearly in time.

The important difficulty, however, in respect to the bill of exceptions here, arises not out of the time of its being tendered and sealed, but out of the fact that neither in the bill itself nor in the entry of its being made a part of the record, is there any distinct averment of the fact that the exception to the opinion of the court refusing the instructions, was taken at the time of the rendering of the opinion, or indeed at any time before the verdict was rendered.

The presence of this last mentioned fact is essential to entitle a party relying on a bill of exceptions, to claim any benefit from his bill. It is incumbent on him to show that he saved the point or took the exception in the manner already indicated, or in some more solemn form, either at the time when the opinion of which he complains was given, or at least before the verdict of the jury was rendered. In the absence of such showing, justice to his adversary would require that he should be held to have yielded to said opinion. It is not just or reasonable that he should be allowed to take his chance before the jury, and in the event of defeat, then to deprive his
139 successful opponent *of the benefits of the verdict by an exception, which, if insisted on during the trial, might have been met and counteracted by the latter.

It seems to me, however, that the plaintiffs in error, notwithstanding the omission of the record to state expressly and directly that the exception was taken at the trial, have yet shown, with satisfactory certainty, that such was the fact. For whilst neither the bill of exceptions nor the memorandum of its being made part of the record, contains a positive averment that the exception was insisted on during the trial before the jury, they do not, in my opinion, when read together, amount to an averment inconsistent with the existence of such a fact. The most that can be said of the effect of the two statements taken together, is that it leaves it somewhat in doubt whether such was or was not the fact. A legal and satisfactory explanation of this doubt in favor of the existence of the fact, I think, arises out of evidence afforded by other portions of the record, and certain presumptions springing from the very nature of the transaction.

We have seen that the memorandum at the foot of the judgment, in speaking of the bills of exceptions to the opinions of the court overruling the motion for a new trial, and the motion in arrest of judgment, says, in respect to them, that the defendants "this day excepted to two opinions of the court given against them, and tendered their bills of exception thereto;" but when it comes to speak of the bill in question, it says, "and also tendered a bill of exceptions to an opinion of the court given against them on the 21st of November 1855." From the marked difference of the terms used in reference to the first two bills, from those used in reference to the bill in question, there arises an inference, little inferior in force to an express negative of the fact, that the exception to which the last bill refers was made at the time of the entry. Why say, in
140 *respect to the first two, that the defendants this day excepted, &c., and tendered their bills, &c., and of the bill in question, merely that they tendered a bill to an opinion given before, if there was not a purpose to convey the idea that the exception to said opinion was not taken on that day?

The last day preceding that mentioned in the record, is the day on which the trial was had and the verdict given; and when we look to the bill of exceptions, we see that the defendants did except at some period of time: And it seems to be conceded, that if the bill in its conclusion had spoken in the past instead of the present tense; had used the terms "excepted and prayed," instead of saying "except and pray;" that those terms, taken in connection with the memorandum aforesaid, and all the recitals of the bill, would have shown sufficiently that the exception was taken at the time of the ruling of the court in respect to the instructions.

I do not think that the mere circumstance that the party, in reciting the fact of his excepting to the opinion of the court, has adopted the present instead of the past tense, should work the important result of making the bill conclusive proof that the exception was not taken till after the ver-

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dict. In drafting the bill, the slightest inadvertence might cause the one expression to be used instead of the other. The bill of exceptions may have been prepared at the time of the trial, though not tendered to the judge for his signature till the time of the rendering of the judgment; and in such case, the language might have been very properly used.

We have seen that the verdict was immediately followed by a motion for a new trial; which the court took time to consider. The bill of exceptions in question may, though perhaps then ready, have been withheld to await the action of the judge
141 on the motion *for a new trial, which, if granted, would dispense with the signing and recording the bill of exceptions. There is always a strong presumption that the judge would not sign a bill of exceptions to an opinion given on the trial, unless the exception was taken in time; and as the bill of exceptions here was filed at the time of the rendering of the judgment, when, as appears by the amendments of the record, the defendants in error were present by their attorneys, we have a still further presumption, and one of great force, in favor of the conclusion that the exception must have been taken at the proper time, and that all was rightly done in respect to the bill, arising from their failure to object to its being received and entered.

Little aid in determining the question under consideration is derived from a reference to the decisions of other states; as each state has moulded for itself, either by statute or the decisions of its courts, a practice in the matter of bills of exceptions, varying in a greater or less degree from the practice observed in any other state. The case of Harlow v. Humiston, 6 Cow. R. 189, however, seems to me to furnish strong persuasive authority in favor of the bill of exceptions in this case. In that case an exception was taken by the defendant below to a charge by the court to the jury. The bill of exceptions, after stating the charge, concluded thus: "The jury retired, and returned and delivered their verdict in favor of the plaintiff for fifty dollars damages. To all which charge the counsel for the defendant excepted." By the laws and practice of New York it was necessary that the exception to the charge should have been taken before the verdict of the jury was rendered, and it was obvious that there was doubt, from the conclusion of the bill, whether the exception had been taken before or after verdict; and an objection to the bill was urged on that score.

The objection in the appellate court
142 was overruled, the chief *justice, Savage, in rendering the opinion of the court, remarking, "It is objected that the exception came too late, and that it is too general. We must presume it was taken in time; otherwise, the court would not have allowed it."

I do not think that under the circumstances of this case we should violate any rule or incur any hazard of doing injustice to the defendants in error, by adopting a similar course here. A bill of exceptions, it is true, is a part of the record, and may not be contradicted by evidence extrinsic of the record. Still, it is not an essential portion of the regular and necessary history of the steps in a cause, its whole purpose being to bring into the record matters of which the account of the ordinary proceedings would otherwise take no notice. It is made a part of the record only at the instance of counsel; and the counsel and court concur in making it up. When, therefore, on comparing a bill of exceptions with the entry of its being received as part of the record, and other portions of the record, such a doubt arises as we have here, I think that the expressions out of which the doubt arises may be construed in reference to the circumstances shown by the record to have existed at the time the bill was tendered and received. The bill here having been tendered before or at the time of rendering the judgment, when, not only according to all presumption independent of the record, but also according to the averments of the record, the defendants in error were present by attorney, I am of opinion that the presumptions arising from this state of facts, taken in connection with the other considerations already adverted to, justify and require such an interpretation of the ambiguous expressions in the record as will sustain the validity of the bill. In cases where the bills of exceptions to rulings at the trial are not tendered till at some day subsequent to that on which the final
143 judgment is *rendered, I think that a more rigid rule should be observed. In such cases, the record ceasing to afford any longer evidence of the continued presence of the opposing party or his counsel, I think, that a party, who may have thus delayed to tender his bill, should be held to show, by averments of the record, free from reasonable doubt, that the exception was taken at the time of the ruling of the court excepted to, or at least before the finding of the verdict by the jury.

The rulings of the court in regard to the instructions being thus, as I conceive, properly before us for review, I shall proceed briefly to consider them. And it seems to me that the court did not err in refusing to give the first instruction prayed for by the plaintiffs in error. The declaration did not charge that they had been guilty of any want of diligence; did not impute to them any negligence in the transmission of the message; and there was no question of negligence before the jury.

I think that the court also properly refused to give the second instruction asked by the said plaintiffs in error. If the company, by reason of their having sent to Messrs. Smith & Co., the factors of the defendants in error, a message to purchase a larger quantity of cotton than the quantity mentioned in the message which the company were authorized to transmit, had rendered themselves liable to relieve the defendants in error of any excess of cotton purchased

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by their factors, in pursuance of the first mentioned message, no reason is perceived why the company was not equally bound to relieve them of all loss or obligation by them incurred on account of the accustomed and reasonable commissions of their factors, charged for effecting the purchase. And upon the supposition, therefore, that Smith & Co. would have been bound to accept, in behalf of their principals, an offer by the company, or an agent of the com-
144 pany, to pay all the costs and *charges of the purchase of such excess, including the commissions aforesaid, on receiving such excess, or else release the company from any responsibility the said company were under to the defendants in error for having transmitted a wrong message, they were not bound to accept any offer of the kind which did not include the commissions aforesaid.

In respect to the rulings of the Circuit court in refusing to give the third instruction asked by the plaintiffs in error, and in giving the instructions which it did give, it was, I think, the duty of the defendants in error, as soon as they were apprised of the mistake or alteration in their message, and of the purchase, by their factors, of the two thousand and seventy-eight bales of cotton, if they intended to hold the company responsible for the excess of cotton over the five hundred bales, to have notified the company of such intention; to have made a tender of such excess to the company on the condition of its paying the price and all the charges incident to the purchase, and to have also further notified the company, that in case of its refusal to accept said tender, and comply with its conditions, they would proceed to sell such excess at Mobile, and after crediting said company by the net proceeds, would look to it for the difference between the amount of such proceeds and the cost of the excess, including all proper charges: and on the failure of the company, after notice, to accede to their offer, they ought to have proceeded to act accordingly. I do not think that the duty of the defendants in error, upon such failure of the company, in respect to the disposition of the five hundred bales of the excess, two hundred and eighty-four bales of which the testimony tends to show was on shipboard, and two hundred and sixteen under a contract of affreightment, varied substantially from their duty in this regard respecting the one thousand and seventy-eight bales
145 *which they proceeded to sell at Mobile. The principles and rules regulating the subject, required, as I conceive, a sale of said five hundred bales also at the nearest market (Mobile), to be taken by the purchaser or purchasers as it stood, namely, two hundred and eighty-four bales as on shipboard, and two hundred and sixteen bales as under a contract of affreightment.

The defendants in error had no right to subject the company to the hazards attendant upon sending the cotton to a foreign market. The loss (if any) which they had incurred on the said five hundred bales at the time of the refusal of the company to relieve them of the excess of cotton purchased, was the difference between the cost, including all proper charges, and its then present net value. Notwithstanding the refusal of the company to relieve them of the excess, or to have any thing to do with it, they had no right to subject the company to the hazards of any greater loss. These views are, I think, fully sustained by the principles to be deduced from the cases of Sands & Crump v. Taylor & Lovett, 5 John. R. 395; Cornwal v. Wilson, 1 Ves. sen. R. 509; Kemp v. Pryor, 7 Ves. R. 237; Chapman v. Morton, 11 Mees. & Welsb. 533; and the doctrines on the subject stated in Paley on Agency, ch. 1, § 7. The only doubt on the subject, arising from the consideration of these authorities, is whether the defendants in error, notwithstanding their notice to the company of their purpose to send on the five hundred bales, and hold it responsible for the loss that might arise, and the company's refusal to take it off their hands, have not, by sending the cotton to Liverpool instead of selling at Mobile, lost all right to recover of the company for the loss which might have been sustained on the said five hundred bales in case it had been sold in Mobile. I do not think, however, that if the defendants in error sent on the cotton, with the intention not of tak-
146 ing to themselves the profits *which might arise from a sale of the said five hundred bales in Liverpool, but of indemnifying themselves out of the proceeds of sale to the extent of the costs and obligations incurred by them by the purchase, they thereby, in the event of a still greater loss growing out of sending the cotton to Liverpool, lost any right they may have had to recover of the company for the loss that would have been sustained had the cotton been sold at Mobile, on the refusal of the company to relieve them of the excess.

On the other hand, if the defendants in error sent the five hundred bales aforesaid to Liverpool for purposes of speculation, with the intention of taking to themselves the profit in the event of a profit, and in the event of a loss, of visiting the loss on the company, the case in respect to said five hundred bales would, I think, be different. They could not claim all the benefits of a complete ownership of the property, and in case of a loss, demand of the company to make good the loss. Parties thus situated, if they do not abandon the property, cannot, in case they mean to sue for damages, go further, in dealing with the property retained by them, than to look to it as in the nature of a pledge, which may be sold for their indemnity. And it seems to me, therefore, that the purposes and objects of the defendants in error in forwarding the five hundred bales aforesaid to Liverpool, was a matter proper to be submitted to the jury for their consideration, in passing upon the damages in respect of the five hundred bales. Whilst, therefore,

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I think that the Circuit court did right in refusing to give the third instruction prayed for by the company as asked, I think it ought, in lieu of said instruction, to have modified the instructions which it did give, in accordance with the foregoing views.

There was, as has been already stated, no issue of negligence on the part of
147 the company in transmitting *the message, in the case; and the instructions of the Circuit court, so far as they make the right of the defendants in error to depend in any manner on its appearing to the jury that the message was altered by the negligence of the company, were, I think, erroneous. On the first view of the case I was strongly of the impression that the questions, whether the jury might or might not regard the company as a common carrier, and might or might not infer, from the facts in the case, such an implied contract as the law attributes to common carriers, were properly before us in passing upon the instructions. But upon further reflection, I am of the opinion that they are not. If the plaintiffs in the action desired to get an instruction from the court on these matters, they ought to have stated, hypothetically, the evidence from the belief of which the jury were to ascertain that the company was a carrier, and from which they were to infer the implied contract aforesaid, and to have set out in the instructions the character of such implied contract. This was not done. And there being in the case no instructions asked for so framed as properly to elicit from the Circuit court any expression of opinion on said questions, it seems to me that the Circuit court, in saying to the jury, that "if they believe from the evidence that the message of the plaintiffs directing the purchase of five hundred bales of cotton, was delivered to the defendants to be transmitted, and they undertook to transmit it for the hire of one dollar and seventy-nine cents," and should also believe the other facts hypothetically stated as the grounds of a recovery, the defendants were liable, is, in respect of the contract and undertaking of the company, to be understood as if it had said to the jury, that if they believed that the company undertook to transmit the message accurately and correctly for the hire aforesaid, and should also believe
148 the other facts aforesaid, *the company was liable. Under this view of the instructions, the parties were left free to contest the questions aforesaid before the jury, not because of a liberty so to do, given by the instructions, but because the instructions did not in any manner pass upon them. So understanding the instructions, I do not think that there was any error in them in said particular. And being of the opinion that the questions aforesaid are not properly before us, as arising either out of the instructions asked or the instructions given, I decline expressing any opinion upon them.

These views of the case, without any more special application of them to the rulings of the Circuit court upon the instructions, will serve to indicate with sufficient certainty the particulars wherein, in my opinion, the said court has erred in said rulings. And because of such errors, I think that the judgment should be reversed, the verdict set aside, and the cause remanded for a new trial, in accordance with the principles herein declared; with liberty to the parties to amend their pleadings, if so advised.

LEE, J., thought that it did not satisfactorily appear, that the exception to the opinion of the court refusing the instructions asked, and giving other instructions, was taken before the jury retired to consider of their verdict. On the merits, he concurred in the opinion of Daniel, J.

ALLEN, P., and MONCURE, J., concurred in the opinion of Daniel, J.

The judgment was as follows:

It seems to the court, that the Circuit court did not err in overruling the motion of the plaintiffs in error in arrest of judgment.

And it appearing to the court, that
149 there is neither *a certificate of all the facts nor a certificate of all the evidence in the cause, it seems further to the court, that the plaintiffs in error have not sustained their allegations, assigning as cause of error that the said Circuit court erred in overruling their motion to set aside the verdict and grant them a new trial, on the ground that the verdict of the jury was contrary to the evidence.

And it seems further to the court, that the said Circuit court did not err in refusing to give the first instruction prayed for by the plaintiffs in error, nor in refusing to give the second instruction prayed for by said plaintiffs in error.

It seems further to the court, that the said Circuit court did not err in refusing to give to the jury so much of the third instruction prayed for by the said plaintiffs in error as asked the said Circuit court to instruct the jury, that "if the jury shall believe from the evidence that when the one thousand bales of cotton shipped by the factors of the plaintiffs to a foreign market, it was by them shipped on account and for the plaintiffs, with a view of taking advantage of the fluctuations of the market; and if they shall from the evidence further believe, that if a large profit instead of a loss had been realized on the quantity so shipped, they would not have accounted, and in point of fact did not intend to account to and with the defendants for the profits, then and in that case they must find for the defendants."

But it seems to the court, that the said Circuit court ought to have given to the jury, in lieu of so much of said instruction, an instruction to the effect, that if they should believe from the evidence that when the one thousand bales of cotton was forwarded by the factors of the defendants in error to a foreign market, it was by them forwarded on account of and for the said

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defendants in error, with a view, on
150 the part of *the said defendants in error, of taking advantage of the fluctuations in the market; and if they should further believe from the evidence, that if a profit instead of a loss had been realized on the quantity so forwarded, the defendants in error would not have accounted, and in point of fact did not intend to account to and with the company for the profits, then and in that case the defendants in error were not entitled to recover for any loss sustained on the quantity so forwarded.

It seems further to the court, that the said Circuit court did not err in refusing to give to the jury the residue of the said third instruction. But it seems to the court, that the said Circuit court ought, in lieu of said residue of said third instruction, to have instructed the jury, that in case they should find for the said defendants in error, they should, in fixing the amount for which to render their verdict, ascertain the loss sustained on the one thousand and seventy-eight bales sold at Mobile, by deducting the net proceeds of such sale from the cost of the said one thousand and seventy-eight bales, and also find for what sum the five hundred bales (the residue of the one thousand five hundred and seventy-eight bales of excess) would have sold at Mobile at public sale, immediately before the two hundred and sixteen bales, a part of the said five hundred bales, was delivered on shipboard, to be taken by the purchaser or purchasers as it then stood, to wit, two hundred and eighty-four bales as on shipboard, and two hundred and sixteen bales as not then shipped, but under a contract of affreightment, subject to the contract for freight, and deduct said sum from the cost of the said five hundred bales, including all proper expenses and charges at Mobile, and in putting the cotton on shipboard, but not including the charge of freight on the said five hundred bales from Mobile to Liverpool; and add said balance to
151 the amount ascertained *as aforesaid as the loss on the one thousand and seventy-eight bales; and that said aggregate, together with interest from such day as the jury should think right, to the day of rendering their verdict, should constitute the sum for which to render their verdict.

It seems to the court further, that the Circuit court erred in the instructions which it gave to the jury, in so far as it made the right of the defendants in error in any measure dependent on its being shown that their message was altered by the negligence of the company, it seeming to the court that there was no question of negligence on the part of said company in issue before the jury.

And it seems further to the court, that there were no instructions prayed for so framed as properly to elicit from the Circuit court any instructions of the said court as to whether the company were to be regarded as common carriers, or whether the jury might infer a contract of any character from the nature of the calling of said company.

And it seems to the court, that the instructions of the said Circuit court should not be construed as indicating any opinion of the said court on said questions, or as intending in any manner to affirm or deny the right of the defendants in error to recover upon such an implied contract; but that the said Circuit court, in saying to the jury that if they believed that the company undertook to transmit the message, and should also believe the other facts hypothetically stated in said instructions as the grounds of the recovery, that then the company were liable, is to be understood as if it had said to the jury that if they believed that the company undertook to transmit the message accurately and correctly, and should also believe the other facts just indicated, that then the company were liable.

It seems to the court, that under the said instructions the parties were left free
152 to contest the questions *in respect to the calling of the company and the implied contract aforesaid, before the jury, not because the liberty to do so was expressly given, or involved in the instructions aforesaid, but because the Circuit court had not given any opinion on said questions.

And it appearing to the court, that said questions are not presented properly to this court for its decision, either by the instructions given or the instructions asked on the trial, it seems to the court improper to express any opinion upon said questions. And construing the instructions given by the Circuit court as just indicated, it seems to the court that said instructions are erroneous, so far and so far only as they are in conflict with the principles herein already declared.

And as, because of the errors in the rulings of the said Circuit court in respect of the instructions asked and of the instructions given, the judgment must be reversed, it becomes unnecessary for the court to consider whether the said Circuit court erred or not in overruling the motion of the plaintiffs in error to set aside the verdict and grant them a new trial, on the ground of newly discovered evidence.

And because of the errors which have been pointed out, it is considered by the court that the judgment of the said Circuit court be reversed, &c., with costs; and it is ordered, that the verdict of the jury be set aside, and the cause remanded for a new trial to be had in accordance with the principles herein declared, with liberty to the parties to amend their pleadings, if so advised.

Judgment reversed.

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153 *Evans, Trustee, v. Greenhow & als.

April Term, 1859. Richmond.

Trust Deeds—Trustee and Beneficiaries—Execution Creditors—Priorities.*—The trustee and benefici-

*Trust Deeds—Trustee and Beneficiaries—Execution Creditors—Priorities.—In Wiant v. Hays, 38 W. Va.

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aries in a debt to secure *bona fide* debts, without notice, are purchasers for valuable consideration, within the meaning of the exception in the statute, Code, ch. 188, § 3, p. 717; and will be preferred to an execution creditor of the grantor in the deed, as to a chose in action thereby conveyed.†

Thomas Crouch, claiming to be the creditor of George Ives deceased, for money paid as a joint surety with him, in March 1854 filed his bill in the Circuit court of the city of Richmond, against the administrator and heirs of Ives, and a former guardian of the heirs, seeking to subject a lot in the city which was a part of Ives' estate, and also to have any money in the hands of the former guardian applied to the payment of the debt. In February 1855 there was a decree ascertaining the amount of the plaintiff's claim at nine hundred dollars, as of the 1st day of October 1850; and a commissioner was directed to sell the lot, and report to the court.

On the 27th of February Samuel C. Greenhow filed his petition in the cause, claiming the proceeds of the sale of the lot, as an execution creditor of Thomas Crouch. It appears that in May 1852 Greenhow recovered a judgment in the Circuit court of Henrico county, against Thomas
154 Crouch and two others for *the sum of one thousand one hundred and fifty-four dollars and ninety cents; on which sundry executions had been sued out, but only the sum of four hundred dollars had been made upon them. On the 17th of February 1855 a new execution was issued on the judgment, which went into the hands of the sheriff of Henrico at 12 M. of that day; and on the 19th of the same month another execution was issued, and went into the hands of the sheriff of the city of Richmond on the same day.

On the 5th of March Thomas J. Evans was admitted a party defendant in the suit, and contested the right of Greenhow to the fund in the suit. He claimed it under a deed dated on the 15th of February 1855, and recorded on the 17th of the same month, at 2 o'clock P. M., on the acknowledgment of the grantors; by which Thomas and Richard Crouch conveyed to Evans their interest in the claim involved in the suit of Crouch against Ives, in trust to secure certain creditors named in the deed. Evans had no knowledge of the existence of this deed until it was recorded; and in his answer to the petition he insists that he and the beneficiaries in the deed were assignees for valuable consideration without notice of the petitioner's execution, and therefore that they came within the exception in the 3d section of chapter 188 of the Code of 1849; and were entitled to the subject.

On the same day on which Greenhow filed his petition the commissioner reported his sale of the lot. And the proceeds of that sale not being sufficient to pay the plaintiff's debt, the former guardian of the heirs admitting that he had in his hands a fund belonging to them, an order was made directing him to pay into bank, to the credit of the cause, a sum sufficient to discharge the balance of the debt. And then the cause coming on to be heard
155 on the 13th of June *1856, the court decreed in favor of Greenhow for the fund. And from this decree Evans applied to this court for an appeal; which was allowed.

Nance & Williams, for the appellant.
Claiborne, for the appellees.

MONCURE, J., delivered the opinion of the court:

686, 18 S. E. Rep. 809, it is held that under sec. 2, ch. 141, Code of W. Va. a writ of *fieri facias* is a lien upon personal property, not of such a nature as to be leviable, owned by the debtor before its return day if docketed as required in said section, against a purchaser for value, without notice other than the constructive notice arising from such docketing; but, if it is not docketed, the lien will not affect the purchaser if he be a *bona fide* purchaser for value and without notice of the writ; and it makes no difference, so far as the protection of the purchaser is concerned, whether he purchase before or after the return day of the writ, citing *Evans v. Greenhow, 15 Gratt. 162.* See also, Shurtz v. Johnson, 28 Gratt. 667, citing the principal case. In Charron v. Boswell, 18 Gratt. 228, and *note*, the principal case is referred to.

In Trevillian v. Guerrant, 31 Gratt. 527, the court said: "It is conceded that under the third section the lien of an execution upon the debtor's choses in action is a legal lien, and continuing in its nature; that it does not cease with the return day, and that it is good against all persons except an assignee for valuable consideration without notice. This is settled by the decisions of this court in Puryear v. Taylor, 12 Gratt. 401; *Evans, Trustee, v. Greenhow et als., 15 Gratt. 153*; Charron & Co. v. Boswell, 18 Gratt. 216."

Same—Same—Purchaser.—For the proposition that the trustee and beneficiaries in a deed to secure *bona fide* debts, without notice, are purchasers for valuable consideration, the principal case is cited with approval in the following cases: Exchange Bank v. Knox, 19 Gratt. 747, and *note*; Antoni v. Wright, 22 Gratt. 873, and *note*; Shurtz v. Johnson, 28 Gratt. 667, and *note*; Cammack v. Soran, 30 Gratt. 296, and *note*; Williams v. Lord, 75 Va. 404; Witz v. Osburn, 83 Va. 230, 2 S. E. Rep. 33; Throckmorton v. Throckmorton, 91 Va. 47, 22 S. E. Rep. 162; Chapman v. Chapman, 91 Va. 400, 21 S. E. Rep. 813; Cox v. Wayt, 26 W. Va. 817; Harden v. Wagner, 22 W. Va. 365; Duncan v. Custard, 24 W. Va. 737; Western Mining, etc., Co. v. Peytona Cannel Coal Co., 8 W. Va. 441; Kimmins v. Wilson, 8 W. Va. 591; Farmers' Bank v. Willis, 7 W. Va. 47; Ruffner v. Mairs, 33 W. Va. 661, 11 S. E. Rep. 7; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. Rep. 361, 363. See 2 Va. Law Reg. 707. See, in accord, Wickham v. Lewis Martin, 13 Gratt. 427, and cases cited in *foot-note* thereto; Richeson v. Richeson, 2 Gratt. 497; Weinberg v. Rempe, 15 W. Va. 829. See monographic *note* on "Deeds of Trust."

†This section of the statute extends the lien of a *fi. fa.* to all the personal property of the debtor, including choses in action, except certain property of a husband or parent, and "except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall be valid only from the time that he has notice thereof."

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The Code, ch. 188, § 3, p. 717, provides, that "Every writ of fieri facias hereafter issued shall, in addition to the effect which it has under chapter 187, be a lien from the time that it is delivered to a sheriff or other officer to be executed, upon all the personal estate of, or to which the judgment debtor is possessed or entitled (although not levied on nor capable of being levied on under that chapter), except in the case of a husband or parent, such things as are exempt from distress or levy by the 34th section of chapter 49, and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall be valid only from the time that he has notice thereof. This section shall not impair a lien acquired by an execution creditor under chapter 187."

The controversy in this case arises under this section of the Code. The subject in controversy is a chose in action, which belonged to Thomas and Richard Crouch. The appellee, Samuel C. Greenhow, claims a lien upon it under the said section, by virtue of sundry writs of fieri facias, issued after the Code took effect, upon a judgment obtained by him against Edwin Farrar and the said Thomas and Richard Crouch. The appellant claims a lien upon it by virtue of a deed of trust executed by said Thomas and Richard Crouch, and duly recorded, whereby they assigned the subject to him,

156 in trust to secure the payment, as *mentioned, of certain debts of theirs, named in a schedule annexed to the deed. And though the said Greenhow's execution lien is prior in time to the appellant's deed of trust lien, yet the appellant insists that the latter is prior in right, inasmuch as he is an assignee for valuable consideration and without notice, within the meaning of one of the exceptions contained in the section giving the execution lien as aforesaid. The question is, therefore, narrowed down to this, whether he is such an assignee or not?

The deed of trust is certainly an assignment of the subject in controversy, and the appellant is therefore an assignee thereof. He is also an assignee without notice. He denies notice in his petition and answer, and there is no proof or even averment of such notice in the record. Is he an assignee for valuable consideration?

A pre-existing debt is, of itself, a valuable consideration for a deed of trust executed for its security; which deed, if it be duly recorded, and was not executed with a fraudulent intent, known to the trustee or the beneficiaries therein, will be valid against all prior secret liens and equities and all subsequent alienations and incumbrances. It is not necessary to the validity of the deed, that it should be executed by the trustee or the beneficiaries, or even that they should know of its existence before the intervention of subsequent claims. The deed being apparently for the benefit of the creditors thereby secured, their acceptance of it will be presumed until the contrary appears. If any of them refuse it, their refusal will relate back to the date of the deed, and avoid it ab initio as to them. A debtor, even though he be in failing circumstances, may lawfully prefer one creditor to another, and make a valid deed of trust for that purpose. These principles are now well settled in this state, as the following cases sufficiently show: Garland v. Rives, 4 Rand. 282; Skipwith's

157 ex'or v. Cunningham, *&c., 8 Leigh 271; McCullough, &c. v. Sommerville, Id. 415; Lewis v. Caperton's ex'or, &c., 8 Gratt. 148; Phippen v. Durham, &c., Id. 457; Dance, &c. v. Seaman, &c., 11 Id. 778; and Wickham, &c. v. Lewis Martin & Co., 13 Id. 427. In the last case Judge Daniel said (and in this part of his opinion all the other judges substantially concurred), "I think it has been the constant course of the courts in this state to regard the creditors in a deed of trust, made by their debtor bona fide for their indemnity, in the light of purchasers for value." Id. 437.

It is not proved, nor even intimated, that the debts secured by the deed of trust in this case, are not all bona fide debts; nor that the trustee or any of the creditors participated in, or had notice of any fraudulent intent on the part of the grantors; nor, indeed, that there was any such intent, other than may be implied by the existence of the execution lien, which was unknown to the trustee and beneficiaries until after the recordation of the deed. No such intent appears on the face of the deed.

The appellant is therefore an assignee for valuable consideration and without notice, in the general sense of the terms. Why is he not such an assignee, within the meaning of the exception aforesaid? The terms are therein used without qualification or limitation; and the presumption is, they were intended to be used in their general and well understood sense. There is nothing in the nature of the case which requires that they should be construed in a different and more restricted sense.

It is argued by the counsel for the appellee, that the additional effect given by the Code to the writ of fi. fa. was intended as a substitute for the remedy formerly afforded by the writ of ca. sa. thereby abolished; and that as the effect of the lien afforded by the execution of the latter writ was to override subsequent alienations, so the delivery of the former to the sheriff

158 *for execution should have the same effect, except so far as an intention to the contrary may plainly appear in the Code; and that it does not plainly appear that such an assignment as that under which the appellant claims, comes within the meaning of the exception.

It is true, that the additional effect given by the Code to the writ of fi. fa. was intended as a substitute for the remedy formerly afforded by the writ of ca. sa. But it was not intended to be coextensive with that remedy in all respects. On this subject the revisors observe, "We will not

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undertake to say that the remedies now proposed to be substituted in the place of process to take the body for debt, will in every possible case attain for the creditor everything that he can now attain by means of that process; but we express the opinion, without hesitation, that in cases generally, the rights of creditors will be better protected by the measures proposed than by those for which they are substituted." Code, p. 716, note.

The two remedies differ in many respects. The new remedy is more beneficial to the creditor in some respects and less so in others, than the old. It gives a lien on all the personal estate of the debtor from the time that the writ of fi. fa. is delivered to the officer for execution, subject only to the exceptions enumerated. The lien does not depend upon the levy of the writ, but continues to operate after the return day and until the right of the creditor to levy any execution upon his judgment ceases, or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other legal process. Code, p. 717, § 4; Puryear v. Taylor, 12 Gratt. 401.

On the other hand, the ca. sa. was a lien only from the time of its execution, and then only a qualified and conditional lien. It was not a lien at all upon personal estate until by the act of March 2, 1821, it was declared, that "every writ of capias ad satisfaciendum shall bind the property
159 of the goods of the party *against whom the same is sued forth, from the time that such writ shall be levied." Sess. Acts, p. 35, ch. 34, § 4. It is at least doubtful whether even that act made it a lien on choses in action. The language of the act is almost identical with that which declared that no writ of fieri facias, &c., "shall bind the property of the goods against which such writ is sued forth, but from the time that such writ shall be delivered," &c. 1 Rev. Code, p. 529, § 13. If the word "goods," occurring in each of these two acts in pari materia, be construed to have the same meaning in each, as would seem to be reasonable, then, as it clearly did not embrace choses in action in the latter, so it did not in the former. Again: the lien of the ca. sa. was dependent for its effect upon the debtor's taking the oath of insolvency. Until then, the lien was inchoate and conditional; and if the debtor died, or escaped, or was discharged, without taking the oath of insolvency, the lien was thereby determined. A ca. sa. was rarely resorted to until a fi. fa. had been tried without effect. So that it was only in the rare cases in which a ca. sa. was issued and executed, and the debtor took the oath of insolvency, that the creditor had the benefit of the ca. sa. lien. Effect might be given to such a lien against persons claiming by voluntary act of the debtor, without doing injustice to them; for they could not well be assignees without notice while the debtor was in custody. No effect was given to it against liens acquired by other creditors by act of law while he was in custody. Jackson v. Heiskell, 1 Leigh 257; overruled by Foreman v. Loyd, 2 Id. 284.

The writ of fi. fa. is generally issued on a judgment, and always, in the absence of special direction to the clerk to the contrary. It is to this execution, thus almost always issued upon a judgment, that the Code, ch. 188, § 3, has imparted the important additional effect therein men-
160 tioned. In giving to the creditor *this new and extensive lien, it was eminently proper so to guard it as that it should do no injury to the just rights of others. Accordingly, it was given, subject to certain exceptions, which the legislature supposed would have that effect, and which are reasonable, and ought to be fairly construed. Among them is the exception in favor of an assignee for valuable consideration and without notice. The propriety of this exception, so far as it applies to an assignment for value paid at the time, is not denied. Nor will it be denied that it applies to an assignment in discharge of a pre-existing debt. But it is contended that the exception does not apply to an assignment for the security of a pre-existing debt. Such an assignment seems to be as well within the spirit as the letter of the law. It could never have been intended by the legislature that any assignment for valuable consideration, without notice and duly recorded, should be affected by the secret lien of an execution which may have issued from the court of a remote county of the state, and been years since returnable. Persons dealing with the execution debtor have no convenient means of informing themselves of such a lien, and are not bound to make enquiry. A judgment is a lien on the land of the debtor against subsequent purchasers from him; but the law requires it to be registered for their information. It does not require the lien of a fi. fa. to be registered, because it did not intend that purchasers for valuable consideration and without notice should be affected by such lien. To give it that effect, would not only be unjust to innocent persons, but would very much obstruct the free circulation of personal property, which the public interest requires and the law favors. It will not do to say that an assignee for the security of a pre-existing debt would only be placed in statu quo, and would therefore not be injured by being deprived of the benefit of his lien. He may have reposed on that security and been thereby prevented
161 *from seeking satisfaction in any other way. At all events, having obtained that security bona fide, he ought not to be deprived of it, and is fairly entitled to all the advantages to which he would be entitled in any other case as a bona fide purchaser for value and without notice.

But it is argued, that if this be the case, a debtor may always avoid the execution lien, by making an assignment for the benefit of other creditors. And so, it may as well be said that he may, by making an

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absolute assignment for value paid at the time; or by receiving debts due to him from persons having no notice of the lien. The law has afforded to the judgment creditor as ample remedies as possible, consistently with the rights of others, to enforce the satisfaction of his judgment. It has made his judgment a lien on the whole real estate of the debtor. It has made his fi. fa. a lien from the time that it is delivered to the officer to be executed, on all the personal estate of the debtor on which it is capable of being levied and is actually levied before the return day; which lien overreaches all intermediate alienations and incumbrances with or without notice. And it has, in addition to that effect, made it a lien, from the same time, on all the personal estate of or to which the judgment debtor is possessed or entitled (although not levied on, nor capable of being levied on as aforesaid), subject only to the exceptions mentioned. And it has provided as ample means as possible for the enforcement of this last mentioned lien, by enabling him to compel the debtor to discover and surrender his estate, and to compel any other person on whom there is a liability by reason of said lien, to discharge such liability. By resorting to, and pursuing with diligence these means, or some of them, the creditor is generally able to prevent an evasion of his execution lien: and if he be not always able to do so, it is only because
162 *rights of others, which the law regards as superior to his, stand in his way.

It is further argued, that as one of the executions of the appellee was in the hands of the sheriff, and in full force when the deed of trust was recorded, and when the appellee filed his petition in this case, the lien of that execution is therefore superior to the lien of the deed of trust, though the lien of the other executions of which the return day had passed, might be inferior thereto. The subject in controversy being a chose in action, is incapable of being levied on under chapter 187 of the Code; and a lien upon it by execution could therefore be acquired only under chapter 188. Under the latter, it is immaterial whether the return day of the execution be past or not. In each case, the lien exists, and to the same extent. It may be proper to observe here, that the deed of trust was recorded before the appellee filed his petition aforesaid, or the suggestion therein referred to.

It is further argued, that the appellee has at least equal equity with the appellant, and the legal right, or at all events, a prior equity, and ought, therefore, to prevail in this controversy. If it can be said that he has equal equity, it cannot properly be said that he has the legal right. The law under which he claims expressly excepts an assignee for value and without notice: so that such an assignee and not the execution creditor has the legal right. As between them, there is no execution lien on the subject, and the debtor had the same right to make the assignment as if the execution never had issued.

The court is therefore of opinion that the appellant is entitled to the fund in controversy; and that the decree be reversed with costs, and the cause remanded to be further proceeded in accordingly.

Decree reversed.

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163 *Averett's Adm'r v. Booker.

April Term, 1859. Richmond.

[76 Am. Dec. 203.]

Bill of Exchange—Case at Bar.*—The following is not a bill of exchange, nor does it import a valuable consideration, or a promise by the drawer to the payee to pay if the money is not paid by the drawee:

Lynchburg, December 8, 1852.

$1,080 59

The trustee of N. and A. will pay to B. the sum of one thousand and eighty dollars and fifty-nine cents, with interest from 15th March 1850, out of any moneys in his hands belonging to me.

W. B. A.

This was an action of assumpsit in the Circuit court of the city of Lynchburg, brought by William T. Booker against William B. Averett's administrator. The plaintiff declared upon the following paper, which he averred was made for value received.

Lynchburg, December 8, 1852.

$1,080 59

The trustee of Norvell and Averett will pay to William T. Booker the sum of one thousand and eighty dollars and fifty-nine cents, with interest from 1st of March 1850, out of any moneys in his hands belonging to me.

Wm. B. Averett.

On the trial of the cause, the plaintiff introduced in evidence the foregoing paper, and also proved that it was presented and not paid; and that there were no effects out of which the order could, at the time of the trial, be paid. And this being all the evidence in the cause, the court, at the instance of the plaintiff, instructed the jury that they might infer from the paper aforesaid, a consideration moving from the
164 plaintiff *to the defendant's intestate, which entitled him, without further evidence than the paper itself, to recover in this case.

To this opinion of the court the defendant excepted: And there having been a verdict and judgment against him, he applied to a judge of this court for a supersedeas; which was allowed.

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*In Williamson v. Cline, 40 W. Va. 205, 20 S. E. Rep. 921, the principal case was cited as authority for the proposition that if an instrument recites that its promise is "for value received," these words are *prima facie* evidence of valuable consideration. See generally, monographic *note* on "Bills, Notes and Checks."

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Green, for the appellant.
Garland, for the appellee.

LEE, J. The only question in this case is that raised by the instruction asked for by the defendant in error upon the trial. The declaration unlike that in Jackson v. Jackson, 10 Leigh 448, sufficiently avers a consideration for the draft or order which it describes, but as when it was produced at the trial no consideration was expressed upon its face and it was not stated to have been made "for value received," the question made was whether the jury could from the paper alone infer such a consideration moving from the defendant in error to the plaintiff's intestate as would entitle him to recover without further evidence.

If the order in question were good as a bill of exchange it cannot be questioned that the party might have recovered upon it without averring in his declaration or proving at the trial that any value had been received for it, as such a bill is presumed to stand on valuable consideration and prima facie to import it. Bayly on Bills, ch. 1, § 13, p. 40; Macleed v. Sneed, 2 Str. R. 762; Poplewell v. Wilson, 1 Id. 264; Philliskirk v. Blackwell, 2 Maule & Sel. 395; Wilson v. Codman's ex'or, 3 Cranch's R. 193, 207; Hatch v. Trayes, 11 Adolph & El. 702; 39 Eng. C. L. R. 207; Jones v. Jones, 6 Mees. & Welsb. 84; Bayly on Bills, ch. 9, p. 390; Coombe v. Ingram, 4 Dowl. & Ryl. 211. But

I think it clear that this paper cannot
165 be regarded as *a bill of exchange, nor as carrying with it the exemption pertaining to that class of securities from the necessity of both averring and proving a sufficient consideration as the condition of recovering upon it. To constitute a good bill of exchange, the sum to be paid must not only be in money and certain in amount, but it must be payable absolutely and at all events. If it be payable out of a particular fund or upon an event which is contingent, or if it be otherwise conditional, it is not in contemplation of law a bill of exchange. Roberts v. Peake, 1 Burr. R. 323; Carlos v. Fancourt, 5 T. R. 482; Chitty on Bills, ch. 5, p. 152 et seq.; Bayly on Bills, ch. 1, § 6, p. 16 et seq.; Story on Bills, § 46; Crawford v. Bully, Wrights R. 453; Van Vacter v. Flack, 1 Smedes & Marsh. R. 393; Hamilton v. Myrick, 3 Pike's R. 541. Here, the sum to be paid is not payable absolutely and at all events. It is payable out of a particular fund to wit the moneys, if any, in the hands of the drawee belonging to the drawer. The draft therefore cannot be treated as a bill of exchange, nor can a recovery be had upon it as such.

So, again, if the paper in question contained an express promise to pay the sum mentioned upon which an action of debt might be maintained under our statute, I incline to think that the recovery might be had without further proof of consideration. If debt would lie upon the paper, it would be evidence of such indebtedness as would be a sufficient consideration for the promise to pay in the action of assumpsit. The case of Jackson v. Jackson, above cited, so far as it is of any authority, having been decided by a court equally divided, shows that it is not necessary in such a case even to aver a consideration. For the declaration without averring such consideration was sustained by the court below, and that judgment was affirmed by the division of this court. But it is unnec-

166 essary *to go into this question in this case, because whilst the declaration in all its counts sufficiently avers a consideration, it is not pretended that the paper offered in evidence contained any thing that could by any construction be held to be an express promise to pay the sum of money mentioned in it. And not being a bill of exchange, no promise is raised by law in favor of the payee against the drawer from the failure of the drawee to accept or to pay. Josceline v. Lasserre, Fortesc. R. 281; S. C. 10 Mod. R. 294, 316; Jenny v. Herle, 1 Stra. R. 591; S. C. 2 Ld. Raym. R. 1361; Haydock v. Lynch, 2 Ld. Raym. R. 1563; Banbury v. Lisset, 2 Stra. R. 1211; Dawkes v. DeLorane, 3 Wils. R. 207; S. C. 2 Wm. Black. R. 782; Nichols' adm'r v. Davis, 1 Bibbs' R. 490; Mershon v. Withers, Id. 503; Carlisle v. Dubree, 3 J. J. Marsh. R. 542.

The case of Jolliffe v. Higgins, 6 Munf. 3, might seem at first blush from the reporter's syllabus of the point decided, to be somewhat in conflict with the principles above stated; but upon closer examination, I think the decision will be found to be in perfect harmony with them and to be abundantly sustained upon the case itself. No reasons are assigned by the court for affirming the judgment, but upon the report of the case, I think we can see ample grounds on which to vindicate its correctness without disturbing any of the principles to which I have adverted. The action was assumpsit and the declaration counted specially on the draft or order set out, and also for money had and received by the defendant to the use of the plaintiff. The plea was the general issue; and at the trial, the defendant demurred to the evidence. This consisted of the draft or order described in the declaration by which the drawer (the defendant) directed the drawee (Waite) to pay to the plaintiff the sum of one hundred and eight dollars and eighty-five cents which

the order stated he (the drawer) had
167 lodged in the hands of the *drawee and was the property of the payee as guardian, &c., with proof of non-payment by the drawee, and protest therefor, and notice to the drawer; and also that the drawer had never deposited any such funds or other funds whatsoever with the drawee. Now, I do not think it by any means clear that the order was not good as a bill of exchange. Mr. Wickham for the plaintiff in error, it is true, contended that it was not because it was not made payable to order, and was drawn on a particular fund; and this Mr. Leigh appears to have conceded. Formerly it was doubted whether it was not essential to the character of a bill of ex-

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change that it should be payable, e. g. to A or his order or to bearer. But it is now well settled that it is not essential to the character either of a bill of exchange or of a promissory note that it should be negotiable. Chadwick v. Allen, Str. R. 706; Smith v. Kendall, 6 T. R. 123; The King v. Box, 6 Taunt. R. 325; Burchell v. Slocock, 2 Ld. Raym. R. 1545; Bayly on Bills, ch. 1, § 10, p. 33; Chitty on Bills, ch. 5, p. 181; Story on Bills, § 69. And it may with great force be contended that the order to pay was neither conditional nor restricted to any particular fund, but as well as can be ascertained from the statement of the case, was absolute and unconditional to pay the amount. It is true it was added that the drawer had lodged the amount in the hands of the drawee and that it was the property of the payee. Whether this statement was true or false would not affect the character of the order. The theory of every bill of exchange is that the drawer has funds in the hands of the drawee subject to his order, and whether this be true or false the character of the bill is the same. See Story on Bills, § 13. The reason given for making the draft would not necessarily change the absolute character of the order, or whether true or false, effect its legal character and incidents. It would
168 seem to fall *rather within a class of cases which are carefully distinguished from those in which the order is to pay out of a particular fund, although at first glance they might seem to be of them. Thus a bill drawn by a freighter payable to a person entitled to receive the freight "on account of freight," is good, for it is not payable out of a particular fund but merely shows to what account it is to be applied or what is the value that has been received. Pierson v. Dunlop, Cowp. R. 571. So a bill for money as "the drawer's quarter's half pay by advance" is good; for it is not payable out of a particular fund but is to be paid in advance; and will be payable whether the half pay ever become due or not. Macleed v. Snee, 2 Stra. R. 762. And so specifying the fund in any other manner out of which the value was received for which the bill is drawn will not vitiate the bill; thus stating "value received out of the premises in Rosemary Lane," or "being a portion of a value, as under, deposited in security of payment hereof;" or "on account of wine had by me" (the drawer); or "being so such due by me to A. at Lady-day next." In these cases the bill is not payable out of a particular fund, but it only specifies the value received and the occasion of the draft. See Haussoullier v. Hartsinck, 7 T. R. 733. Bayly on Bills, p. 18; Story on Bills, § 47.

But if the order could not be treated as a bill of exchange, certainly from its terms it might be fairly and legitimately inferred that the defendant had had in his hands money belonging to the plaintiff which he had failed to pay over to him and which he falsely pretended by the order he had lodged in Waite's hand for him. The amount therefore would clearly be recoverable in an action for money had and received and the demurrer to the evidence could not avail the defendant.

The court may therefore have
169 thought either that *the order in this case was good as a bill of exchange, or that the evidence was sufficient to sustain the second count of the declaration, and that the judgment was therefore right, and should be affirmed.

All contracts by our law must be either contracts by specialty or contracts by parol. If not by sealed instruments, they are parol whether verbal or in writing, and if in writing, whatever may be the rule of the civil law, or whatever the doubt created by the remarks of Lord Mansfield and Justice Wilmot in Pillans v. Mierop, 3 Burr. R. 1668 et seq., there must be in general a sufficient consideration to support them, just as if they were proved by parol evidence only. The authorities for this proposition are numerous and familiar, and I deem it unnecessary to stop to cite any. Commercial paper and perhaps promises in writing for the payment of money on which debt would lie under our statute, constitute exceptions to the rule, but otherwise it is universal and pervading. Accordingly, the defendant in error recognizing the rule and its applicability to this case, asked the court to instruct the jury that they might infer the consideration from the paper itself, and the court gave the instruction asked. The whole case then is resolved into the enquiry whether the paper does of itself, furnish proof of a legal promise and a sufficient consideration?

Now I apprehend that a paper of this character can only be said to furnish such proof, where the consideration is stated in it or it is stated to be for value received, or some equivalent, or where the terms in which it is expressed are inconsistent with any other theory than that it was upon a consideration. If those terms are just as consistent with the theory of a total want of consideration as they are with that of its existence, it would seem impossible to say that they afford such a legal presumption that the paper was founded on a con-
170 sideration as would justify the jury *in finding it as a fact. In the paper in question, no consideration is stated nor is the draft stated to be made "for value received," nor are any equivalent terms used showing that it was made for a consideration. And taking all the terms of the paper together they are at least as consistent with the theory of an absence of all consideration as they are with that of any value received. The terms of the order would admit equally well of several different constructions. The drawer might have known that he had just such a sum in the hands of the drawee and intended merely to give authority to the latter to deliver the same to the payee for him. Or without knowing whether the trustee had received funds for him or not, might have merely given the order if he had, to authorize the

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payee to receive them for him as his agent. The counsel for the defendant in error, it is true, asserts that the order was drawn at a time and at a place at which the plaintiff's intestate might have as conveniently drawn his funds from the hands of the drawee himself as Booker the payee could do it for him. Nothing of this however appears in the record, nor does it appear, as is also alleged, that the intestate was a partner of the firm of Norvell & Averett. If these facts would have influenced the case they were not before the jury, there being, as has been stated, no evidence whatever except the order itself and proof of non-payment, and that there were no effects out of which it could be paid. So, it is perfectly inconsistent with the terms of the order, that it may have been drawn for the purpose of loaning the amount to the payee if the drawer had the funds in the hands of the drawee, or of making a gift to him of the amount if it could be had. Either of these hypotheses and others that might be suggested are just as reasonable as that insisted on by the defendant in error that the order was given in discharge of a
171 debt due him from *the payee; and I cannot think the circumstance that the order calls for interest on the sum named from a given day is of such conclusive import as is attributed to it by the counsel. Whilst it is strictly consistent with the existence of a debt that was thereby settled, it is not inconsistent with either of the other hypotheses suggested.

The court having given the instruction asked for, ignored all the other hypotheses than that of a debt due to the payee from the drawer or of value received by the latter; and as the jury were told they might infer a consideration from the paper itself, they could only regard it as peremptory to them to make that inference, because if they might infer it, it was their duty to infer it; and to say that they might infer it was equivalent to saying that they must infer it because it was a matter not depending on the weight of evidence or force of circumstance but simply upon the legal import of the paper itself.

I think the Circuit court erred in giving the instruction asked for, and am of opinion to reverse the judgment.

ALLEN, P., and DANIEL, J., concurred in the opinion of Lee, J.

MONCURE, J., concurred in the result.

Judgment reversed.

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172 *Monteith, Sheriff, & als. v. The Commonwealth.

April Term, 1859, Richmond.

1. **Sheriff—Motion against—Allegations of Notice.***—On motion against a sheriff and his sureties for his failure to pay the taxes due to the commonwealth, it is not necessary that the notice should state on what bond of the sheriff the motion will be made.

2. **Same—Bond of—Recitals in—Case at Bar.**—M is elected sheriff of S in May 1854, and gives bond as such. In July 1856 he gives bond under the act of March 15th, 1856, extending the time for which sheriffs should hold office, to January 1st, 1857. In May 1856 he is re-elected sheriff for a regular term of two years commencing the 1st of January 1857: but he does not give his official bond under that election within sixty days from his election nor until the 12th of January 1857, when it is executed by himself and his sureties. This bond recites his election for two years from the 1st of January 1857, is acknowledged in open court and ordered to be recorded: and M is permitted by the court to qualify as sheriff and act as such. HELD:

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whether the court below erred in holding the notice in this case fatally defective. The notices in such cases, as in notices for judgments of any kind, are treated with great indulgence by the courts. The purpose of such a notice as the present one is to acquaint the defendants with the grounds on which the plaintiff proposes to proceed against the defendants, and all that is required in such notice is that it should be so plain that the defendants cannot mistake the objects of the motion, however it may be wanting in form and technical accuracy. As showing the great indulgence with which such notices are dealt, I would refer to the cases of *Monteith v. Com., 15 Gratt. 172*, and Supervisors v. Dunn, 27 Gratt. 608, in which cases it was held on motions against the sheriff and his sureties, because of his failure to account for taxes, it was not even necessary to state in the notice on what bond of the sheriff the motion will be made. In the first of these cases, ALLEN, P., says: 'The notice is of a motion against the sheriff and others, his sureties, for certain taxes due from said sheriff for 1857. No particular bond is described, but it was incumbent on the commonwealth to show at the trial that the said sheriff, with the persons named as his sureties, had duly executed a bond for the faithful discharge of the duties of his office for that year.' The sheriff's bond in the case before us, while there is a failure to state its contents, except by saying it was 'a bond as sheriff of Hancock county,' is fully identified by its dates and otherwise. It is obvious that this failure to specify the contents of the bond does not make a notice defective, for calling it a bond given as sheriff makes it so plain that the defendants cannot mistake the bond on which he is proceeding, and they sufficiently know its contents by its being called a sheriff's bond. Under the liberality of the court in reference to notices, it would seem unwise to attempt much accuracy or particularity; for, if the notice descends to particulars as to dates, sums, and names, the document referred to must, when produced, correspond with the notice, though, of course, such particularity would not vitiate a notice. See Drew v. Anderson, 1 Call 51; Cookes v. Bank, 1 Leigh 433. Any danger of this sort would be avoided by a more general description, provided it be not so vague that what is intended may be mistaken. See Graves v. Webb, 1 Call 443; Segouine v. Auditor, 4 Munf. 398; Steptoe v. Same, 3 Rand. (Va.) 221; Supervisors v. Dunn, 27 Gratt. 612; Board, etc., v. Parsons, 22 W. Va. 308; Lemoigne v. Montgomery, 5 Call 528; Booth v. Kinsey, 8 Gratt. 560; Hendricks v. Shoemaker, 3 Gratt. 197; White v. Sydenstricker, 6 W. Va. 46." ...

*Sheriff—Motion against—Allegations of Notice.—In Shepherd v. Brown, 30 W. Va. 19, 3 S. E. Rep. 189, it is said: "It only remains for us to determine

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1. **Same—De Facto—Liability.**†—If M is not sheriff *de jure*, he is sheriff *de facto*, and as such is bound for his acts.
2. **Same—Bond of—Recitals in—Sureties Estopped to Deny.**‡—The sureties of M in his last bond are estopped by the recitals thereof, from saying M was not sheriff, and the bond is binding upon them.
3. **Same—Re-election—Case at Bar.**—M having professed to enter upon his office and act under his last election, it cannot be held that he continued to hold over and act under his first election, on the ground that his successor had not qualified, so as to subject his sureties in the previous bonds.
3. **Appellate Practice—Motion—Sheriff—Case at Bar.**—The notice to the sheriff and his sureties being of a motion for a balance of the land, property and free negro taxes of 1857, and the judgment being for a balance due upon these and also for the license tax; this is error for which the judgment will be reversed in the appellate court.

This was a motion by the commonwealth, in the Circuit court of the city of Richmond, against James Monteith, sheriff of Stafford county, and twelve others as his sureties, for the recovery of a balance of the
173 *land, property and free negro taxes of 1857, due from Monteith. The facts are stated by Judge Allen in his opinion. There was judgment in favor of the commonwealth for seven thousand three hundred and fifty dollars and sixty-one cents, with twelve per cent. interest thereon from the 13th of September 1858 until paid, and one thousand one hundred and two dollars and fifty-nine cents damages. And the defendants having excepted, and put the facts upon the record, applied to this court for a supersedeas; which was allowed.

Wellford and Marye, for the appellants.
The Attorney General, for the commonwealth.

ALLEN, P. On the 29th day of April 1858 the auditor of public accounts notified the plaintiff in error, James Monteith, as sheriff of Stafford county, and the other plaintiffs in error as his sureties, that instructions would be given to the attorney general to move against them for the balance of the land, property and free negro taxes of 1857, due from James Monteith, sheriff of Stafford county; also for damages, &c.

The plaintiffs in error appeared, and objected to the legality of the motion, and moved to dismiss it: 1st, because it did not appear from the notice on what bond the motion was made; 2d, that if made on the bond executed on the 12th of January 1857, the said bond was illegally taken, because the same was not executed within the time limited by law for the taking thereof. The motion was overruled, an exception taken, and in the bill of exceptions the facts, as agreed upon the trial, were set out.

From these it appeared that the attorney general exhibited an account, which charged Monteith, sheriff of said county, "to
174 balance of land, property, free *negro and September license taxes of 1857, $7350 61, interest at 12 per cent. from 13th September 1858." Also, an affidavit of service of the notice on all the plaintiffs in error. One of the parties to whom the notice was directed, was dead, as appeared from the affidavit. It further appeared, that James Monteith was elected sheriff of said county in May 1854, and executed his official bond on the 10th of July following. That on the 14th day of July 1856 he gave another bond, in pursuance of the act of March 15th, 1856, continuing the term of office to which he was elected in May 1854, until the 1st of January 1857; that in May 1856 he was re-elected sheriff of said county for a regular term of two years, commencing the 1st of January 1857; and that no other than said bond of the 14th of July 1856 was given by him after his re-election in May 1856 until the 12th of January 1857, on which day he executed the bond of that date, which was signed by the plaintiffs in error and the security since deceased. The condition of this bond recites, that said

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See also, Board Supervisors v. Dunn, 27 Gratt. 612; Board v. Parsons, 22 W. Va. 312, citing and following the principal case.

†**Officers—De Facto—Validity of Acts.**—In Roche v. Jones, 87 Va. 487, 12 S. E. Rep. 965, it is said: "It is alleged that Councilman A. D. Wallace, who voted for the ordinance, had, about two weeks before its passage, moved his residence beyond the corporate limits of the town, and had thereby vacated his office of councilman; and that, consequently, his vote was a nullity. But this is a *non sequitur*; as Wallace had continued to exercise his office as councilman, and to discharge its functions, until 1st July, 1889, when his successor qualified. He was a *de facto* councilman, and his acts, as such, were valid and binding. *Monteith, Sheriff, v. Commonwealth, 15 Gratt. 172;* Griffin's Ex'or v. Cunningham, 20 Gratt. 40; McCraw v. Williams, 33 Gratt. 513; Blackwell on Tax Titles, p. 100-103."

‡**Bonds—Recitals in—Estoppel.**—For the proposition that the obligors of a bond are estopped to deny the recitals thereof, the principal case is cited and followed in the following cases: Findley v. Findley, 42 W. Va. 381, 26 S. E. Rep. 436; B. & O. R. Co. v. Vanderwarker, 19 W. Va. 270; Pannill v. Calloway, 78 Va. 395; Chapman v. Com., 25 Gratt. 721, and *note*; Gibson v. Beckham, 16 Gratt. 321, and *note*.

See, in accord, Cox v. Thomas, 9 Gratt. 320; Bank v. Fleshman, 22 W. Va. 317; Cecil v. Early, 10 Gratt. 198; Franklin v. Depriest, 13 Gratt. 257, and *note*; Hoke v. Hoke, 3 W. Va. 561; Pratt v. Wright, 13 Gratt. 175, and *note*; Wynn v. Harman, 5 Gratt. 157; Taylor v. King, 6 Munf. 358; Cordle v. Burch, 10 Gratt. 480; Board of Supervisors v. Dunn, 27 Gratt. 608; 4 Min. Inst. (3d Ed.) part 2, p. 1120. See monographic *note* on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124; also, monographic *note* on "Estoppel" appended to Bowen v. McCormick, 23 Gratt. 310.

In Childrey v. Rady, 77 Va. 534, the principal case is distinguished. In Griffin v. Macaulay, 7 Gratt. 476, it is held, that a trust deed to secure creditors, reciting the amount of the debts due to the different creditors is not conclusive, even as against the grantor and his administrator of the amount of the respective debts.

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James Monteith hath been elected sheriff of the county of Stafford for the term of two years, commencing from the 1st of January 1857. The bond appears to have been acknowledged in open court, and ordered to be recorded. The parties also agreed that there was a balance of land, property, free negro and license taxes for the year 1857, unpaid and due by said Monteith, amounting to the sum of seven thousand three hundred and fifty dollars and sixty-one cents. It was further agreed, that there should be no formal pleadings, but that the plaintiffs in error might avail themselves of all legal defences to the commonwealth's motion.

On these facts the court entered judgment, that the commonwealth should recover against the plaintiffs in error seven thousand three hundred and fifty dollars
175 *and sixty-one cents, the balance of the land, property and free negro taxes of 1857, due from said Monteith, sheriff as aforesaid, with interest, damages and costs.

The first objection, that the notice did not show on what bond the motion was made, was properly overruled. The notice is of a motion against the sheriff and others, his sureties, for certain taxes due from the said sheriff for 1857. No particular bond is described, but it was incumbent on the commonwealth to show at the trial that the said sheriff, with the persons named as sureties, had duly executed a bond for the faithful discharge of the duties of his office for that year.

The main question upon this branch of the case is, whether the bond of the 12th of January 1857 was a valid obligation.

The constitution, art. vi, sec. 30, provides, that the voters of each county shall elect a sheriff, who shall hold office for the term of two years; and the 23d section of the same article directs that all officers, whether elected or appointed, shall continue to discharge the duties of their respective offices after their terms of service have expired, until their successors are qualified. And art. v, § 38, provides, that the manner of conducting elections and making returns of elections, of determining contested elections, and of filling vacancies in office in cases not specially provided for in the constitution, shall be prescribed by law. And the general assembly may declare the cases in which any office shall be deemed vacant, where no provision is made for that purpose in the constitution.

To carry out in part these constitutional regulations, the legislature, by an act passed April the 22d, 1852, Sess. Acts, p. 64, ch. 71, directed that the voters of each county should, on the fourth Thursday in May, elect a sheriff, whose term of office, by the 18th section of said act, was to
176 commence on the first day of *July next succeeding the election, and to continue for two years. By the 7th section, the officer conducting the election at the court-house, within five days from the commencement of the election, was to examine the poll, ascertain the result, and declare the person to whom the greatest number of votes were given, to be elected. By the 8th section, the officer conducting the election is to make true return of the sheriff elected; which shall be handed to the clerk of the County or Corporation court, to be filed in his office. The 9th section provides, that the return shall be subject to the enquiry, determination and judgment of the County court, upon complaint made in the mode designated of undue election or false return; prescribes how contested elections shall be proceeded in, and that the court, in judging of said elections, is to proceed on the merits thereof, and determine finally concerning the same, according to the constitution and laws. By the 10th section, the court is to proceed, at the first session after the complaint of an undue election or false return is made, to determine said contest without a jury, unless good cause be shown for a continuance. By the 14th section, whenever a vacancy shall occur in said office, the County court shall order a writ of election to supply the said vacancy. And by the 19th section, it is enacted that before entering upon the discharge of his duty, the person elected shall take the oaths of office prescribed by the Code, and give such official bond as is required of him; that he shall take such oaths and give such bond in the proper court within sixty days after his election; and if he fails so to do, his office shall be deemed vacant. But his qualification, unless he be elected to fill a vacancy, shall not be deemed to take effect before the first day of July next after his election.

The act of March 15th, 1856, changing the time at which the term of office
177 shall commence, made no *alteration as to the time of the election or the period thereafter within which bond was to be given.

In this case, the bond upon which the parties were notified not having been executed until the 12th of January 1857, more than sixty days after the election, a question arises whether there was then any authority to take it, or whether the obligors can be permitted to allege that the same was invalid. Upon the provisions of the constitution and laws referred to, the attorney general insists that until the County court has actually adjudged or determined that the title to the office of sheriff, derived from the election of the voters, has been forfeited by the failure to qualify and give the official bond, he is still, to all intents, in office, and may rightfully qualify; and if he does so, his title to the office cannot be questioned in any proceeding thereafter. The law in this respect adopts the terms of the constitution, which empowers the general assembly to declare the cases in which any office shall be deemed vacant; and there is much force in the argument that the word "deemed" here should be taken in the sense of adjudged or determined by that authority which is to determine whether

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there has been an undue election or false return, upon proper complaint made, and which is required to order a new writ of election when a vacancy occurs in the office. It can hardly be supposed that the legislature intended to make the omission to give bond within sixty days after the election, work an absolute forfeiture of the title in every supposable case. The title to the office is derived from the election by the voters. The declaration of the officer conducting the election and his certificate are merely evidences of the fact of an election, and do not affect the validity of the title conferred by such election. If the officer conducting the election, and whose duty it is, within five days from the commencement of the election, to examine the

178 *poll, ascertain the result, and declare the person for whom the greatest number of votes have been given, to be duly elected, should neglect or refuse to perform this duty within the sixty days, his default should not operate to forfeit the title of the person elected to the office. So, if an election should be contested, the court may, for good cause shown, continue the controversy from term to term. If so continued, the controversy would generally continue beyond the sixty days. In such case, if the contest should be determined in favor of the party returned as elected, his omission to give the bond within sixty days after the election, would not, as it seems to me, forfeit his title. In these and perhaps other instances it would seem that justice to the party elected requires that the law should be so construed as to allow some extension of the time beyond the sixty days. The legislature, however, in the clause under consideration, has used this word "deemed" twice, and in the last instance, certainly in the sense of to look upon, regard, hold, take. The clause declares that if he fail to take the oaths and give the bond within sixty days after his election, his office shall be deemed vacant, but his qualification shall not be deemed to take effect before the 1st of July next after the election. No adjudication or determination was contemplated by the use of the word in the last member of the sentence.

The act passed March 30th, 1858, Sess. Acts, p. 17, ch. 20, entitled an act providing for general elections, &c., uses the same terms, and in reference to other officers. The 56th section thereof, for instance, provides that the office of judge shall be deemed vacant not only when he dies, resigns, or is removed from office, but also when he fails to qualify within thirty days next after he receives his commission; thus seeming to treat the failure to qualify within the thirty days, as creating a vacancy to

179 the same extent as when *the vacancy is caused by death, resignation or removal from office. The succeeding section provides, that when there shall be such vacancy in the office, the governor shall make known the fact, by proclamation, within ten days after the fact shall come to his knowledge, &c.—the words "such vacancy" referring to a vacancy produced by any of the causes enumerated in the preceding section.

Under these various provisions of the constitution and laws, questions of great importance may arise as to the proper construction of this term, as used in the constitution, and adopted in the laws to carry the constitution into effect. The case under consideration, it seems to me, may be correctly decided on other grounds upon which I prefer to place it, as it was argued before the vacancy on the bench was filled.

Was not Monteith, after he gave bond and entered upon the discharge of the duties of the office, sheriff de facto? If he were not in all respects an officer de jure, because of the failure to qualify and give the bond in the time prescribed, was he a mere usurper, undertaking to act without any pretence or color of right? This cannot be maintained upon the facts in this record. He had been regularly elected; from that election he derived his title to the office; no commission was necessary to perfect it; the law required none; and in practice no commission issues. The subsequent steps of the officer conducting the election are only intended to authenticate the fact of such election, and the qualification and bond do not confer the office, but are preliminaries to his entering upon the discharge of the duties of the office to which he has been elected. Asserting such title to the office, he executed and acknowledged the bond required by law, before the tribunal authorized to take the official bond of sheriffs. The condition of the bond so executed recites that he hath been elected sheriff of

180 the *county of Stafford for the term of two years, commencing from the 1st of January 1857; and binds him to the faithful discharge of the duties of his office aforesaid, according to law: Thus showing that he claimed to act under the title conferred on him by election, and gave bond to execute the duties of the office to which he asserted a legal right.

It was held in the case of The King v. Lisle, Andrews' R. 164 (S. C. 2 Stra. R. 1090), that in order to constitute a mayor de facto, it is necessary that there should be some color of an election. In The Town of Plymouth v. Painter, 17 Conn. R. 585, a person eligible to the office of grand juror, was in October duly chosen a grand juror for the following year. He refused to take the oath prescribed, and was fined according to law for such refusal. He paid the fine, and in the month of May afterwards took the oath and exercised the functions of a grand juror, by making a presentment and prosecuting it. In a suit between third parties, in which the validity of his official acts came in question, it was held that he was an officer de facto, and his acts as such were valid. It was insisted there, if a person chosen does not accept and qualify, the office becomes vacant; but the court held, that although it might not be easy in all cases to determine what ought to be con-

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sidered as constituting a colorable right to an office, so as to ascertain whether one is a mere usurper, there was a fair color of right in the person acting as grand juror to exercise that office, whether he was legally entitled or not. He was plainly more than a mere usurper; he was legally appointed; was eligible, and claiming a right to act under his appointment, took the oath prescribed. These, if nothing had intervened, would have been sufficient to confer a complete title to the office; and even if his previous refusal to take the oath disqualified him from doing so afterwards, this effect was not *so palpable as to deprive him of a fair color of right to exercise the office. There was an observance of all the legal forms, and this clearly constituted a colorable title or apparent right.

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In the case of The People v. Collins, 7 John. R. 549, a person was duly elected a commissioner of the highway for the ensuing year. The law provided that the commissioner, before he entered on the discharge of the duties of his office, and within fifteen days after his election, should take and subscribe the oath of office before some justice of the peace, who, within eight days thereafter, should certify the oath and deliver it to the town clerk; and that if he shall not take and subscribe such oath and deliver such certificate, such neglect shall be deemed a refusal to serve in such office; and the town may proceed to choose another. The commissioner chosen had not taken the oath, and filed the certificate according to the act. The commissioner having laid out a survey of a road, the town clerk refused to record it. Upon an application for a mandamus to compel him to record the survey, it was argued that if the person elected does not take the oath within fifteen days, it is a refusal to accept, and the office becomes vacant, so that a new election may be made, and that no quo warranto was necessary, because the act considers the office as vacant, and provides for filling it. But the court held, that if he acted without qualifying, he was liable to a penalty, or the town might choose new commissioners; but if the town did not, the subsequent acts were valid, so far as the rights of third persons and the public were concerned. He was commissioner de facto, since he came to the office by color of title.

In Fowler v. Beebee, 9 Mass. R. 231, it was objected that the sheriff whose deputy executed the writ, was not sheriff de jure, he having been appointed and commissioned some months before the law erecting the *county for which he was appointed, went into operation. The plea was overruled, because he was sheriff de facto, and his acts and those of his deputies were valid as to third persons. Upon an information against the same officers, it was decided in 10 Mass. R. 290, that their appointments were made without constitutional and legal authority.

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The principle of these and the like cases, say the court in Wilcox v. Smith, 5 Wend. R. 231, is this, that a person coming into office by color of election or appointment, is an officer de facto, although it be conceded that his election or appointment was invalid; or I may add, although by neglecting or refusing to qualify, the law treats the office as so far vacant as to provide for filling it by a new appointment.

And this is a sufficient answer to the argument, that if a sheriff coming into office under color of an illegal election, is to be treated as an officer de facto, a mere stranger, if permitted to qualify, might intrude himself into the office. Such a person would be a mere usurper, and his acts void. There being but one mode of acquiring the title to the office, to wit, by election, where it appeared that no such claim of title is preferred, the act of qualification would confer no right, for no title is thereby acquired; and the court or tribunal permitting it would be acting not under authority of law, but without law, and the act would be not voidable, but wholly void.

The provision in the constitution, that officers shall continue to discharge the duties of their respective offices until their successors are qualified, does not affect the question in the present case. He had been elected sheriff in 1854, and continued in office, by virtue of said election, or by executing a new bond, as provided for by the act of March 15th, 1856, postponing the commencement of the term from the 1st of July to the 1st of January next after the election. *By asserting his title to office under his last election, and giving bond, he admitted he was not in office under his previous election. There could be but one sheriff, and by assuming office under color of the last election, the office was full, and filled by him, either de jure or de facto, under his last election. Nor, as it seems to me, would the case have been varied, if a stranger had preceded him. The return of the election is to be made to the clerk of the county, to be filed in his office. The returns of the election are subject to the enquiry, determination and judgment of the County court, where there is a complaint made in the mode prescribed. It hears and determines contested elections; it passes upon the sufficiency of the sureties offered; it receives and orders to be recorded the official bond. It must ascertain whether a vacancy exists before it can order a writ of election to supply it. Even if the law declaring that the office should be deemed vacant upon a failure to give bond within sixty days, be mandatory and not directory, and it was the duty of the court to have ordered a new writ, still it was not done. On the contrary, they recognized the title preferred; and so recognizing it, though it be conceded they erred, they were acting within the scope of their authority, and their act is not void. It must be respected; and the person so admitted into office, upon title claimed to be derived from regular election, and, as in this case, admitted to have been asserted under such election, can only be ousted by

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a quo warranto, the proper proceeding to try the validity of the title to an office. Town of Plymouth v. Painter, 17 Conn. R. 585. It would be oppressive on the preceding sheriff and his sureties, if they were required to ascertain at their peril whether his successor had been regularly inducted into office by the officers or courts to whom this duty was confided by law. The duty of the preceding sheriff is at an end
184 when a successor *claiming to be duly elected is inducted into the office, through the agency of the proper officers and tribunals charged with this duty.

In Harris v. Jays, Cro. Eliz. 699, it was conceded by the court, that if one being created bishop, the former bishop not being deprived or removed, admits one to a benefice, the act is good and not avoidable, for that the law favors one in a reputed authority. There was in fact a bishop de jure, yet respect was paid to the act of another, who was inducted into office claiming under the color of a proper appointment. 16 Vin. Abr. tit. Offices, G. 4; O'Brian v. Knivan, Cro. Jac. 552. Treating him as sheriff de facto, his acts are valid as respects the rights of third persons who have an interest in them, and as concerns the public in order to prevent a failure of justice. Such is the case of public officers, who are such de facto, acting under color of office, by an election not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in case of sheriffs, constables, &c. 2 Kent 345 (295 mar.), and the cases before referred to; and Jones v. Gibson, 1 N. Hamp. R. 266; The Margate Pier v. Hannam, 5 Eng. C. L. R. 278.

If then the sheriff is in office as sheriff de facto, it is not for him to deny the validity of his title, or to say that he is not sheriff de jure, or that the court had no authority to take his bond. When the court recognized the validity of his title, whether they erred or not, they were acting within their jurisdiction in requiring the bond; for the law makes it the duty of the court to take such bond from the sheriffs elected. The title by election so recognized subsists until the party is ousted; and while it does exist, the court may rightfully require the bond. Whenever it is conceded that he is sheriff de facto, it is also conceded that the
185 *office is full. He cannot deny that he is sheriff de jure; and conceding him to be in office, the law makes it the duty of the court to require bond. In this case, there is no question that the bond is in proper form, taken by the proper tribunal, and shows that it was given by him as sheriff for a specified term for which he was elected. It would be most unjust to the public, and to individuals who must rely on this bond as their security for the due performance of the duties of his office, to permit him now to controvert the truth of his own assertions. Nor can I perceive any better ground upon which the securities can stand. If the bond is valid as to him, it is equally so as to them. The fact of election is proved by the recital in the condition, and admitted in the agreement of facts. And the recital shows the bond was taken and received by virtue of such title; and this, it seems to me, they are estopped from denying, even if the agreement of facts did not show the election.

The cases referred to, and relied upon in the argument, do not establish any principle at variance with the proposition above maintained.

In the United States v. Kirkpatrick, 9 Wheat. R. 720, the validity of the bond was not in question. The law authorized the president, in the recess of the senate, to make appointments, by granting commissions which should expire at the end of the next session. Bond with surety was given under this commission. Afterwards, a new appointment, by and with the consent of the senate, was made. The court held that the two commissions could not be considered as one continuing appointment; the acceptance of the last commission was a virtual superseding and surrender of the former; and that the liability of the sureties was confined to the duration of the first commission.

In the case under consideration,
186 the sureties are liable *for the discharge of the duties of the office for the term for which the bond recites he was elected, and thereafter until a successor qualifies.

In Branch v. Commonwealth, 2 Call 570, the condition of the bond was for the collection of taxes imposed by an act of assembly recited in the condition of the bond. This law had expired. No taxes were collectible under it, and the liability of the sureties could not be extended beyond their undertaking, to taxes collected under a subsequent law. No question as to the validity of the bond or the effect of a recital as estopping the parties, was decided. The sureties stood upon the letter of the bond.

In Stuart v. Lee, governor, 3 Call 421, the law directed that the bond should be payable to the justices, and that the penalty should be one thousand pounds. The bond was taken, payable to the governor, in the penalty of ten thousand pounds. The suit was brought in the name of the governor at the relation of the party injured. It was a suit under an act of assembly authorized to be brought on certain bonds given under statutes. The court held, that as the statute required a bond in the penalty of one thousand pounds, payable to the justices, this was not such a bond as the act required; and being sued on as a bond taken under the act, the action could not be maintained.

In the case under consideration, the bond is taken in a proper penalty, and payable to the proper party, and so conforms to the law.

In The Commonwealth v. Jackson's ex'or, 1 Leigh 485, it appeared that there was no law authorizing the sergeant of the Hustings court of Williamsburg to collect public

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taxes, or the court to appoint a collector or take a bond from him. The court held, that such bond was not valid and obligatory on the surety. No reasons are assigned; but the bond was taken not only without authority of law, but against the policy
187 of *law; it was an unauthorized interference of the court with the collection of public revenue; a duty confided by law to officers designated by the law.

In our case, the County court is the tribunal to which the law confides the duty of taking the bond, and the bond is in furtherance of public policy.

The cases of Frazier v. Frazier's ex'ors, 2 Leigh 642, and Roberts v. Colvin, 3 Gratt. 358, merely decide that the parties could not be charged beyond the stipulations of their contract. The bonds did not conform to law, and did not extend to the liability asserted.

In none of these cases did the question of estoppel arise.

In the case of Cutler v. Dickinson, 8 Pick. R. 386, an administration bond given to a judge of probate, was offered in evidence, and the court held that the obligors were estopped by the recital in the bond to deny the appointment of the administrator; and in Allen v. Luckett, 3 J. J. Marsh. R. 165; Stockton v. Turner, 7 Id. 192; Kellar v. Beeler, 4 Id. 655; the parties were estopped from denying that there was such an injunction, judgment or decree as these bonds recited, although in all these cases the matter recited ought regularly to appear of record; and in Franklin's adm'r v. Depriest, 13 Gratt. 257, the official bond of an executor was made payable to four justices, one of whom was not a member of the court at the time. It was held that the sureties were estopped from averring that he was not a member of the court, as by their bond they acknowledged that the four persons to whom it was made payable, were justices of the County court then sitting.

Upon these authorities, it seems to me that the sureties as well as the principal would be estopped from denying the title by which the sheriff claimed his office. They acknowledged in the condition that he had been elected sheriff for said county
188 for the term of *two years, commencing from the 1st of January 1857, and bound themselves for his faithful discharge of the duties of his office aforesaid: the office of course to which he then had title by virtue of his election for a term of two years just commencing.

Upon the whole, I regard the bond as valid, and that the motion to dismiss was properly overruled.

But it seems to me there is error growing out of the variance between the notice and judgment and the proof, which must lead to a reversal, and a remanding of the case for a new trial. It was agreed that there should be no formal pleadings, but that the defendants might avail themselves of all legal defences to the motion. The parties agreed the facts, and the question was referred to the court whether any, and if any, what judgment should be rendered. The parties were notified that a motion would be made against them for the balance of the land, property and free negro taxes of 1857, &c., without specifying any amount. The account filed shows a balance of land, property, free negro and September license taxes of 1857, amounting to seven thousand three hundred and fifty dollars and sixty-one cents. By the facts agreed, it appears that there was a balance of land, property, free negro and license taxes for the year 1857, unpaid and due by the sheriff, amounting to seven thousand three hundred and fifty dollars and sixty-one cents; and the court rendered judgment for that sum, the balance of the land, property and free negro taxes of 1857, due from said sheriff, with interest, damages and costs. By the facts agreed, it would seem that the balance was made up of license taxes as well as of land, property and free negro taxes; but there is nothing to show what proportion of such balance was license taxes. It is most likely, as was suggested in argument, that the payments made, when applied to the license taxes, discharged them,
189 and that there may be *that balance of the other taxes due for the year 1857; and that if the subject had been adverted to on the trial, it could have been shown that such was the state of the case. There is, however, nothing in the record to enable the court to correct the error. As the notice did not claim any license taxes, and the judgment is pursuant thereto, it would not be a bar to another proceeding for the license taxes, and the facts agreed show a fatal variance between the notice and judgment and the proof. I think on this account the judgment must be reversed, and the cause remanded for a new trial.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

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190 ***Ushers' Heirs v. Pride.***

July Term, 1858, Lewisburg.

1. **Evidence—Certificate of Auditor—Delinquent Land.**—A certificate purporting to be made by the auditor of the state, in pursuance of the act of March 15, 1838, Sess. Acts, p. 16, § 7, of land forfeited for non payment of taxes, being in the usual form in which he certifies papers from his office, is evidence of the execution of such certificate, and of the official character of the paper, and also of the facts therein contained.

2. **Same—Same—Statute—Retrospective Effect.**†—Though such certificate was made in 1844, yet it having been offered in evidence in 1856, it is *prima facie* evidence, by the act, Code, ch. 176, § 4, p. 660

*This case and the next were decided at the July term 1858, of the court, but were not then directed to be reported. They are now published by the direction of the judges, at the request of members of the western bar.

†**Evidence—Statute—Retrospective Effect.**—See principal case cited and approved in James River, etc., Co. v. Littlejohn, 18 Gratt. 76.

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though said act was passed after the certificate was made.

3. **Taxation—Forfeiture of Lands—Redemption.**‡—Lands returned delinquent for non-payment of taxes between 1820 and 1831, were forfeited by the act of April 1, 1831, Sup. R. C. p. 345, § 2, if not redeemed before the 1st of November 1833; and by subsequent acts the time was extended; but the forfeiture became complete on the 1st of October 1834; and the forfeiture was not released, unless the owner redeemed the land in the mode provided by statute.

4. **Ejectment—Outstanding Title—Case at Bar.**§ The heirs of a patentee of land forfeited for non-payment of taxes and not redeemed, cannot maintain ejectment for it against a party who has entered upon it peaceably, though the tenant has no title to the land.

This was an action of ejectment in the Circuit court of Wood county, brought in June 1841, by the lessee of the heirs of Thomas Usher, jr. and Abraham Usher against Jesse Pride, Burr Triplett and three others, to recover a tract of land of twenty-four hundred acres, separate parcels of which were held by each of the defendants. The cause came on to be tried in November 1856, as against Jesse Pride.

191 *The plaintiffs claimed under a patent from the commonwealth of Virginia, bearing date the 24th of July 1788, for fourteen hundred acres; and it was admitted by the defendant, that the lessors of the plaintiff were the heirs of Thomas and Abraham Usher, and that the land in controversy was included in the patent.

It appears from the evidence, that Thomas and Abraham Usher, the patentees, lived in Maryland, and that they died prior to 1800, and also that from 1839 to June 1845 some of the heirs were infants, and also that others were married women.

In 1816 some of the heirs came out to the county of Wood, and went upon the land within the boundary of the fourteen hundred acre patent, and claimed it as theirs, and rented a portion of it to a tenant for one year; and that this tenant went upon the land in the fall of 1816, and cultivated some twenty-five or thirty acres, which were cleared. That the same person who had been the tenant in 1816, in the years 1828 and 1829 took possession of the land by the permission of James Pugh, who professed to act as the agent of Ushers' heirs; and put up the fences, and pastured the fields with his hogs and cattle, there being no person residing thereon; and that this tenant professed to hold the land under Ushers' heirs. That in the years 1833 and 1834 a part of the land, but not that held by Pride, was occupied by a tenant, who leased it from James Pugh, who professed to act as the agent of Ushers' heirs. And that about the 1st of June 1835 one of these heirs moved out from the east to the county of Wood, and settled upon the land, on that part of it occupied by the last tenant, and remained upon it, claiming it as the land of Ushers' heirs, until February 1836, when he left it. And the tenants occupying the land had sufficient property thereon to pay the taxes for the years they were upon the land.

It appears further, that from 1800

192 to 1817, inclusive, *the land was not entered upon the commissioner's books for taxation in the names of the patentees, or their heirs, or of any person claiming under them. In 1818 it was so entered in the names of Abraham and Thomas Usher; and the land which had

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‡**Taxation—Forfeiture of Land—Redemption.**—See principal case cited in Smith v. Tharp, 17 W. Va. 233, 239; Yokum v. Fickey, 37 W. Va. 773, 17 S. E. Rep. 322.

Same—Statutes Providing for Forfeiture of Land—Constitutional.—In State v. Sponaugle, 45 W. Va. 426, 32 S. E. Rep. 287, it was said: "How has this question of forfeiture for taxes been regarded by the Virginia courts? They have been unable to discover that it is not due process of law. It is true that in Kinney v. Beverley, 2 Hen. & M. 318, where the act of 1790 which provided that lands on which taxes should not be paid for three years 'shall be lost, forfeited and vested in the commonwealth,' JUDGE TUCKER did express the opinion that, without office found, the state could not take title, as it was only by record the king could take title; not definitely saying the act was invalid. JUDGE ROANE (than whom no one has a higher name among Virginia jurists) said, 'I cannot for a moment doubt the power of the legislature to pass the law in question;' and he said that no inquest of office was necessary, and that such a construction would defeat collection of revenue. JUDGE GREEN'S opinion does not mention the subject. So this case cannot be quoted (as it is sometimes) as against the validity of forfeiture acts, as it was decided on other points. In Wild v. Serpell, 10 Gratt. 405, it was held that 'the statutes of Virginia forfeiting land to the commonwealth for the failure of the owners to enter them upon the commissioner's books and pay taxes are constitutional,' and that title vested under them in the state without judgment, decree, or inquest of office. Several cases uphold the statute. Staats v. Board, 10 Gratt. 400; Levasser v. Washburn, 11 Gratt. 572; Smith v. Chapman, 10 Gratt. 445; Hale v. Branscum, 10 Gratt. 418; *Usher v. Pride, 15 Gratt. 190.* These cases are unsatisfactory, in not discussing the matter; but they do decide it, though in but one was it expressly mentioned. In Armstrong v. Morrill, 14 Wall. 120, the constitutional point was not discussed, but the Virginia forfeiture acts were recognized as operative. So it was settled in Virginia. In West Virginia, our courts, in many decisions, have recognized the Virginia decisions as binding authority. Twiggs v. Chevallie, 4 W. Va. 463; Smith v. Tharp, 17 W. Va. 221." See also, in accord, McClure v. Maitland, 24 W. Va. 576, and M'Clure v. Manperture, 29 W. Va. 641, 2 S. E. Rep. 765, citing as authority the same cases which are cited above.

Adversary Possession—Land Forfeited to State.—Actual possession of land forfeited to the state for nonpayment of taxes cannot divest the state's title. See principal case cited as authority for the proposition in Postlewaite v. Wise, 17 W. Va. 7; Smith v. Tharp, 17 W. Va. 231; Reusens v. Lawson, 91 Va. 244, 21 S. E. Rep. 347.

See also, monographic *note* on "Adversary Possession" appended to Nowlin v. Reynolds, 25 Gratt. 137.

§See generally, monographic *note* on "Ejectment."

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been previously forfeited under the act of 1814, was redeemed in 1820. But the land never was entered on the commissioner's books in the name of the heirs of the patentees, nor in the name of any person claiming under the patentees, from the year 1837 to 1846, both inclusive, except for the year 1839.

The tenant offered in evidence two certificates, signed James E. Heath, auditor, dated in January 1844, and July 1845, stating the taxes due on the land from 1819 to 1837, both inclusive, and that no payment had been made in redemption of the land since 1818; and certifying that the land had been returned delinquent from the county of Wood for the years specified, in the names of Thomas and Abraham Usher, and was reported to the commissioner of forfeited and delinquent land for Wood county, for sale. To the introduction of this evidence the plaintiff objected; but the court overruled the objection; and he excepted.

The evidence being concluded, the tenant, by his counsel, moved the court to instruct the jury, "that taking the evidence so offered on behalf of the plaintiffs to prove all that it tends to prove, yet the evidence so offered on behalf of the plaintiffs, when considered in connection with the evidence offered by the defendant, does not prove and is not such a subsisting valid title, as entitles them to recover in this action." This instruction the court gave; and the plaintiffs excepted. And there having been a verdict and judgment for the defendant, the plaintiffs applied to this court for a supersedeas; which was awarded.

193 *Grattan, for the appellants, insisted:

1st. That the certificates of the auditor were improperly admitted as evidence. That the act, Sup. R. C. p. 348, § 7, under which they were admitted, does not apply where there are infants or femes covert, and that there were both in this case.

2d. That this land was not forfeited. If the jury might have made any reasonable inference, which would have prevented the forfeiture, the instruction in the form it was given is erroneous. That though the land was forfeited under the act of 1814, it was redeemed in 1820. That by the act of 1817, 2 Rev. Code, p. 559, § 2, land was no longer forfeited for non-payment of taxes; and it could not be forfeited prior to the act of 1831, which forfeited it on the 1st of January 1832; Sup. R. C. p. 345, § 2, 4: And prior to January 1832, the act of December 1831 was passed, which gave further time to pay the taxes; Sup. R. C. p. 356, § 1. Before that time expired, forfeiture for non-payment of taxes was abolished, and a lien upon the land was substituted for it. Sup. R. C. p. 359, § 3, 8. And he insisted further, that the jury might have reasonably inferred from the possession proved in 1833 and 1834, by the tenants of the plaintiffs, and from the possession of one of the heirs in June 1835, that they were in actual possession of the land on the 1st of April 1835, so as to prevent the forfeiture under the act of 1835, Sess. Acts 1834–5, p. 12, § 2.

3d. That as the patent gave the plaintiffs seizin in deed, and as they are proved to have had actual possession in 1816, 1828, 1829, 1833, 1834 and 1835–6, and as the defendant sets up no title in himself, but was a mere trespasser, he could not set up an outstanding title in a third person. Middleton v. Johns, 4 Gratt. 129; Tapscott v. Cobbs, 11 Gratt. 172; Doe *ex dem. Humphrey v. Martin, 41 Eng. C. L. 23; Doe ex dem. Leeming v. Skirrow, 34 Id. 64; Atkins v. Lewis, 14 Gratt. 30.

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Fry, for the appellee, insisted:

1st. That the certificates of the auditor were properly admitted as evidence, under the act, Code, p. 661, § 4, act of 1850–51, p. 34; Burdett v. Taylor, 11 Leigh 339. That there was no proof that any of the plaintiffs were infants; and if some of them were femes covert, still as to all adult parties and parties sui juris, the certificates were admissible.

2d. That possession was sufficient to defeat a plaintiff who had no title. Adams Eject. 32; Moody v. McKim, 5 Munf. 374. That though an ouster of actual possession will give the party ousted a right to recover against the party ousting him, having no title; it was different where a party enters upon a vacant possession. That here there was no proof of ouster, and therefore the cases cited on the other side either did not apply to the case, or were authorities against the appellants.

3d. That the plaintiffs had no title, the land having been forfeited to the commonwealth. That though it was true the land was redeemed from the forfeiture under the act of 1814, and by the act of 1817 land was not forfeited, yet it was again forfeited under the act of 1831, and the acts subsequent to 1834 did not release the forfeiture, but only gave further time to redeem the land; which had not been done by these plaintiffs. That in fact the land was omitted from the commissioner's books from 1831 to 1846, and was on that ground forfeited under the act of February 1835, Sess. Acts 1834–35, p. 12. Having no title, and not having proved an actual ouster by the defendant, the plaintiffs could not recover in ejectment, though the defendants showed none.

195 *ALLEN, P. The first question presented in this case, arises on the third bill of exceptions taken by the plaintiff in error at the trial. From that it appears that certain certificates, purporting to be signed by J. E. Heath, auditor, were permitted to go in evidence to the jury, without proof of their execution, or of the official character of J. E. Heath, as tending to prove that the tract of one thousand four hundred acres was delinquent for the years and the amount therein set forth, and that the same had not been paid at the date thereof. The act of April 1, 1831, Sup. R. C. p. 348, § 7, makes such certificates evidence of the delinquency and forfeiture as against the parties therein named. And

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the act of March 15, 1838, Sess. Acts, p. 16, § 7, makes it the duty of the auditor to cause to be made out a list of every tract of land in the counties west of the Alleghany mountains, forfeited to or vested in the Literary fund for the non-payment of taxes charged thereon, and which shall not have been redeemed; and to transmit such lists to the commissioner for the sale of delinquent lands.

It being thus made the duty of the auditor to make out and furnish said lists and certificates in his official character, his attestation of the certificate in the usual mode of certifying official copies of documents under his control, must be deemed sufficient evidence of the execution of such document, and of the official character of the officer; as much so as the attestation of a clerk to an official copy from his office, is deemed and taken as evidence of the execution of the paper, and of the character of the officer, in the absence of any suggestion to the contrary. Upon general principles, and without reference to any particular statute, the certificate of the auditor of a fact appearing from the books under his control, and upon whom the law imposes the duty of examining such books, and giving a certificate of the facts
196 thereby appearing, as a guide *for other officers in the performance of duties imposed on them, would be competent as evidence of such fact. Baker v. Preston, Gilm. 235. And there being no particular mode of authentication or seal of office prescribed, the signature of the officer in his official character must prove itself and authenticate the instrument. In Taylor v. Burdett, 11 Leigh 334, it was decided, that as in case of sickness or absence of the auditor, the chief clerk in the office is required to perform the duties of the office, a certificate being signed by an individual as chief clerk and acting auditor, it must be presumed he was acting by reason of the sickness or absence of his principal. No objection seems to have been made to the certificate for want of authentication or proof of execution, nor does it appear that any such proof was offered. The question arose upon a motion to exclude from the jury the patent of the plaintiff, under the 17th section of the act of 1830-31, before referred to, until the plaintiff should show that he had his lands duly entered and charged with taxes, and had paid the same. The court was to determine the fact before admitting the patent to be read in evidence to the jury; and as it could only ascertain the fact by legal evidence, the question of the admissibility of such certificate without further proof of authentication, arose as soon as it was offered to satisfy the court of this preliminary fact.

By the Code of Virginia, ch. 176, § 4, p. 660, it is enacted that the certificate of the first auditor of the fact and time of the return of any real estate as delinquent, shall be prima facie evidence of what is stated in such certificate; and such certificate sealed, or sealed and signed, or signed alone, shall be admitted as evidence without any proof of the seal or signature, or of the official character of the person whose name is signed to it. The act of March 31, 1851, Sess. Acts, p. 33, § 13, extends the
197 provision to the *auditor's certificate of the payment or non-payment at any time of taxes on forfeited or delinquent lands, &c., but does not alter or affect the section of the Code as to the effect and admissibility of the certificate of the auditor of the fact and time of the return of any real estate as delinquent. That is the character of the certificates here, and the proof of the signature and official character of the officer is dispensed with. The provision, though enacted since the date of the certificate, is general, and permits a certificate to be admitted in evidence whenever offered without proof of execution or of the official character of the officer. Such provision, though retrospective, is not objectionable; it violates no right, and makes no change in the evidence of the fact affecting the right. The fact of delinquency, as appearing on the books in the auditor's office, creates the forfeiture; the official certificate is by law made evidence of the fact; and how that is to be authenticated is mere matter of practice, which may be regarded as may be most convenient in prescribing proceedings in court.

After the evidence was concluded, the defendant's counsel moved the court to instruct the jury, that taking the evidence of the plaintiff to prove all that it tended to prove, yet that the evidence so offered on behalf of the plaintiffs, when considered in connection with the evidence offered by the defendant, does not prove and is not such a subsisting valid and legal title as entitled the plaintiffs to recover in this action. Grave objections might be alleged against such a course of proceeding. The court is asked to substitute itself to the place of the jury; to exercise the functions of the jury in determining upon the weight and credit of the testimony, and deducing from it all such proper inferences as the jury might have deduced. I should not have deemed it erroneous, if the court had declined to
198 give such an instruction, and *had put the party to his demurrer to the evidence. The instruction however was given; the evidence is set out in the bill of exceptions; and as there is no conflict in the testimony, no injustice can be done to the plaintiff in error by viewing the testimony, as if there had been a demurrer to the evidence, giving to them the benefit of all proper inferences and presumptions, and disregarding any conflicting testimony offered by the defendant in error.

The first question that arises upon the evidence so certified, relates to the forfeiture of the lands claimed by the plaintiffs, for the non-payment of taxes charged thereon.

A grant issued to Thomas Usher, jr., and Abraham Usher on the 24th of July 1788, of one thousand four hundred acres of land, which it was admitted embraced the land

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in controversy; and it was further admitted, that the lessors of the plaintiff are the heirs of the said patentees. It appeared that the land had not been entered on the commissioner's books for Wood county from 1800 to 1817, both inclusive, in the names of the patentees, or their heirs, or of any person claiming under them. The first entry on the books of the commissioner of the revenue for said county, was made in the names of the patentees in the year 1818; and the heirs of said patentees had not hitherto caused said lands to be entered on said books in their names. It appears from the certificates of the auditor that no payment had been made in the redemption of said land since 1818, and that the land was returned as delinquent for the taxes charged thereon from 1819 to 1831, inclusive, and for the years 1833, 1836 and 1837.

By the act of April 1st, 1831, Sup. R. C. p. 345, § 2, lands returned delinquent for 1820 or any previous year, if not redeemed before the 1st of January 1832, were forfeited; and lands returned delinquent
199 for any *year subsequent to 1820 and previous to 1831, were forfeited if not redeemed before the 1st of November 1833.

By the acts of December 16, 1831, and of March 10th, 1832, further time for redemption upon all such lands was given until the 1st of April 1834. The period for redemption was extended by the act of March 11, 1834, to the 1st of October 1834. The act of Febuary 27, 1835, § 1, gave further time, until the 1st of July 1836, for the redemption of such lands returned delinquent, and which became vested in the Literary fund on the 1st of October 1834. The act of March 30, 1837, extended the time for the redemption of such forfeited lands until the 15th January 1838; and the act of March 15, 1838, extended the time to the 1st day of July 1838, when the period for redemption expired. The forfeiture of such lands returned as delinquent became complete on the 1st of October 1834. The subsequent acts treated them not as lands returned as delinquent merely, but as lands forfeited; and although further time to redeem was given, the forfeitures which had accrued by prior laws were not released, except in such cases where the owner availed himself of the privilege to redeem. Staats v. Board, 10 Gratt. 400. The land in question, therefore, never having been redeemed, became actually forfeited and vested in the Literary fund on the 1st of October 1834.

The proof certified shows that the patentees were dead when the land was entered in their names in the year 1818. It is unnecessary to consider whether under the act, 2 Rev. Code of 1819, p. 15, § 13, 16 and 30, this was not the regular course until the heirs caused a transfer to be made on the commissioner's books to their names, according to law. More especially, as it seems that payment in redemption of said lands for the taxes prior to 1818, had been made in the names of the patentees. But be this as it may, either the lands were properly entered, and being returned delinquent, were forfeited for the non-payment
200 *of taxes, vesting in the Literary fund such estate as was vested in the person in whose name it was returned delinquent, and in the heirs, devisees or purchasers claiming under such person at the time such land were forfeited according to the act of April 1, 1831, Sup. R. C. p. 346, § 4; or if not properly entered, then they became forfeited for failure to enter according to the act of February 27, 1835, § 2; which forfeiture became absolute by the failure to redeem before the 1st of November 1836, according to the act of March 23, 1836, as no actual possession of the owner or proprietor or of his tenant is shown to have existed on the 27th February 1835, the time of the passage of the act. And it further sufficiently appears, that the amount of taxes, exclusive of damages, exceeded the sum which was relinquished by the act of 1832 or subsequent laws, if any such enquiry could be raised until the lands were actually entered on the books of the commissioner of the revenue, and the amount ascertained. I think, however, the entry in the name of the patentees concludes the heirs and purchasers claiming under them, and they were forfeited for the delinquency in failing to pay the taxes charged thereon. But the result is the same under any aspect of the case as presented by the facts certified.

The defendant showed no title in himself; and it has been insisted, that according to the cases of Middleton v. Johns, 4 Gratt. 139, and Tapscott v. Cobbs, 11 Gratt. 172, the defendant showing no title, should not be permitted to set up an outstanding title to prove that the plaintiff has no title.

The testimony in the case shows acts of possession at different times by some of the plaintiffs, and by their agent and tenants. The last act of possession proved is, that one of the lessors of the plaintiff about the 1st of June 1835 moved from the east to the county of Wood, and settled upon the one thousand four hundred acre tract, remained until February 1836,
201 *when he left the land; and that he claimed the land as the Usher land; that the place where he so settled was a different portion of the one thousand four hundred acre tract, from that in controversy; and that the improvement where he settled was afterwards held by a third person adversely to the plaintiffs' title.

It does not appear that there was any privity between the lessors of the plaintiff and the defendant, or that there was any obtrusion on the actual possession of the plaintiffs in error. The land being forfeited and actually vested in the Literary fund, the possession of the plaintiffs after such forfeiture gave them no rights as against the commonwealth. For any thing that appears, the possession was abandoned in February 1836. It does not appear when or how the defendant entered. But being in possession, and nothing more appearing, he may retain it, and cannot be deprived of the enjoyment of the property by one

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who is proved not to have any right to the land in controversy. It appears from the Code, p. 560, note to § 14, that a proposition of the revisors to change the rule which permitted a defendant in possession to defeat a recovery by showing an older title than that of the plaintiffs in a third party under whom the defendant does not claim, was rejected by the legislature. The case under consideration must be governed by the general rule as recognized in Moody v. McKim, 5 Munf. 374, and the recent case of Atkins v. Lewis, 14 Gratt. 30, there being no proof to bring it within the exception acted upon in Middleton v. Johns, 4 Gratt. 129, and Tapscott v. Cobbs, 11 Gratt. 172.

I think the judgment should be affirmed.

The other judges concurred in the opinion of Allen, P.

Judgment affirmed.

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202 *Stinchcomb v. Marsh.

July Term, 1858, Lewisburg.

1. **Ejectment—Evidence—Record of Another Action of Ejectment.***—In an action of ejectment, the record of another action of ejectment between other parties, is not competent evidence upon a question of boundaries or the location of the land in controversy.
2. **Power of Attorney—Conveyance of Land—Case at Bar.**—M gives to J a power of attorney to sell her lands in the county of R, with power to J to appoint other agents or attorneys. J executes a power to C to sell the lands, but the power only authorizes C to act in the name of J, and it is signed by J in his own name, without any reference to his principal. This power does not authorize C to convey the land as attorney of M.

This was an action of ejectment in the Circuit court of Ritchie county, brought in March 1852, by Thomas Stinchcomb against Enoch Marsh, to recover one hundred acres of land. On the trial of the cause the plaintiff claimed under a patent from the commonwealth to Robert McClure and John Relfe, for one thousand acres of land, which described it as beginning at a white oak, corner to Hugh Lenox's survey, No. 11, and thence by a line of said Lenox S. 45 W. 497 poles to a black oak, &c. And as evidence tending to locate the grant, he introduced in evidence a copy of a plat and certificate of a survey of ten thousand acres made for Hugh Lenox, lying on the waters of Hughes' river, and beginning at a beech No. 11, and running thence S. 45 degrees east 1385 poles, and also a patent to Lenox founded on this survey. And further to locate the patent under which he claimed, he then offered in evidence the records in two cases in ejectment, the first between John Rawson, plaintiff, and Levi Dawson, defendant; and the other between the same plaintiff and William L. Hitchcox, defendant; in which cases Rawson claiming, as the 203 plaintiff alleged, *under Lenox's patent, had recovered a judgment fixing the boundaries of said patent as contended for by the plaintiff in this case. To the introduction of this evidence the defendant objected; and the court sustained the objection: and the plaintiff excepted.

The plaintiff having traced the title under which he claimed from the patentees to Mrs. Susan Mitchell, introduced in evidence a power of attorney from Mrs. Mitchell to her son John Mitchell, authorizing him to sell and convey any lands belonging to her in the counties of Wood and Ritchie; and also to appoint such other agents and attorneys as he might deem necessary to carry into effect the foregoing power. He also introduced in evidence a power of attorney from John Mitchell to Warren W. Chapman, dated the 9th of June 1846, by which John Mitchell appoints Chapman his attorney, in his name to sell and convey, upon such terms as his said attorney should deem most for his advantage, all such lands in the counties of Wood and Ritchie to which Susan Mitchell had title, and to sell which he John Mitchell held her power of attorney. And he authorized his said attorney to prepare deeds with such covenants of warranty as to Mitchell's said attorney should seem expedient, and to deliver them as his deeds. And throughout the paper it is all by or for John Mitchell; and is executed by him simply as John Mitchell, without saying as attorney, or adding the name of Mrs. Mitchell. Indeed, there is no reference to her in the power, except that hereinbefore given. The plaintiff then offered in evidence a deed executed by William W. Chapman as attorney in fact for Susan Mitchell, to the plaintiff, referring to the foregoing powers of attorney for his authority, conveying to him the undivided moiety of two tracts of one thousand acres each, one of which the plaintiff insisted included the land in controversy in this case. And the deed being offered in 204 evidence only for the *purpose of showing title in himself under it, the court being of opinion that it did not pass the title, on the motion of the defendant excluded it: and the plaintiff again excepted.

There was a verdict and judgment for the defendant. And thereupon Stinchcomb applied to this court for a supersedeas; which was allowed.

Hoffman, for the appellant.
Kercheval, for the appellee.

LEE, J. Two questions occur in this case, first, whether the records of the cases of Rawson v. Dawson and Rawson v. Hitchcox mentioned in the plaintiff's first bill of exceptions were properly excluded from the jury, and second, whether the deed from Chapman as attorney in fact for Susan Mitchell to the plaintiff of the 15th of August 1848 was properly rejected when offered to prove the transfer of the legal title to the

*See principal case cited in Wise v. Postlewait, 3 W. Va. 460. See generally, monographic *note* on "Ejectment."

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land therein described to the plaintiff. Of these in the order stated.

It is a well settled rule of evidence that a verdict and judgment in an action at law cannot be received in evidence upon the trial of an action between others not parties to the first, nor standing in privity with those who were, for the purpose of proving any fact upon which such verdict and judgment were founded and which being essential to their rendition, is to be regarded as established by them. The party in the second action had no opportunity of cross examining the witnesses in the first, nor of confronting them with others by whom the facts deposed to by them might have been effectually disproved. 1 Greenleaf Ev. § 522, et seq.; Duchess of Kingston's Case, 20 How. St. Tr. 38, and n. 1. Moreover, although the witnesses in the first cause might all have been competent to give evidence in the second, yet it
205 might have *been otherwise, and the verdict and judgment may have been founded upon the testimony of the party himself who offers the record in the second cause or some other witness who would be equally incompetent. But this enquiry the court cannot stop to make. It would be opening a door to subjects and questions entirely apart from the true issue before the jury, and might lead into a wide field of irrelevant enquiry and discussion. Because therefore of the potential vice in the record as an instrument of evidence in the second cause the court has no alternative but to exclude it. Where the fact of such verdict and judgment having been rendered is proper and relevant evidence, as they can only be proved by the record, it may be admitted for that purpose, but when so admitted it cannot be used as evidence to prove any fact or allegation however material or traversable, upon which they must be supposed to have been rendered. Greenleaf Ev. § 538, 539, 527; 1 Stark. Ev. 213.

To this general rule there are some exceptions, as in the class of cases known as proceedings in rem, such as judgments of condemnation of property as forfeited, a prize in the exchequer or admiralty courts, and adjudications upon the personal relations of a party such as marriage, divorce, settlement and the like. 1 Greenleaf Ev. § 525, 541 and n, § 544 and n, § 545. Another exception it is said has been made in the case of verdicts and judgments upon subjects of a public nature, such as matters of reputation, customs and the like. 1 Greenleaf, § 526. Whether the latter class of exceptions can have any place in this state at this day, it is deemed not very material to enquire. For the verdicts and judgments offered in this cause can be brought within the range of neither of these classes. They were not cases in any sense in the nature of proceedings in rem, nor were they upon subjects of a public nature within the meaning of the ex-
206 ception contended *for. They were strictly suits inter partes, concerning private rights only; and they must fall within the class of cases, the verdicts and judgments in which, are evidence of the facts on which they were founded, only as between those who were parties, or who stand in privity with those who were.

The purpose for which these records were offered was to prove the boundaries of the ten thousand acre survey made for Hugh Lenox which the land claimed by the plaintiff was said to adjoin; and it was sought to do this by showing that in those causes, that survey had been located by the verdicts in the same manner in which the plaintiff sought to locate it in this action, and thus to make them evidence of the boundaries claimed as established by the findings of the juries in the two causes produced. This was in direct contravention of the rule of evidence just adverted to and violative of all the principles on which it is founded.

Nor could these records have been admitted upon the principle which admits, in certain cases, evidence of hearsay, reputation, tradition. It is true the principle of the admissibility of such testimony in cases of a public nature has been extended by our courts to questions of private boundary; but it is difficult to perceive how this can render admissible the verdicts and judgments in cases between others, although the same boundary may have been the subject of dispute. Such verdicts and judgments may have been founded upon the hearsay or tradition given in evidence, or upon evidence of a totally different character. The identity of the boundary as claimed on the ground with that described in the muniments of title relied on, may have been established by the conformity of natural objects actually found with those called for. It may have been made out by artificial monuments shown to exist as marked trees of the kind called for, the annulations on which
207 were found to agree with *the years elapsed since the date of the survey relied on. It may have been deduced from a connection with one or more adjoining surveys the location and boundaries of which were sufficiently proven or undisputed. Or it may have been determined from several of these different sources of evidence, or all, combined. Again. The proofs of hearsay or tradition, or whatever they were, were from the mouths of witnesses who might or might not be competent to give testimony in the particular case: but the party had no opportunity to show their incompetency to testify against him, or to cross examine them or to meet their statements by opposing proofs. Now, as we have seen, the court will not enter upon enquiries as to the nature of the proofs in the former case or the competency of the witnesses who then deposed to give evidence in the principal case. To attempt it would only lead to indefinite delays and breed inextricable confusion. That the former verdicts and judgments may have been obtained under such circumstances as should preclude them from being evidence in the principal case and that the court can-

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not undertake to analyze the proceeding of which they were the result, renders their rejection a matter of inevitable consequence.

In the case in judgment the records which were offered in evidence were in cases between totally different parties, nor is any privity shown between any of them and any party in this cause. They show nothing of the nature of the proofs exhibited, nor do they disclose who were the witnesses examined. There is no savor of antiquity about them if that would have helped the argument, for they were rendered within the year before the trial of this case. The same sources of proof which were turned to so good account in those cases were, it may be supposed, equally accessible to the parties in this. If the witnesses in them were competent to give evi-
208 dence in *this case, they might have been examined, and the jury left to draw their own inferences from their testimony without being influenced by the finding of another jury upon the same testimony. If they were not examined no reason has been shown for the omission even if the court would go into that enquiry. If they would not have been competent, that itself would be a conclusive reason for excluding the verdicts founded upon their testimony.

The rules of evidence have to a certain extent been relaxed on questions of boundary, but it is deemed unwise and inexpedient to extend the encroachment upon well settled and wholesome principles further than the courts have already gone. That the monuments of boundaries owing to the perishable materials of which they were made, may gradually disappear, has led to the admission of traditionary evidence concerning them, but it can furnish no sufficient reason for breaking down the well established barrier which restricts the effect of a verdict and judgment as evidence of the facts in issue in the cause, to those who were parties or stood in privity with those who were.

The second question relates to the exclusion of the deed from Chapman as attorney in fact for Mrs. Mitchell. If he had due authority as such, the deed should have been permitted to go to the jury, as it was in regular and proper form. If he had not, then Mrs. Mitchell was not bound, her title did not and could not pass by it, and as it was offered for no other purpose than to prove a transfer of her title to the plaintiff, it was properly excluded.

To show that Chapman was authorized to execute a deed for Mrs. Mitchell, the letter of attorney from John Mitchell of the 9th of June 1846 was first read in evidence to the jury. By the letter of attorney from Mrs. Mitchell to John Mitchell, the latter had the power to appoint such further
209 agents and attorneys as *he might deem necessary to carry into effect the power granted to him. The question then is was this power to appoint agents and attorneys duly executed as the law then stood by the letter of attorney to Chapman.

The power given to John Mitchell to appoint an agent who would be authorized to convey the legal title vested in Mrs. Mitchell, must of necessity have been executed by a deed, for no agent can bind his principal by deed unless he be so authorized by an instrument of equal solemnity. And as the law was then understood, to bind the principal every deed should be executed for and in the name of his principal, though it was not material whether the attorney sign the name of his principal with a seal annexed, stating it to be done by him as attorney for the principal, or whether he sign his own name with a seal annexed, stating it to be done for the principal. But if the deed do not purport to be the deed of the principal and be signed and sealed by the attorney neither in the name of his principal nor in his own name as his attorney it is not the deed of the principal. And in executing the power conferred, the attorney should conform to the terms and nature of his authority, and do that which it was the intention and legal effect of the power he shold be authorized to do in a legal and proper manner. Otherwise the act will be ineffectual to bind the principal.

Now the letter of attorney to Chapman does not purport to be the act of Mrs. Mitchell or for her or in her name. It purports to be the act of John Mitchell in his own name and on his own behalf. He appoints Chapman "his attorney," to sell, &c., "for his advantage and profit," to make seal and deliver deeds "as his deeds," to receive moneys coming "to him" on account of sales "for him and in his name," and "for him and in his name" to make seal and deliver acquittances. Nor is it signed
210 with the name of Mrs. *Mitchell stated to be by her attorney nor is his name stated to be for his principal. It is signed by him in his own name as if the instrument were executed in his own right and on his own behalf. Such an execution of the power could not bind Mrs. Mitchell nor invest Chapman with authority to transfer the legal title to the land. If John Mitchell had conveyed the land by a deed executed in the form adopted for this power, such a deed prior to the provision of our present Code, would not have passed the legal title. And a power executed by him under his authority to appoint other agents for his principal should be executed for or in the name of the principal just as should a direct deed of conveyance from himself. Whether a conveyance or a power to some other to convey it was but the execution of his power by deed, and that deed to be effectual must be executed in the manner required by the rules of law.

What might be the construction of such an instrument executed since our present Code took effect it is unnecessary to enquire as the paper in question was executed in 1846; but it cannot be sustained on the authority of Shanks v. Lancaster, 5 Gratt. 110, or of Bryan v. Stump, 8 Gratt. 241, as it is a different instrument from those

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in question in those cases and executed in a different manner. Prior to the Code at least, the question was not simply what the grantor intended to do, but whether the intent to execute the power was carried out in a legal and proper manner. In every case of a deed executed by an attorney it might be supposed that he intended to conform to his power and satisfy its requirements; but if he have failed to execute it in the manner required by the rules of law, it must be ineffectual, for his intention could not remedy the defective Code in which he attempted to carry his intention into execution. I refer on this subject to Sergeant Moore's Rep. Trin. 6 Eliz.
211 *No. 191, p. 70; Coombe's Case, 9 Rep. 75; Frontin v. Small, 1 Str. R. 705; S. C. 2 Ld. Raym. R. 1418; White v. Cuyler, 6 T. R. 176; Wilks v. Back, 2 East. R. 142; 5 Bouv. Bac. Ab. "Leases," I. 10, p. 571; Bogart v. De Bussy, 6 John. R. 94; Fowler v. Shearer, 7 Mass. R. 14; Elwell v. Shaw, 16 Mass. R. 42; Jones' dev. v. Carter, 4 Hen. & Munf. 184; Clarke's lessee v. Courtney, &c., 5 Peters' R. 318, 349; Martin v. Flowers, 8 Leigh 158. In the two cases last cited, the deeds were held inoperative because although purporting to be made by the parties as attorneys for their principals, they were yet executed by the attorneys in their own names and not in those of their principals.

That a spirit of self-reliance and directness of purpose, as suggested by counsel in argument, will prompt the people of this age and country to disregard the formalities of conveyancing and the rules of law by which they are prescribed, can constitute no sufficient reason nor furnish any adequate authority to the courts to change the law or overthrow plain intelligible and well settled legal principles. That is the province of the legislature, not of the judiciary. For the latter to undertake to mould the law so as to be adapted to the loose and careless modes of conducting business transactions which are said to prevail would be but to inaugurate uncertainty and confusion in the administration of justice, and lead to evils which though not at once foreseen and appreciated, might prove far greater and more to be deplored than the hardship which may occur in individual cases from an adherence to the settled rules of law, but which at last must be traced to the parties' own improvidence and want of reasonable care and precaution.

The result is that the letter of attorney from John Mitchell to Chapman being ineffectual to constitute the latter the attorney for Mrs. Mitchell, the deed which he undertook to make for her did not trans-
212 fer *the legal title to the plaintiff, and as it was offered for no other purpose than to prove such transfer, it was properly rejected by the court.

I think the Circuit court did not err in its ruling upon either of the questions raised, and am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

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213 *Miller v. Williams & al.

July Term, 1859, Lewisburg.

1. **Ejectment—Title of Plaintiff—Case at Bar.**—There is a sale of land under a decree to H who is the plaintiff in the suit; and the sale is confirmed and a conveyance ordered to the heirs of H, but no conveyance made. The heirs sell to third persons, but no deed is shown; but these purchasers take possession and put a tenant on the land. Afterwards on appeal the decree is reversed, the sale set aside, and a conveyance of the land directed; and in pursuance of this decree the court below sets aside the sale and directs a conveyance to the original owner, which is executed; and then the tenant in possession of the land attorns to this original owner, who holds by this tenant until he leaves the land, and afterwards continues in possession. In ejectment by the purchaser from the heirs of H against the original owner, HELD: the attornment of the tenant was not illegal, and the party getting possession through and from him is not the tenant of the plaintiffs so as to entitle them to recover without showing title in themselves.

2. **Sale of Delinquent Lands—Quære.***—Pending the appeal the land is returned delinquent for nonpayment of taxes in the name of the original owner, and is sold and purchased by the purchasers from the heirs of H. QUÆRE: If it was not their duty to pay the taxes, and if they can set up a title under that sale and purchase against the original owner.

3. **Same—Removal of Commissioner—Effect of Conveyance by Substitute.**—J, a commissioner of forfeited

*Sale of Delinquent Lands.—In McClure v. Maitland, 24 W. Va. 580, it is said: "The land sold being the property of the state and the court and commissioner her agents to make the sale, they are responsible to her and to her only for their acts. But like all other agents they must act within their authority and in the manner prescribed by it or their acts will have no effect. Therefore, unless they in making sales of the forfeited lands of the state, do substantially conform to the provisions of the statutes conferring the authority, their acts and proceedings will be ineffectual to divest the state's title or transfer it to the purchaser. *Miller v. Williams, 15 Gratt. 213.*"

Landlord and Tenant.—In Voss v. King, 33 W. Va. 245, 10 S. E. Rep. 405, it is said: "If the tenant, with notice to the landlord, disclaims the tenure, and claims the fee adversely, in right of himself or a third person, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right; and the landlord's right of entry is complete, and he may sue at any time within the period of limitation from that time. Willison v. Watkins, 3 Pet. 43; Kane v. Bloodgood, 7 Johns. Ch. 90; Tyler, Ej. 311; Wild v. Serpell, 10 Gratt. 405; *Miller v. Williams, 15 Gratt. 213, 219;* Cooey v. Porter, 22 W. Va. 120."

See also, Turpin v. Saunders, 32 Gratt. 33, and *note*, and Dobson v. Culpepper, 23 Gratt. 362, and *note*, both citing the principal case.

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and delinquent land, sells a tract of land and receives the purchase money. He is then removed and B is appointed in his place. B has no authority to convey the land to the purchaser; and his conveyance does not pass the title.

4. **Same—Same—Same.**—In such a case the court must make an order directing B to convey the land before he can make a valid conveyance.

5. **Same—Loss of Report of Commissioner—Right to Prove the Facts by Evidence Aliunde.**—The report of J of the forfeited lands in the county being lost, and the report of the sale of the land not showing plainly the land sold or the interest which the person in whose name it was forfeited held therein, it was not competent for the commissioner to resort to evidence *aliunde* to ascertain these facts; and therefore his deed is invalid.

6. **Same—Joint Commissioners—Validity of Separate Acts.**—Where there are two commissioners of forfeited and delinquent lands in one county, they are not required to act jointly; but each may act separately, and his deed will convey title to land sold by him.

214 *This was an action of ejectment in the Circuit court of Nicholas county, brought in August 1855, by Hazael Williams and Thomas McCleary against Charles C. Miller, to recover a tract of three thousand acres of land. On the trial there was a verdict and judgment for the plaintiffs; and the defendant excepted to opinions of the court overruling a motion for a new trial, and also for refusing and giving certain instructions. Numerous questions were raised, but only two of them were considered by this court.

As early as December 1782 George Clendenin and George Huston his surety executed a bond to John Mayo, binding themselves to pay him fifteen thousand pounds of tobacco. And in December 1794 Clendenin executed a power of attorney to Huston, authorizing him to sell a tract of three thousand acres of land, which Clendenin held under a patent from the commonwealth, and to apply the proceeds of sale to the payment of the debt due to Mayo. But Huston was not to sell the land or any part of it for a less price than one dollar per acre. This land was then within the county of Greenbrier, but is now in the county of Nicholas, and is described in the patent as lying in the county of Greenbrier, on the north side of Gauley river, including Stroud's improvement and the several branches of said creek.

Huston was sued upon the bond, and compelled to pay it: and he then filed a bill in the Chancery court at Staunton against John Cantril, the administrator of Clendenin, and the widow and heirs, seeking to subject the tract of three thousand acres of land and the other estate of Clendenin to satisfy him for what he had paid. In June 1823 a decree was made for the sale of this land: and in November following the marshal reported that it had been sold to George Huston at the price of thirty cents per acre.

Huston died in 1826; and the suit
215 was revived in *the name of Philip Pitman, his administrator, who had purchased the interest of the other distributees in the suit. And on the 19th of July 1827 the court confirmed the sale to Huston, and directed the marshal of the court to convey the land to Huston's heirs by name, or whomsoever they might appoint. It does not appear that this conveyance was ever executed by the marshal.

The debt due to Huston not having been satisfied by the sale of the land and the application thereto of the amount found to be due from Cantril, the administrator of Clendenin, on the 21st of July 1827 Pitman filed a supplemental bill, seeking to set aside certain gifts of slaves made by Clendenin to his three daughters before their marriage, as fraudulent and void as against creditors. But when the cause came on to be heard in August 1830, upon this supplemental bill, it was dismissed by the chancellor: And thereupon Pitman took an appeal to the Supreme court of appeals; where the case lingered until April 1840, when that court not only affirmed the decree of the chancellor dismissing the supplemental bill, but holding that the appeal brought up the whole case, reversed and annulled all that had been done in the original cause, and sent the cause back with directions that all the proceedings for subjecting the tract of three thousand acres of land, should be set aside, and a conveyance to the heirs of Clendenin should be decreed.

In pursuance of this decree the chancellor in June 1840 made a decree in conformity therewith, and appointing a commissioner to convey the land to the heirs of Clendenin: And this was done by a deed bearing date the 16th of August 1841.

After the sale of the land to Huston had been confirmed, and the heirs of Huston had sold their interest therein to Pitman, as before stated, about the year
216 *1828 or 1829 the plaintiffs took possession thereof, claiming the same as purchasers from Pitman; and they put George Rader into possession of it as their tenant; and he continued in possession as their tenant until the 13th day of October 1840; when he entered into an agreement under seal with Charles S. Miller for himself and the other heirs of Clendenin, by which he took a lease of the land from them, referring to the late decree of the court of appeals, to continue until the 1st of March 1842. And he continued to hold the land under renewed leases until the 1st of April 1847; when it was leased by Miller, acting for himself and the other heirs of Clendenin, to other parties; and the defendants so continued to hold possession of the land, by their tenants, down to the institution of the suit, claiming under Clendenin, and adversely to the plaintiffs.

Whilst the suit of Huston's adm'r v. Cantril & als. was pending in the Court of appeals, and in April 1839, John G. Stephenson, the commissioner of delinquent and forfeited lands for the county of Nicholas, seems to have made a report of the forfeited

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lands in the county of Nicholas, and to have reported the tract aforesaid of three thousand acres as forfeited in the name of John Cantril for the non-payment of taxes. And at the April term 1839 of the Circuit court of that county, the court made a decree directing the lands so returned forfeited to be sold. At the fall term of the court Stephenson reported that he had sold one tract of three thousand acres in the name of John Cantril, which was purchased by Hazael Williams and Thomas McCleary, at sixty-five dollars and twenty-five cents; that being the amount of taxes and damages, which was paid in hand: And at the April term 1840 the sale was confirmed by the court.

At the April term 1841 of the court
217 Alexander *Brown was appointed a commissioner of delinquent and forfeited lands for the county of Nicholas: and at the next September term John Brown was appointed to the same office in the place of Stephenson, removed. And by deed bearing date the 27th of May 1843, John Brown, as such commissioner, conveyed to Williams and McCleary the land which had been sold to them by Stephenson; describing it as a tract of three thousand acres patented to George Clendenin deceased, and forfeited in the name of John Cantril, it being the survey on which George Rader lives, on Stroud's creek.

When the evidence had been introduced, the defendant moved the court to give eight different instructions to the jury; but it is only necessary to state the second, which was as follows:

2d. The decree of the Circuit court for the county of Nicholas rendered at its April term 1839, and the return of sales made by John G. Stephenson, commissioner for the county of Nicholas, purporting to be sales made by him of forfeited and delinquent lands for the county of Nicholas, dated the day of 1839, and returned to the September term of said court 1839, and the decree of said court rendered at the April term 1840, confirming said sales, were not sufficient to vest the commonwealth's title, by forfeiture to the tract of land in controversy, in the plaintiffs, Hazael Williams and Thomas McCleary, or to authorize John Brown, who was subsequently appointed a commissioner of delinquent and forfeited lands for said county, to make and execute the deed dated the 27th of May 1843, to the complainants for the aforesaid land in controversy. This instruction the court refused to give: and the defendant excepted.

Upon the application of the defendant Miller, who had purchased the interest of Cantril and wife in the land, this court awarded a writ of error.

218 *Parks and Fry, for the appellant.
Gordon and Price, for the appellees.

LEE, J. Various questions have been elaborately discussed by the counsel in this case, two only of which, however, do I propose to consider. These are:

First, whether the defendants in error who were the plaintiffs in the court below, have made out a case entitling them to recover without showing the legal title which they claim to have derived under the sale made by the commissioner of delinquent and forfeited lands and the deed made to them by Commissioner Brown.

Second, whether such sale and deed did invest them with the legal title to the land in controversy so that they can recover on the strength of such legal title alone.

And, first, as to the right to recover without showing a legal title. If the plaintiffs holding peaceable possession of the land had been entered upon and ousted of such possession by the defendants having neither title to nor authority to enter upon the premises, according to a recent decision of this court they could have maintained ejectment upon their possession alone without showing a legal title. Tapscott v. Cobbs, 11 Gratt. 172. Or if the defendants were the tenants of the plaintiffs or the latter had the right to treat the former as such, then as they repudiated such tenancy and claimed to hold adversely, the plaintiffs might have recovered upon this ground without the necessity of showing a legal title, because being tenants the defendants could not dispute their landlord's title. Willison v. Watkins, 3 Peters' R. 43; Emerick v. Tavener, 9 Gratt. 220; Adams Eject. 3 n. 57 n. 247 n. 5, (ed. 1830); 2 Greenl. Ev. § 305, and authorities cited in n. 1.

That the defendants entered as tres-
219 passers cannot *be said with any propriety. They entered under authority of the decree of the 17th of June 1840 made in conformity to that of the Court of appeals of the 18th of April 1840. By those decrees, the decree for the sale of the land at which Huston, under whom the plaintiffs claimed, had purchased was reversed and annulled; and it was not left an open question whether the purchaser would be disturbed by the reversal of the decree of sale, for the decree went on to set aside all the proceedings had in the original cause including the sale, in terms, and appointed a commissioner to reconvey to the heirs of George Clendenin the land which had been so sold. And this deed was afterwards regularly executed by the commissioner. It is true these plaintiffs were not themselves parties to the cause, but Huston's heirs, and their immediate vendor Pitman, were, and they must stand on the footing of pendente lite purchasers and be bound by the decree. Thus the defendants obtained their possession under a bona fide claim of title and the authority of the decree of the court which restored to them all the rights of which they had been divested by the sale under the former decree.

But it is insisted that the plaintiffs had the right to treat the defendants as their tenants because the attornments made to them by Rader were unlawful and void, and that therefore they could not contest the plaintiffs' title until they had first restored the possession.

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The general rule that a tenant may not dispute the title of him by whom he has been let into possession, cannot be questioned; but there is this modification, which is well established, that he may always show that his landlord's title has expired or been extinguished since the lease, or that he has sold his interest in the premises, or that it is alienated from him by judgment and operation of
220 law. Syburn's lessee v. *Slade, 4 T. R. 681; Colemere's lessee v. Whitroe, 1 Dowl. & Ryl. N. P. Cases, 1 (16 Eng. C. L. R. 409); Van Schaick's lessee v. Davis, 5 Cow. R. 123; Lowden's lessee v. Watson, 2 Stark. R. 230; Russell's lessee v. Rowland, 6 Wend. R. 666, 670; Adams Eject. 247 & n. 6. So if these parties could have been considered as tenants, they would have had the right under this modification of the rule to show that since the lease to Rader the title of the plaintiffs under which they got into possession had been extinguished by the decree of the Court of appeals and that of the Circuit court made in conformity to it. But they did not admit themselves to be tenants of the plaintiffs, nor had the latter the right to treat them as such. They always claimed to hold adversely, and although they came into possession by means of the attornments of the plaintiffs' tenant Rader, yet those attornments were made under such circumstances that the liabilities of tenants were not created by them. They were made after and in consequence of the decrees by which these parties had been fully restored to all their rights in the land and the title of the plaintiffs under the previous decree and sale, had been extinguished. They had the right to enter and take possession if they could do so peaceably. The recoverer after judgment may enter without execution where the demand is certain. Thus after judgment in a common recovery the demandant may enter or take out execution at his election. Shelley's Case, 1 Rep. 93, 106; Mary Portington's Case, 10 Rep. 35. The patron who recovers in quare impedit may present without a writ to the bishop. Rud v. Bishop of Lincoln, Hutton's R. 66. And after a recovery in ejectment the lessor of the plaintiff may enter without the sheriff, for his assistance is but to preserve the peace. Siderf. R. part 2, p. 156. Withers v. Harris, 7 Mod. R. 64, 69; Badger v. Lloyd, Holt's R. 199. And being
221 thus entitled to enter, he cannot *be considered as a trespasser for asserting that right unless his entry be attended with such acts of violence as will subject him to a criminal prosecution. Taylor v. Cole, 3 T. R. 292. Such an entry after judgment in ejectment works no disseisin of the freehold, nor can the true owner ever elect to make the person then in possession, a disseisor. He could not bring an assize of novel disseisin at common law; the entry is not injuste et sine judicio, but under authority of a court of justice and lawful, and therefore not liable to punishment by fine as every disseisin was. Taylor ex dem. Atkyns v. Horde (1757), 1 Burr. R. 60, 113, 114; Doe ex dem. Atkyns v. Horde (1777) 2 Cowp. R. 689, 701. Being thus entitled to enter and take possession, no reason is perceived why they might not acquire it by the attornment of the tenant in possession. It was the duty both of his landlord and himself to surrender it in conformity to the decrees, and the taking of the attornments was not in fraud of the rights of the plaintiffs, nor did it violate any law. For the act of assembly (1 Rev. Code 1819, p. 370, § 33), following the act of 11 Geo. 2, ch. 19, § 11, while it declared that the attornment of a tenant to any stranger should be void, unless with the consent of the landlord, expressly excepted such attornment made pursuant to or in consequence of a judgment of a court of law, or the order or decree of a court of equity. The attornment here was plainly in consequence of these decrees and was thus within the exceptions made in the act.

But it may be said that although this be true in respect of the title which the plaintiffs claimed under the purchase from Pitman, yet that after this purchase and after they had placed Rader in possession to hold as their tenant, they acquired an independent paramount title under the sale by the commissioner of forfeited lands and the deed made to them by Brown, which was not affected by the decrees in the chancery
222 *case; and that when they became invested with this title, immediately their tenant Rader held under them in respect of it also, and that as to it, his attornment was void.

It may be true that as between the plaintiffs and Rader, the latter might be regarded upon the accession of the new title as holding under it also; but I am not prepared to agree that this would deprive the defendants of the benefit of the decrees. If the possession had been vacant, they were entitled notwithstanding the plaintiffs had acquired an independent title pending the chancery suit to enter upon the premises and take possession. If they had come with a writ of possession, the new title would have been no answer to the sheriff's demand; and as when they did come the tenant in possession surrendered it to them and they entered upon it, I conceive they were in upon their own title and not as tenants, and that in either case the plaintiffs would have been put to their action upon their new title. The rule too forbidding the tenant to dispute his landlords' title would on the terms on which it is usually propounded, seem to relate to the original title under which he had been let into possession. See Adams Eject. 247; 1 Greenl. Ev. § 24, 25; 2 Ibid. § 305. And it may be questioned how far these plaintiffs claiming under the purchase from Pitman and standing in privity with Clendenin's heirs could be allowed to set up against them a title acquired by forfeiture for non-payment of taxes. It might be urged with great force that it was their

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duty to protect the title against such forfeiture and that their purchase at the tax sale should enure to the benefit of those ascertained to be the true owners. But it is unnecessary to pursue these enquiries for in the most favorable view to the pretensions of the plaintiffs, we are only brought to.

The second question above stated,
223 which relates to *the effect of the sale of the land as forfeited under the order of the Nicholas court and the deed made by Commissioner Brown in transferring the commonwealth's interest and vesting in the grantees the legal title to the land described in the deed.

The sale was under an order made at the April term 1839, which after reciting that John G. Stephenson commissioner of delinquent and forfeited lands, had that day made a report of the forfeited lands in the county of Nicholas, directed him in general terms to make sale of said lands upon the terms prescribed by law. Stephenson afterwards reported that he had sold sundry tracts of land in obedience to said order, and amongst others "a tract of 3000 acres in the name of John Cantril," which was purchased by Hazael Williams and Thomas McCleary at the price of sixty-five dollars and twenty-five cents, that being the amount of the taxes with the damages due thereon. At the April term 1840 this sale was confirmed. On the 9th of September 1841 Stephenson was removed from office, and John Brown appointed commissioner of delinquent and forfeited lands in his place; and subsequently Stephenson having never conveyed the land to the purchasers whilst he continued in office, Brown undertook to convey it by deed dated the 27th of May 1843. At the time of the execution of this deed there was another commissioner of delinquent and forfeited lands for the county of Nicholas, one Alexander Brown, who had been appointed at the April term 1841, and he had given bond and duly qualified as such, but he did not unite with John Brown in making it. And it is objected that the commissioners took a joint authority under the act, and that neither could act separately or without the concurrence of the other.

This objection, I think, cannot avail to affect the validity of this deed. It is
224 true in some of the counties *in which more than one commissioner of forfeited and delinquent lands was appointed, it is understood that they have construed their authority to be joint and not several, and have acted conjointly in all their proceedings. Such however, I think is not the true construction of the act by which the appointment of such commissioners was directed. The object of the law in authorizing several commissioners in one county, was to speed the sales of forfeited lands in the large counties in which from the number of forfeitures, they could not be investigated and reported to the court and the numerous tracts sold by a single commissioner in a reasonable time. The power conferred was a several one to be exercised by each commissioner, who is afterwards throughout the act spoken of in the singular, and there is nothing whatever in any of its provisions to indicate that it was to be exercised by the commissioners, where more than one, conjointly. And it would have retarded rather than promoted the object which the legislature plainly had in view, to make the power joint instead of several. I am however of opinion that it has not been shown that Brown had any legal authority to execute this deed. He was not the commissioner who sold the land and who was authorized to receive the purchase money, nor has any order of the court been produced directing him to make the conveyance. That he had been appointed a commissioner of forfeited land to supply the vacancy occasioned by the removal of Commissioner Stephenson did not of itself import an authority to make deeds for lands sold by his predecessor. By the act of 1837 it was the duty of the court in all cases to direct the deed to be made, and no deed could be made without such order; by the act of 1838, § 9, provision is made authorizing the commissioner by whom a sale is made to receive any purchase money before it is due, deducting the interest
225 thereon from the time when paid *to the time when the same would become due and payable according to the terms of sale, and thereupon the purchaser became entitled to his deed for the land so purchased and paid for, upon application to the commissioner. But the commissioner thus authorized to convey without the order of the court was he who made the sale and received the money. The words are "upon application to the said commissioner," referring to the one who had made the sale and received the money. No other would be authorized to collect or receive the purchase money of lands sold, without an order of the court, nor could the successor of a commissioner who had died or been removed from office know personally or undertake to recite that the money had been paid in advance to his predecessor. In such a case the proper course is for the purchaser to apply to the court and upon proving that the purchase money has been duly paid by reference to the report of sale if it showed it or by extrinsic evidence if it did not, to ask an order directing some other commissioner to make the deed.

In Walton v. Hale, 9 Gratt. 194, the president of this court says "the commissioner to make sales under the delinquent land laws * * * has no interest in the subject of sale. He acts like a commissioner to make sales under a decree of the Chancery court and is clothed with a mere naked authority." It was therefore held that the deed of such a commissioner could avail nothing where his authority to make it did not appear, as in that case where the commissioner had undertaken to make the deed to a person other than a purchaser at his sale.

In Rockbold v. Barnes, 3 Rand. 473, which

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was the case of a sheriff's sale of delinquent land, the deed purported to be made by the deputy sheriff, and it was held that to make it evidence of transfer of title it should be proven that the principal was sheriff
226 and *that the party who undertook to convey was his deputy. In Wilsons v. Bell's lessee, 7 Leigh 22, which was a similar case, the sale had been made by the sheriff, but the deed reciting such sale was made and acknowledged by the deputy as his own act, though it purported to be the deed of the principal. The deed was rejected as evidence of title, and the judgment was affirmed. In that case the opinion is expressed that where in such a case the sale is made by the sheriff, the deed cannot be made by the deputy and vice versa; and Tucker, P., refers to the terms of the act as fortifying "the natural supposition that he who makes the sale is to make the title." In Flanagan v. Grimmet, 10 Gratt. 427, Allen, P., refers to a case decided by this court, Keezee v. Leece (not reported), in which where the sale had been made by a deputy but the deed executed by the sheriff, the objection to the deed was overruled and it was suffered to go to the jury, and this court affirmed the judgment. But if in that case the correctness of the distinction implied in the opinions of the judges in Wilsons v. Bell's lessee (above cited) between the sheriff and his deputy, was doubted or disaffirmed, certainly I think, it will not be questioned if predicated of a sheriff and his successor in office or of a commissioner of forfeited lands and his successor.

The deed executed by Commissioner Brown, it is true, recites that it was made in pursuance of an order of the court made on the 9th of September 1841 directing the acting commissioner to convey the land to the grantees. No such order is produced, and the mere recital of authority in such a deed would not be evidence against others asserting an adverse claim. Carver v. Jackson, 4 Peters' R. 83; Wiley v. Givens, 6 Gratt. 277; Walton v. Hale, 9 Gratt. 194. The presumption I think is that there was in fact no such order, but that the
227 order of the 9th of September *1841, appointing Brown successor of Stephenson was construed (erroneously I think) as importing a direction to make deeds for lands sold but not conveyed by his predecessor. I think the deed was ineffectual for want of a sufficient authority in Brown to make it; but there is another objection which is perhaps equally fatal.

The report of the sale made by Commissioner Stephenson merely describes the land as "one tract of 3000 acres in the name of John Cantril * * * lying on waters of Gauley river and Beaver creek," and the order confirming the sale describes it as "3000 acres sold in the name of John Cantril." The order for the sale is a general order directing the sale of the lands forfeited within the county of Nicholas according to the report of the commissioner made on that day. But this report is not produced, why, the record does not disclose, though it was stated in the course of the argument that it had been lost; and we cannot know that it ever was reported as forfeited except so far as we may infer it from the fact that it was reported as having been sold as such and the confirmation of that report. But what was the description given of it in the report of forfeiture, if such there was, we are not informed, nor can we undertake to say from the record of the proceeding as we have it, that the "3000 acres in the name of John Cantril on the waters of Gauley river and Beaver creek," is the same three thousand acres granted to George Clendenin, or that it was the survey on which George Rader lived on Stroud's creek, nor does it inform us what John Cantril had to do with the three thousand acres granted to George Clendenin. Whether he claimed the whole tract or an undivided interest in it on behalf of his wife who it was proved on the trial of this cause (though it does not appear in the proceeding for the sale) was one of the heirs of George
228 Clendenin, we *are unable to learn, nor whether the entire tract was reported as forfeited or his undivided interest only. We cannot suppose that it was reported as forfeited as omitted land because not entered in the name of George Clendenin or of his heirs, because it is treated as forfeited for non-payment of taxes charged to John Cantril, and also because it is clearly proven that at the date of the act of 1835 the land was in the actual possession of parties claiming under the Clendenin title, and therefore not liable to forfeiture as omitted land. All these difficulties Commissioner Brown undertakes to resolve. He identifies the "3000 acres in the name of John Cantril on waters of Gauley river and Beaver creek," with the tract granted to George Clendenin on the north side of Gauley river, including Stroud's improvement and the several branches of Stroud's creek and a branch of Beaver creek, referring to the patent for the boundaries; and he ascertains that the whole interest in this tract had been forfeited in the name of John Cantril; and accordingly undertakes to convey it to the purchasers at the sale made by Stephenson. In doing this, even if he had had authority to make a deed, I conceive that he went out of the chart prescribed to him by the record and transcended his authority in undertaking to identify the land sold by Stephenson by elements of description furnished by himself outside of the record.

On both the grounds stated I think the deed of Brown was invalid to convey title to the land in controversy, or at least that its validity is not shown by the record before us, and that the Circuit court should have given the second instruction asked for by the defendants, and should have also sustained the motion to set aside the verdict and grant a new trial.

I am of opinion, therefore, to reverse the judgment and remand the cause for a new trial, upon which the parties may, if they

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can, supply the defects in the record
229 *on which they rely; and as the other questions that have been raised may not arise upon such future trial, I forbear at this time to express any opinion upon them.

The other judges concurred in the opinion of Lee, J.

Judgment reversed.

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230 *Va. Central R. R. Co. v. Sanger.

July Term, 1859, Lewisburg.

1. **Railroad—Carriage of Passengers—Degree of Care.***—Railroad companies conveying passengers, combining in themselves the ownership as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers.
2. **Same—Same—Obstructions on Track—Degree of Care.**—The duty of a rail road company to employ the utmost care and diligence in guarding their road against obstructions on the track is clearly embraced within its warranty to carry their passengers safely, so far as human care and foresight can go.
3. **Same—Same—Same—Negligence of Independent Contractor.**†—If a rail road company, whilst using its track for the carriage of passengers, engages in a work to be done on its road and in the immediate proximity of its track, negligence in the performance of which would, in the estimation and opinion of cautious persons, involve the hazard of obstructions to the passage of its cars, and an accident to a passenger is caused by an obstruction arising from negligence in the performance of the work; it is no defence to show merely that they had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of one of his employees.
4. **Same—Same—Same—Same—Case at Bar.**—Contractors employed by a rail road company to deliver stone on the road and prepare it for ballasting the track (the ballasting not being necessary to the security, but being intended for the preservation of the track), place the stone in ridges so near the rail that it is struck by the step of the baggage car, or the ridge is disturbed and a stone rolled down by the hub of one of the cars, or is rolled down by the jarring of the train as it passes near the ridge, or it is loosed from its place and rolled down by the haste of one of the hands employed by the contractors in getting off the ridge to avoid the train, and the cars run against it, and are thrown off the track, whereby a passenger is injured; it is for the jury to enquire whether there was not danger in the work, arising from the mode and manner in which it was done; whether the company did not know, or by the exercise of the proper diligence might not have ascertained, the existence of such danger; and whether they had used due care and foresight in guarding against it; and if they have failed in this, the company is responsible to the passenger for the injury he has sustained.
231 *5. **Instructions—Equivocal.**‡—An instruction which is susceptible of two constructions, one of which is erroneous, and which may therefore mislead the jury, should not be given.

This was an action on the case in the Circuit court of Augusta county, brought by Jacob Sanger against the Virginia Central Rail Road Company, to recover damages for an injury which he sustained whilst being carried as a passenger on the defendant's road. On the trial the defendant asked for six instructions to the jury; the first four of which were given, the fifth was refused, and the sixth was given with a slight addition. And to the refusal of the court to give the fifth and sixth instructions as asked for, and the giving the sixth with the addition thereto, the defendant excepted. They are stated by Judge Daniel, in his opinion, with the evidence on which they are based. The jury found a verdict in favor of the plaintiff for six thousand dollars; on which the court rendered a judgment. And thereupon the defendant obtained a supersedeas to this court.

Michie and Stuart, for the appellant.
Baldwin and Imboden, for the appellee.

DANIEL, J. The only questions which we have to consider, are those arising out of the ruling of the Circuit court in respect

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*__Carriage of Passengers—Degree of Care.__—Carriers of passengers must exercise the *utmost* degree of care in transporting passengers. The principal case and Farish v. Reigle, 11 Gratt. 697, were cited in Poling v. Ohio, etc., R. Co., 38 W. Va. 661, 18 S. E. Rep. 787, and Fisher v. W. Va., etc., R. Co., 39 W. Va. 389, 19 S. E. Rep. 587, as leading authorities for this proposition. See also, in accord, Baltimore & Ohio Ry. Co. v. Wightman, 29 Gratt. 431; Baltimore & Ohio Ry. Co. v. Noell, 32 Gratt. 395, and *foot-note*; Richmond, etc., Ry. Co. v. Scott, 86 Va. 907, 11 S. E. Rep. 404; Connell v. C. & O. Ry. Co., 93 Va. 55, 24 S. E. Rep. 467; Searle v. K. & O. Ry. Co., 32 W. Va. 370, 9 S. E. Rep. 248. This degree of care, where the carrier owns the road over which it operates, as in the case of railroads, is not confined to the management of the trains and cars, but most exact care and diligence must also be exercised in the structure and care of the track and in all subsidiary arrangements necessary to the safety of the passengers. See the principal case cited in Gleeson v. Va. Midland Ry. Co., 140 U. S. 435, 11 Sup. Ct. Rep. 862; Baltimore & Ohio Ry. Co. v. Wightman, 29 Gratt. 431; Baltimore & Ohio Ry. Co. v. Noell, 32 Gratt. 394. See, in accord, Searle v. K. & O. Ry. Co., 32 W. Va. 370, 9 S. E. Rep. 248.

†__Same—Obstructions on Track—Negligence of Independent Contractor.__—See principal case approved in Carrico v. W. Va., etc., Ry. Co., 39 W. Va. 94, 95, 103, 19 S. E. Rep. 573, 574, 577; Carrico v. W. Va., etc., Ry. Co., 35 W. Va. 399, 14 S. E. Rep. 15.

See principal case distinguished in N. Y., etc., R. Co. v. Baker, 98 Fed. Rep. 697, 698.

See article in 6 Va. Law Reg. 137, as to the employment of independent contractor.

‡__Instructions—Equivocal.__—The principal case was cited and followed in Gas Co. v. Wheeling, 8 W. Va. 371. See also, *foot-note* to B. & O. R. R. Co. v. Polly, 14 Gratt. 448; monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

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to the fifth and sixth instructions asked for by the plaintiff in error on the trial.

By the fifth instruction the court was asked to say to the jury, that if they believed from the evidence, that the injury received by the defendant in error was caused by the cars being thrown off the track by a large rock suddenly rolled down upon the track by the servants of Brown & Crickhard, contractors for the performance of work which did not necessarily or properly concern the running of the road, nor connect itself with or affect the track
232 or the carrying of passengers *thereon safely, and by no other carelessness; and that the rolling down of the said rock as aforesaid, could not have been foreseen nor provided against by the conductors of the cars, then, although the contract of the company with Brown & Crickhard required that their work should be done according to the requirements of the principal and other engineers of the company, and that Brown & Crickhard should carry out their directions, &c.; yet those provisions in the said contract did not make the employees of Brown & Crickhard servants of the company; and the jury should find for the company.

The sixth instruction asserts the proposition, that although it be true that a common carrier is not at liberty to depute another party to perform any part of his duty in reference to the transportation of passengers, and cannot rely on such a deputation to relieve him from responsibility; yet in a matter not relating to the duty of transportation of passengers, but collateral thereto, and not necessarily affecting the duty of the company as carriers, they stood on the same footing with other persons, and might rely on the default of their subcontractor to the same extent as any other party could do.

The court refused to give the fifth instruction, and gave no other in lieu of it. The court also refused to give the sixth instruction as asked, but in lieu of it, instructed the jury, that although it be true that a common carrier is not at liberty to depute another party to perform any part of his duty in reference to the transportation of passengers, and cannot rely on such a deputation to relieve him from responsibility; yet in a matter not relating to the duty of transportation of passengers, *nor connected with the safety of the road*, but collateral thereto, and not necessarily affecting their duty as carriers, the company stood on the same footing with other
233 persons, and might rely on *the default of their subcontractor to the same extent that any other party could do. The modification made by the court in the instruction, as asked, consisting in the interpolation of the words which I have italicised.

It appears from the certificate of the facts, that Brown & Crickhard were the contractors for the construction of the nineteenth section of the road (the section on which the injury was received); and that their contract included the delivery upon the line of the road, and preparing for the use of the track layers, the stone necessary for ballasting the road; that some month or two before the happening of the act complained of, it became desirable to lay the track upon the nineteenth section, and to use it for the passage of the cars; that Brown & Crickhard were not then ready with the stone for ballasting, and that as ballasting was designed merely to secure the permanency and durability of the superstructure, and was not deemed by the company essential to the present safety of the road, the engineer required the track to be laid without the stone ballasting: and the road was thus brought into use without the ballasting. Brown & Crickhard were required to go on and deliver and prepare the stone for ballasting; and were instructed to place it on the line of the road, outside of the track, in such a position that it could be either used for ballasting or conveniently placed upon cars to be transported elsewhere on the line; though they were instructed not to place it upon the track, or on or between the ties.

It further appears, that Brown & Crickhard were engaged, with a force of fifteen or twenty hands, in delivering and preparing this ballasting, and that the mode of doing it was to place unbroken stone along the line of the road outside of the track, and then to break and heap it up in ridges of convenient size and shape to be measured and received by the engineers.
234 *These hands were engaged at this work at the time the train came up on the day of the injury, and some of them appeared to have been sitting astride the stone ridges, and to have just left their places to avoid the near passing of the cars.

It was proved that the car was thrown from the track by striking against a large stone on the track; but there was a conflict of opinion among the witnesses as to how the stone came to be on the track.

No one saw exactly how the matter occurred, and the witnesses expressing their belief, from the appearances discovered on after examination, differed in opinion as to the precise manner in which the accident was caused.

One witness expressed the belief, as the result of his examination, that the ridge of stone at that point was so near the rail that it was struck by the step of the baggage car, and that by the disturbance thus caused, a large stone was rolled from the top of the ridge, just in front of the wheel of the first passenger car: And in support of this opinion, the witness stated that he observed that the step was very much bent and injured. Another witness thought that the ridge had been disturbed, and the stone rolled down by the hub of one of the wheels of the baggage car; and stated that the casting which covered the hub was very much broken. Another thought that the stone had been, rolled down by the jarring of the train as it passed near the stone ridge. Another, that the stone had probably been loosed from its place and rolled

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down by the haste of one of the hands of Brown & Crickhard in getting off the ridge to avoid the train; and gave as his reason that on examining the spot he found the apron and hammer of one of said hands at the point from which the stone had probably rolled, and saw no evidence that the train had struck the ridge of rock. All, how-
235 ever (the certificate proceeds), *concurred in the opinion that the stone was rolled under the train while in motion, and the stone was found deeply imbedded in one of the ties. The wheel of the car was broken, and the end of the car thrown from the track against a bank, breaking the car, and injuring the plaintiff.

It was found that the nineteenth section had not been surrendered to the control of the road master charged with keeping the road in repair, but was still in charge of the engineer department as under construction.

The engineer who had charge of the section, stated that he considered the contractors Brown & Crickhard and their hands as under his control, and that he had given them such orders as, if obeyed, could have prevented such an occurrence. He further stated that he had frequent occasion to pass over this section of the road, and that he had never observed that any of the stone ridges were so near the track as to be dangerous; if he had, he would have had the authority and it would have been his duty to have them promptly removed. Another witness testified that being in charge of a gravel train in the service of the company, he had had frequent occasion to pass along the line over the nineteenth section, and that he had several times called the attention of those engaged in preparing this ballasting to the fact that the stone ridges were too near the rails, and that there would some accident occur if they were not removed.

I have thus followed up the instructions, with the certificate of the evidence, believing that a mere reading of the two in their immediate connection will of itself go very far towards showing the true object and meaning of the instructions, and the consequent propriety or impropriety of the ruling of the Circuit court in respect to them.

Before proceeding to make such
236 comments upon the *case as may, however, still seem necessary in order fully to test the correctness of the judgment of the Circuit court, it will, I think, be found convenient to direct our attention first to the nature of the contract (express or implied between the parties), by the negligent performance of their part whereof, by the company, the injury to the defendant in error is alleged to have been caused.

And here, in the first place, it is obvious to remark that, whilst the diligence which the law requires of a rail road company in the performance of its duties as the carrier of passengers on its cars, is in no respect inferior in degree to that expected of any other common carrier of passengers by land, the sphere of such duties is, in the case of the rail road company, generally of a much broader extent than that which usually limits the office and duty of a carrier of passengers by stage coaches or other like means of public conveyance. This enlargement of the limits of the duties and responsibilities of the rail road company grows out of the consideration in part that they are ordinarily not only the owners of the carriages or vehicles in which the passengers are transported, and of the motive power, but also the sole and exclusive proprietors of the track and of a certain space immediately contiguous on each side. Combining in themselves the ownership as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. McElroy & wife v. Nashua and Lowell Rail Road Corporation, 4 Cushing's R. 400. And in order to show that they have used such care and diligence in the construction of their road, it is not sufficient to show merely that they em-
ployed for the purpose men of compe-
237 tent skill and *science. Thus, in the case of Grote v. The Chester and Holyhead Railway Company, 2 Exch. R. 251, which was an action against a rail way company for an injury received by the plaintiff by the breaking down of a bridge over which he was passing in a passenger train, it was held that it was a proper question for the jury whether the defendants had engaged the services of competent engineers who had adopted the best method and used the best materials, and that, if the defendants had done so, they would not be liable; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident arising from a deficiency.

And as accidents as frequently arise from obstructions on the track, as perhaps from any other cause whatever, it would seem to follow, obviously, that there is no one of the duties of a rail road company more clearly embraced within its warranty to carry their passengers safely, as far as human care and foresight will go, than the duty of employing the utmost care and diligence in guarding their road against such obstructions.

It would seem to me to follow further, that where a rail road company, whilst using its track for the carriage of passengers, engages in a work to be done on its road, and in the immediate proximity of its track, negligence in the performance of which would, in the estimation and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, it would be just as incompetent for them, in the case of an accident to a passenger caused by an obstruction arising from negligence in the performance of such work, to show merely that they had placed the work in the

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hands of a contractor, and that the obstruction was caused by the carelessness of one of his employees, as it would be for them, in the case of an accident to a passenger, arising from a want of care or skill
238 in the *management and conduct of the train, to show that such management and conduct had been let out to a contractor, and that the accident was due exclusively to the carelessness of one of his employees.

In neither case, I apprehend, could such a deputation by the company of its powers and duties to another, shield it against the complaint of an injured passenger.

It seems to me that the fifth instruction asked, if not plainly in conflict with these principles, is obviously susceptible of an interpretation which might have led to a verdict in disregard of them. We have seen that Brown & Crickhard were engaged in the work of delivering upon the line of the road, and preparing for the use of the tracklayers, the stone necessary for ballasting the road; and we have seen also that the ballasting was designed merely to secure the permanency and durability of the superstructure, and was not regarded by the company as necessary to the present safety of the road; and there is nothing to show that it was so necessary. Under one sense in which the jury might well have understood the instruction, they might have found that the work in which Brown & Crickhard were engaged "did not necessarily or properly concern the running of the road nor connect itself with or affect the track or the carrying of passengers thereon safely;" though at the same time believing that the company had not used due diligence in guarding against accidents which might arise from negligence in the disposition, management and performance of the work. It might well be that the delivery of stone on the road and its preparation for ballasting, if done in a proper manner and with due care, would not affect the track or the carrying of passengers thereon safely: And yet there was evidence tending to show that there was negligence either in Brown & Crickhard or in the
239 officers *of the company in so regulating the heaps or ridges in which the stone was placed, and the proximity of those ridges to the track, as to make them a source of danger to the trains in their passage on the track. For let the theory of either one of the witnesses who expressed their belief as to the manner in which the accident occurred, be adopted; let it be that the ridge of stone was so near the rail that it was struck by the step of the baggage car, or that the ridge had been disturbed and the stone rolled down by the hub of one of the wheels of the baggage car, or that the stone had been rolled down by the jarring of the train as it passed near the stone ridge, or (which is the theory adopted in the instruction) that the stone had probably been loosed from its place and rolled down by the haste of one of the hands of Brown & Crickhard in getting off the ridge to avoid the train: In either one of these aspects, there would be evidence before the jury tending strongly to show a want of due care on the part of those, whoever they were, who had the control and management in the locating and disposing of the heaps and ridges of stone. Not only so; but, whilst there was the evidence of the engineer of the section that he had frequent occasion to pass over the section, and that he had never observed that any of the stone ridges were so near the track as to be dangerous, there was yet also the evidence of another witness, who likewise had frequent occasion to pass over this section, and who stated that he had repeatedly called the attention of those engaged in preparing the ballasting, to the fact that the stone ridges were too near the rails, and that there would be some accident if they were not removed.

With such evidence in the case, can there be a serious doubt that the jury should have been left free to enquire whether there was not danger in the work, arising from the mode and manner in which it was
240 *done; whether the company did not know, or, by the exercise of the proper diligence, might not have ascertained the existence of such danger; and whether they had used due care and foresight in guarding against it? I think not. And yet according to a sense of the instruction in which it might well have been understood, these enquiries were withdrawn from the jury. It is true, that the words "no other carelessness," are used in such a connection as to make the instruction susceptible of the meaning that the verdict of the jury was to be based upon a finding negativing all negligence upon the part of the company. But the fair meaning of the instruction in the particular under consideration, is, I think, one which confines the jury to the finding that the sole and exclusive immediate cause of the disaster (the sudden rolling down of the stone upon the track) was the careless act of the servants of Brown & Crickhard, and that the rolling down of the stone could not have been foreseen nor provided against by the conductors of the cars.

In the view which I take of the case, the enquiry whether Brown & Crickhard were contractors for the work in which they were engaged, is not material. For if the company, by its officers charged with the duty of guarding the track against obstructions, saw, or might, by the exercise of proper vigilance, have seen that Brown & Crickhard were placing the stone in such close proximity to the track, or otherwise disposing of the material used in the work, in a manner calculated to excite in the minds of cautious persons fears and apprehensions for the safety of the track, it was their duty to use the utmost care and diligence to provide against the danger: and we have the evidence of the engineer, that in case he had observed that the ridges had been placed so near the track as to be dangerous, he would have had the authority, and it would have

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been his duty to have them promptly removed.

241 *Any instruction requiring the jury to render a verdict for the company upon a finding which did not clearly negative the want of care, skill or foresight on the part of the company not only in the conduct and management of the train, but also in all the other particulars wherein I have shown the passengers had a right to expect the exercise of such care, skill and foresight by the company and its officers, would have been unjust to the defendant in error. Had the fifth instruction been given, the jury might, and most probably would have rendered a verdict for the company upon a finding far less comprehensive than the one just indicated as essential to such a verdict; and the Circuit court properly refused to give it.

If the company desired to narrow the range of the discussion, and to stake their case on one or more distinct issues, to be found under instructions as to the law applicable to them, it was their business so to frame the instructions as that they might be given with safety as to the rights of the other side.

I have been unable to discover that the Circuit court did any thing to the prejudice of the plaintiff in error in making the slight modification which it made in the sixth instruction. The testimony, in relation to the work undertaken and performed by Brown & Crickhard, was the only evidence in the case to which the proposition of law, contained in the instruction, could be intended to refer. And the only effect which (it seems to me) the words interpolated by the court, to wit, "nor connected with the safety of the road," could well have, would be, to explain to some extent the preceding words in the instruction, and to point the jury to the enquiry whether the work aforesaid was of a character to fall within the designation of the instruction.

The court gave no intimation of its opinion as to the state of the facts of

242 the case; and I do not think *that the slight change which it made in the terms of the instruction, is in any respect objectionable.

I have examined with care the cases cited by the counsel of the company in support of their assignment of errors, and I do not perceive that they declare any principle in conflict with the foregoing views. The duties which a carrier of passengers owes to his passengers, and the duties which he owes to other persons, between whom and himself the relation of carrier and passenger does not exist, are essentially distinct. Decisions, therefore, settling how far it is competent for a company engaged in the business of carrying passengers to protect itself against a suit brought by a stranger for an injury received from the negligent act of an employee of a contractor of the company engaged in the prosecution of a work of the company, by showing that such employee was not, in a legal sense, the servant of the company, do not seem to me to have any immediate bearing on the case in hand. The two cases more especially relied on by the counsel of the company, viz: Reedie v. London & Northwestern Railway Company, 4 Exch. R. 244, and Steel v. Southeastern Railway Company, 223 Eng. L. & E. R. 366; were cases of the kind just indicated. In each case the suit was at the instance not of a passenger, but of a stranger.

In each case, the injury received was caused not by any accident happening in the running of the trains, but by an accident arising from the carelessness of employees of contractors engaged in the prosecution of a work altogether collateral to the running of the cars on the road.

In neither case had the company come under any contract or engagement with the party injured.

The difference is broad and obvious between such cases and the case of an injury received on the cars of a railway company, in their passage on the road, by a

243 *passenger who has taken his seat under the assurance and promise, on the part of the company (which the undertaking necessarily implies), that they have used, and will continue to use all the means of precaution, within the power of human foresight and sagacity, to provide for his safe transportation.

Upon the whole, I am of the opinion that there is no error in the judgment of the Circuit court, and am for affirming it with costs, &c.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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244 *Callison v. Hedrick.

July Term, 1859, Lewisburg.

1. **Public Officers—Proof of Appointment.**—In general it is not necessary to prove the written appointments of public officers. That one has acted as such officer and been recognized by the public as such, is sufficient evidence that he has been duly appointed until the contrary appears. And the case is still stronger where the official character has been recognized by the appointing power.

2. **Turnpike Roads—Proof of Location.***—The plat or map of the survey and location of a turnpike road, with the certificates thereon by the surveyor, returned to the clerk's office and recorded in pursuance of the statute, is evidence of the line of

*Eminent Domain—Compensation to Landowner.—In Keystone Bridge Co. v. Summers, 13 W. Va. 501, it is said: "It is unquestionably true, that he may be, and indeed must be, in all cases deprived of his property taken for a county road, before he receives just compensation, as the law simply provides, that after the road has been established, the county shall be chargeable with the compensation. But it is well settled, that where property is taken by a state directly, or by a town or county under state authority by state authority, it is not essential, in order not to violate this provision of the bill

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the road as located, in an action by the owner of the land against a contractor for entering thereon, and injuring the land: And a partial mistaken change in the name of the road will not exclude them as evidence.

3. **Same—Construction of—Limitation of Action for Damages—Case at Bar.**—An act authorized the construction of a road from M to L, and the road was located and a plat thereof returned to the clerk's office; and an owner of land through which the road was to pass did not apply to the County court within the year to have her damages assessed. The road was in fact made but a part of the distance, and stopped; and at the next session of the legislature a company was incorporated to construct the remainder of the road. This company is entitled to make their road upon the location made under the previous law; and the owner of the land not having applied for damages within the year from the return of the plat, is concluded from recovering them.

4. **Same—Same—Same—Change of Location—Effect.**—In such a case, if the road is changed in any part of it from the location made, the owner of the land may recover damages for that.

This was an action on the case in the Circuit court of Greenbrier county, brought by Margaret P. Callison against Henry Hedick, to recover damages for an entry upon and ploughing up and scraping her lands. Upon the trial, which took place at the October term 1858, the plaintiff proved the entry upon her land by the defendant, and that he ploughed up the same for the distance of about a mile, with the
245 purpose of making *through said lands the Lewisburg and Oakland turnpike. And when she had concluded her testimony, the defendant offered in evidence a plat with the certificates thereon, which the certificate stated was "the profile of the Lewisburg and Marlin's Bottom turnpike from the county line to Lewisburg;" and which the clerk of the County court of Greenbrier certified had on that day, the 7th of March 1854, been returned and deposited in his office by Harvey Handley, the county surveyor, and recorded. This evidence the plaintiff objected to as not being duly authenticated. The defendant then read to the court the act of assembly incorporating the Oakland and Lewisburg turnpike company, passed February 20th, 1856, and also an act incorporating the Lewisburg and Marlin's Bottom turnpike company. (See for these acts the opinion of Lee, J.) And he offered one William Cochran as a witness to prove that he was the superintendent of the Marlin's Bottom and Lewisburg turnpike company. The witness stated that he had been appointed superintendent of said road by an order of the Board of public works. That as superintendent of said road he had attended meetings of the board upon business connected with the road; that he had received a salary as such superintendent, which had been regularly paid to him until the last year; and that the road had been located, and the profile and certificates aforesaid made out, and returned to the clerk's office under his authority as superintendent of the road; and that he had, as superintendent, reported that fact to the Board of public works: And the defendant stated that he proposed to prove further that the road which he made was upon that location.

The plaintiff objected to the statement of the witness of his appointment as superintendent of the road, on the ground that parol evidence of the order of the board was inadmissible without the production
246 of the *order; and to the profile and certificates, as not properly authenticated. But the court overruled the objections and admitted the evidence. Whereupon the plaintiff excepted.

After the evidence above mentioned was introduced, the defendant introduced evidence tending to prove that the trespass complained of, was committed in making the Lewisburg and Oakland turnpike; that the said road was made for a part of the distance on the location of the Marlin's Bottom and Lewisburg turnpike, as indicated in the profile aforesaid; but for another part, it departed from said location. And when the evidence was closed, the plaintiff asked the court to instruct the jury as follows:

1. That if the jury believe that the Marlin's Bottom and Lewisburg turnpike had terminated at the point where the Oakland and Lewisburg turnpike commenced; that no work had been done on the line of the latter road when the latter company was incorporated, and no act done along said line except to make a survey and return a profile of the road; that no interest in the soil of the land in question became vested in the latter company—that the law could not contemplate a continued fee simple title to the land over which the survey was made, when the state had declined to make the road.

2. That if the jury believed from the evidence that there was a departure from the location made by the first company, that the plaintiff is entitled to recover damages for such departure, whatever the law may be on the matter of the first instruction.

3. That in estimating damages for such departure, the jury are not to take into consideration any conveniences which might result to the plaintiff if the road was made. The entry upon her lands, as far as such departures were concerned, was unlawful, and the advantages of the road could
247 not be taken into consideration. *The court refused to give the first instruction to the jury, and in lieu thereof gave the following:

If the jury believe from the evidence that the Marlins Bottom and Lewisburg turnpike road had been located from Lewisburg to Oakland, the point at which the construction of said road had ceased, and that

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of rights, that the law should provide for payment of the compensation, before the property is taken and actually appropriated. See *Callison v. Hedrick*, *15 Gratt. 244;* Redford *et al.* v. Knight, 11 N. Y. 308."

See also, the principal case cited in Bridge Co. v. Comstock, 36 W. Va. 275, 15 S. E. Rep. 73.

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after such location through the lands of the plaintiff, a plat of the land to be taken for such road had been returned to the clerk's office according to law for more than twelve months, and the plaintiff had failed to assert her claim to damages for the land so taken within twelve months after the said plat was admitted to record, she was barred from claiming any damages, and the land covered by said location was vested in the state; and if the act for the construction of the Oakland and Lewisburg turnpike was passed after the said land of the plaintiff had vested in the state as aforesaid, the said company were authorized to construct the road upon the same location without paying any damages to the plaintiff.

The court gave the second instruction and refused to give the third, but in lieu thereof instructed the jury, if they believed from the evidence that any alterations made upon the location of the road through the lands of the plaintiff in making said road were made only with a view to the improvement in the location, they were at liberty in estimating the damages to take into consideration any advantages resulting to the plaintiff from such alteration.

To which opinion of the court, refusing to give the first and third instructions asked for by the plaintiff's counsel, and giving the instructions above stated, the plaintiff, by her counsel, excepted.

There was a verdict and judgment for the defendant. And thereupon Mrs. Callison applied to this court for a supersedeas; which was awarded.

248 *Price, for the appellant.

Wm. Smith and Gordon, for the appellee.

LEE, J. That the evidence offered by the defence in this case might be received under the general issue, if itself free from objection, is very clear. It has long been settled that the defendant under this issue may prove that the locus in quo was his own freehold or that of another by whose authority he entered, or that he hath any other title or right to the possession. Diersly and Nevel's Case, 1 Leon. R. 301; Dodd v. Kyffin, 7 T. R. 354; Garr, &c. v. Fletcher, 2 Stark. R. 71, 3 Eng. C. L. R. 250; Chambers v. Donaldson, 11 East's R. 65, 72; Argent v. Durrant, 8 T. R. 403, Gilb. Ev. 258.

The objection to the evidence offered to prove that Cochran was the superintendent of the road referred to, is I think, wholly untenable. In general it is not necessary to prove the written appointments of public officers. That one has acted as such officer and been recognized by the public as such, is sufficient evidence that he had been duly appointed until the contrary appears; nor is it material how the question arises, whether in a civil or a criminal case, nor whether the officer is a party or his official character is involved incidentally, unless where, being plaintiff, he unnecessarily avers his title to the office or the mode of his appointment; in which case, perhaps, the proof must sustain the entire averment. McGahey v. Alston, 2 Mees. & Welsb. 206; Berryman v. Wise, 4 T. R. 366; Cannell v. Curtis, 2 Bing. N. C. 228 (29 Eng. C. L. R. 316); The King v. Gordon, 2 Leach's C. C. 15; 1 Greenl. Ev. § 83, 92, and cases cited in nn. Still stronger is the case where, as in this, the acts and official character were fully recognized by the appointing power.

Nor can the objection to the plat and profile of road offered in evidence be
249 sustained. It is true there was *at that time no such precise road known to the law as the "Marland's Bottom and Lewisburg turnpike," but it is easy to see how it came to be so designated. By an act passed on the 25th of February 1850, provision was made for constructing what was called the "Huttonsville and Huntersville road." By this act the Board of public works were directed to have the road constructed, and for that purpose they were to exercise all the powers and be subject to all the restrictions which were given to and imposed upon the board by the act providing for the construction of the Staunton and Parkersburg road, passed March 16, 1838, except as therein otherwise especially directed. By that act the powers, duties and restrictions of the board in relation to the Staunton and Parkersburg road are defined by reference to those given to and imposed upon the president and directors of the Northwestern turnpike road by the act providing for the construction of that road, passed March 19, 1831, except as therein specially directed. By the fourth section of that act it was made the duty of the principal engineer to lay out and locate the road, and to deliver to the clerks of the County courts of the counties through which the same might pass, plats or maps of so much of the road as might be within their respective counties, to be by them recorded; and thereupon the land over which the said road should be located was to become ipso facto vested in the commonwealth for the use of the said road. On the 22d of March 1853 an act was passed providing for the extension of the Huttonsville and Huntersville turnpike from Marland's Bottom in the county of Pocahontas to Lewisburg. In the title to the act the road is described as "the Huttonsville, Marland's Bottom and Lewisburg turnpike." By the second section of the act for the construction of the Huttonsville and Huntersville road the Board of public works was directed to employ a competent en-
250 gineer *or superintendent who was to perform the duties enjoined upon the engineer of the Staunton and Parkersburg road, which as we have seen were the same as those enjoined upon the principal engineer by the act for the construction of the Northwestern turnpike. It was proved by the superintendent that the road had been located and the plat and profile offered in evidence made out and returned to the clerk's office under his authority as superintendent, and the fact

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reported by him to the board; and the certificate of the clerk shows that it had been received on the 7th of March 1854 and admitted to record. It of course represented only the Greenbrier portion of the line between Marland's Bottom and Lewisburg, and it was therefore described for the sake of brevity, prehaps, or because it was popularly so called as "the Lewisburg and Marland's Bottom turnpike." That it was so called appears throughout the record, and the plaintiff herself uses that name in speaking of it; and it was afterwards so called in the act of the 26th of February 1856. It was at most a mere misnomer which could mislead no one as the explanation was patent upon the face of the plat when taken in connection with the acts of assembly under which it had been made.

By the "plat of the land" to be occupied by the road required to be turned to the clerk's office by § 5, of ch. 70, of the Code (p. 349), I understand the same thing that is called a "plat or map of the road" in section 4th of the act concerning the Northwestern turnpike road, and I regard the profile in this case if not as perfect as it might have been made, yet as substantially complying with the requirement of the act. And having been returned to the clerk's office by Cochran, the superintendent whose duty from the nature of his office it was to cause the plat and profile to be made and so returned, the authorization of his act is sufficiently implied, and
251 it must be taken to be *the act of the board until the contrary is made to appear.

I think these grounds of objection to the profile as evidence were clearly insufficient, and I pass on to consider the effect of the survey and the return of the profile to the clerk's office in their bearing on the case, in connection with the first instruction asked for by the plaintiff and that which the court gave instead, when it refused it.

It may be inferred from what we see in the record that the Board of public works, under the act of March 22, 1853, had progressed with the work of the road from Marland's Bottom to Lewisburg and had completed the same as far as a place called Oakland; that at that point for some cause which it may not be difficult to conjecture, work upon the road had been suspended, and that it was determined to appeal to the public spirit of the people in the section interested for the means of prosecuting this work deemed of public utility, to its completion. For at the next session of the general assembly, an act was passed (Sess. Acts 1855-6, ch. 198, p. 139) providing for the incorporation of a company to be called the "Oakland and Lewisburg company, for the purpose of continuing the Marland's Bottom and Lewisburg turnpike from Oakland its then southern terminus to Lewisburg. By the second section of this act, the company was required to construct the road of the same width and grade as those of the Lewisburg and Marland's Bottom turnpike, and upon the location determined by the Board of public works, plainly referring to the location which had been made under the act of the 22d of March 1853 for the extension of the Huttonsville and Huntersville road from Marland's Bottom to Lewisburg. Now I can perceive no reason why the legislature might not authorize this company to construct the road upon the ground which had in fact
252 *been appropriated for the same road under another name. By the Code, (ch. 70, § 5, p. 349,) it is provided that upon the return of the plat of the land to be taken for a work of internal improvement to the clerk's office and when admitted to record, the land so to be occupied, shall ipso facto be vested in the state. Whether the interest so vested is an absolute fee simple or a qualified estate in the nature of a base fee for the use and purposes of the work, I do not deem it very material to enquire, though I incline to think notwithstanding the broad language of the act, it is of the latter character only. Were it an absolute fee simple, there would seem to be no need of the eighth section of the same chapter which provides that any land taken for such work may be used not only therefor but also for any other work of a different kind which the legislature might at a future time direct or authorize. Concede that the state takes only a qualified estate in the land, if the legislature could direct the Board of public works or authorize a company or third persons to construct a work of a different character from that for which the land had been appropriated (as to which or the validity or true construction of the section, I express no opinion) I can perceive no reason why it might not authorize a company to construct and use a work of precisely the same character, in fact the very road intended, upon the land appropriated. How is the land owner injured? If he might complain should his land taken for an ordinary turnpike road, be converted to the construction and working of a totally different kind of improvement, such e. g. as a rail road whereby he would be subjected to the greater inconveniences and the risks to life and property from such a road running through his land, (as to which I express no opinion,) surely he can have no just cause of complaint when the road which is actually to be made and used, is
253 *precisely the kind of road for which the land was appropriated. Whether it be made by the Board of public works under the direction of the legislature or by a company under its authority, he is incommoded exactly in the same degree and the conveniences and advantages which he derives are precisely the same.

But it is said the enterprise of constructing a road from Marland's Bottom to Lewisburg was abandoned by the legislature, and that finding it so the plaintiff may for those reasons have failed to file her petition and claim compensation for her land. Where land has been appropriated for a public work and the legislature afterwards by indubitable evidences manifests its intention

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to abandon the enterprise and the interest of the state, if a qualified estate only, has ceased and determined, I certainly will not undertake to affirm that a company incorporated at a subsequent period to construct such a work could claim to occupy the ground formerly appropriated by the state without making such compensation; but in this case there is no evidence of any such abandonment. That the Board of public works had not been able for whatever cause to complete the road to Lewisburg within one year after the filing of the profile in the clerk's office was certainly not sufficient to justify her in concluding that the enterprise was abandoned and induce her to forbear preferring her claim for compensation, if she otherwise would have done so within the year. That the enterprise was abandoned after the road had been made as far as Oakland because the work was suspended, whether before or after the expiration of the year and whether because money could not be raised or the appropriation had been exhausted, was by no means the necessary nor the proper inference. The Board of public works had not the power to declare the enterprise abandoned and surrender the commonwealth's interest in the location. The legislature having *declared
254 its purpose to extend the road to Lewisburg, it would have been more proper to conclude that it would provide the means either by an additional appropriation if the former were exhausted, or as it in fact did at the very next session, by designating another agency to go on and finish the work. And such is the true and proper construction of the act of 1855-6, and it was I think, plainly intended to authorize this company to occupy the location theretofore made by the Board of public works, and complete the line to Lewisburg.

Whether the plaintiff preferred her claim and obtained compensation for the land occupied by the road after the profile had been filed, we are not informed. If she did prefer it and received such compensation, surely she cannot be entitled to demand it a second time. If because she thought the peculiar benefits which she would derive in respect to the residue of her land would be full compensation and did not care to risk costs in seeking more, or whether with a commendable public spirit she chose to waive her claim, she must after the expiration of the year stand on the same footing as if she had received all that she was entitled to.

I think therefore the court properly refused to give the first instruction asked for, and that the instruction which it gave in lieu of it was substantially correct. But I think it erred in refusing to give the third instruction and in giving that which it did give, instead, understanding both as referring to the peculiar benefits which the party would derive in respect to the residue of her land by the construction of the road on the new location. If the company desired to change the location and had the right to do so, it was their duty to conform to the provision of the Code, ch. 56, § 21, p. 296. If they failed to do this, and departed from the location, they became
255 trespassers, and when sued, *they were not at liberty to fall back upon the provisions of that and other kindred sections and have the damages estimated according to the measure of compensation to the land owner prescribed by them. When off of the location they were mere trespassers, and the damages were to be estimated as in other actions of trespass. For this cause I think the judgment should be reversed and a new trial directed.

DANIEL, MONCURE and ROBERTSON, Js., concurred in the opinion of Lee, J.

ALLEN, P., was of opinion that the Lewisburg and Oakland turnpike company were not authorized to occupy the location that had been made by the Board of public works without compensation to the land owners. He concurred in the opinion of Lee, J., on the other points.

Judgment reversed.

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256 *Shue v. Turk, Sheriff.

July Term, 1859, Lewisburg.

1. **Emancipation of a Slave—Case at Bar.**—D makes a contract with H, by which he sells to H his slave S for three hundred and fifty dollars, estimated to be one-half his value, and when H is reimbursed this money from the earnings of S, H is to emancipate him. H hires out S and keeps an account of his earnings and expenses; and when he has received all but about twenty-one dollars, H makes an arrangement with M, a resident of the state of Ohio, but then in the county of R on a visit, by which he receives this balance from M and conveys S to him, and M emancipates S in the county of R, where S is duly registered as a freeman. Before H makes the arrangement with M he has become insolvent, and shortly afterwards a judgment is recovered against him in the county of A, and is levied on S in the county of R. HELD:
   1. **Same—Levy of Execution—Case at Bar.**—That as D might have enforced the contract against H. and compelled him to emancipate the slave upon being reimbursed the amount he had paid, and as H had been repaid, and S had been emancipated in pursuance of the contract, he is not liable to be taken in execution for the debt of H.
   2. **Same—Same—Habeas Corpus.**—S having been emancipated and duly registered as a freeman, and not being claimed as a slave, but as subject to a lien for the debt of H, a proceeding by *habeas corpus* to be relieved from the custody of the officer is a proper mode to try the question of his liability to be subjected to pay the debt of H.
   3. **Same—Recordation of Deed of.**—M having been in the county of R when he executed the deed of emancipation, that was a sufficient residence to authorize the recording of the deed in the clerk's office of that county.
2. **Appellate Practice—Secondary Evidence—No Objection in Lower Court.***—Secondary evidence hav-

*Appellate Practice—Secondary Evidence—No Objection in Lower Court.—In Baltimore, etc., R. R. Co. v.

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ing been admitted in the court below without objection, it cannot be objected to in the appellate court.

In July 1859 John Shue, a man of color, applied to the Honorable Lucas P. Thompson, judge of the Circuit court of Augusta county, for a writ of habeas corpus, alleging that he was a freeman, and had been levied on as the property of Abraham Hanna,
257 by virtue *of an execution which issued from the clerk's office of the County court of Augusta, upon a judgment recovered by Jacob Harnsbarger against Washington Swink, Abraham Hanna and others.

The writ was issued, and upon the hearing before Judge Thompson, Hanna was introduced as a witness by the petitioner, and stated—That Shue the petitioner, was formerly owned by a gentleman named Dismuth, living in Eastern Virginia, but had been hired out for twenty years in Augusta. That about three years since he had received several letters from Dismuth proposing to sell Shue to the witness, and proposing to take three hundred dollars for him, provided witness would agree to allow Shue to pay off the amount of the purchase money by his earnings and hire, and that when so repaid, witness would emancipate him. That witness did purchase him on these terms, at the price of three hundred and fifty dollars, Shue being then worth double the money, and that witness had paid the price. That Dismuth by his agent Hoard gave witness a bill of sale for Shue; and at the same time witness, according to his impression, executed and delivered a contract in writing, wherein was set forth the fact and terms of the contract, viz: that witness had received the bill of sale for Shue, with the understanding and agreement that when Shue's wages and earnings should amount to a sum equal to three hundred and fifty dollars, paid by him to Dismuth, the witness bound himself to emancipate said slave. Where that contract then was, he did not know. Witness regarded himself as the fee simple holder of the legal title of the petitioner, only for the purpose of securing the amount paid by him, and in conscience and morality bound to emancipate him upon being repaid his advances; but did not consider himself as bound to account to the petitioner or his former master. That the object of
258 the arrangement *on the part both of himself and Dismuth, was to afford the petitioner an opportunity to refund to witness the amount he advanced; and thus to procure his emancipation. That witness gave public notice of this arrangement soon after it was made, and that all contracts for the services of petitioner were to be made with witness; which was invariably done. That witness's son kept a regular account of the expenses of witness for the maintenance of the petitioner, and of the proceeds of his work; and in the month of March last it appeared from said account the witness had been repaid the amount advanced by him, with the exception of about twenty-one to twenty-five dollars. That with a view and for the purpose of fulfilling his contract with Dismuth, he made a bill of sale for the petitioner to William A. Marshall, then on a visit to his son in law in the county of Rockingham, but a resident of the state of Ohio, and Marshall paid to him the amount still due, and undertook, when that amount was repaid to him, to emancipate the petitioner.

The bill of sale from Hanna to Marshall bears date on the 26th of March 1859, and purports to be in consideration of three hundred and fifty dollars. By a deed bearing date the 19th of May 1859, Marshall emancipated Shue, stating the consideration to be motives of benevolence and three hundred and fifty dollars. This deed was admitted to record on the same day in the clerk's office of the County court of Rockingham. And in pursuance of an order of the County court of Rockingham, made on the 20th day of June 1859, the petitioner was on the 22d of the same month registered as a free negro in the clerk's office of that court.

In January 1859, Hanna having become embarrassed in his circumstances, by reason of some heavy securityships, he made a deed, by which he conveyed appar-
259 ently *all his property, of which there was a considerable amount of both real and personal estate, to Nicholas K. Trout, in trust for the payment of his debts. The petitioner Shue was not included in that deed, Hanna having stated the facts in relation to him, to the trustee, and being advised by him not to include him. In March 1859 Hanna was thought to be insolvent; though the trustee, who was examined as a witness, stated that his embarrassments resulted from his suretyships, and that it depended on various chancery suits brought to sell the real estate of parties bound with and before Hanna in debts paid by him as surety, whether he would in fact prove insolvent. The trustee said that he was a man of unquestionable integrity and truthfulness; and this was his general character.

The execution under which the petitioner Shue was levied on, was issued on a judgment recovered on a note for one thousand one hundred and twenty dollars, dated the 26th of March 1857, and payable two years after date, on which Hanna was the third accommodation endorser. The levy was made at the instance of Joseph F. Hottle,

Skeels, 3 W. Va. 560, it is said: "This evidence, although secondary, certainly tended directly to prove the contract supposed in the instruction, and the doctrine is too well settled to be called in question that if secondary evidence is introduced without objection in the court below, an objection to it in the appellate court comes too late and will not be considered. *Shue v. Turk, 15 Gratt. 256;* Atkins v Lewis, 14 Gratt. 34; Buchanan v. Clark, 10 Gratt. 172; Tayloe v. Smith, 10 Id. 558; Roberts v. Graham, 6 Wallace 578; Hammel v. The State, 17 Ohio Law State Rep. 628."

See also, Atkins v. Lewis, 14 Gratt. 30, and *note.*

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a subsequent endorser on the same note, who Hanna stated was informed of the arrangement between Dismuth and himself very soon after it was made.

The judge dismissed the writ, and remanded Shue to the custody of the sheriff. And he thereupon applied to this court for a supersedeas; which was awarded.

Hugh W. Sheffey, for the appellant.
Michie and Baldwin, for the appellee.

ROBERTSON, J., delivered the opinion of the court:

It is settled that a negro, claimed and held as a slave, cannot litigate his right to freedom under a writ of habeas corpus.

In this case, however, the petitioner
260 *produces his papers showing, on their face, that he has been regularly emancipated, and registered as a free negro: and it appears upon the return and evidence, that those holding him in custody do not claim him as their slave, but that he is held by virtue of an execution levied for the purpose of subjecting him to a debt due from A. Hanna.

The matter in controversy is not whether the petitioner is a freeman or a slave: but whether, as an emancipated negro, he is liable for a debt of Hanna, his former owner—that is to say, whether, being free, he is subject to a lien, the enforcement of which may have the effect of reducing him again to the condition of slavery.

In Ruddle's ex'or v. Ben, 10 Leigh 467, it was held that a writ of habeas corpus is an appropriate remedy in such case.

This decision, however, was made by a court composed of three judges only, one of whom dissented; and so is not of binding authority. But I think that the decision of the majority, upon this question, was right: and the reasons given by Judge Parker in support of it, are so clear and forcible, that I cannot do better than refer to that portion of his opinion, expressing my entire concurrence in the views presented by him, upon this point.

It becomes necessary, therefore, to determine whether or not the petitioner has been so emancipated as to exempt him from liability for the debt, the execution for which has been levied upon him.

It has, in the argument here, been objected that the facts upon which the petitioner relies are not sufficiently proved, because the contract which Hanna (according to his impression) executed and delivered, the various letters referred to as having been received by him from Dismuth, and the original bill of sale to Marshall,

have not been produced; nor has their
261 absence *been satisfactorily accounted for, so as to render secondary evidence of their contents admissible.

There can be no doubt that if objection had been made before the judge of the Circuit court to the admission of this secondary evidence, it must have prevailed. But an opportunity would then have been afforded the petitioner to remove it, either by the production of the papers, or by accounting for their non-production, so as to render proof of their contents proper. By its being taken for the first time in this court, the petitioner is deprived of that opportunity. The objection must therefore be overruled, and the facts stated in the bill of exceptions regarded as sufficiently proved.

The petitioner does not seem to me to stand in a better position, in any respect, than he would occupy if Hanna, on being reimbursed the amount advanced by him to Dismuth, had himself executed the deed of emancipation. The act was in truth substantially his: and the indirect mode of effecting it which was adopted, coupled with the false considerations recited in the bill of sale to Marshall, and in Marshall's deed of emancipation, are calculated to create doubts as to the fairness of the transaction. But I think that the inference of fraud which might be drawn from these circumstances is abundantly repelled by the other facts of the case. These facts show that there was no design on the part of Hanna to defraud any one; and that his sole purpose was to carry out honestly the contract between Dismuth and himself. He had neither obtained nor sought credit on the faith of his property in the petitioner; having given public notice, in the neighborhood, of the agreement under which he held him, as soon as it was made. Nor was his ability to discharge his debts in the slightest degree affected by all that he did in reference to the petitioner: for,

before he caused him to be emanci-
262 pated, *he had received back every dollar that he had advanced. Hanna's creditors therefore have no right to complain that they have been in any manner defrauded. If they can subject the petitioner to their claims, it is only by virtue of a mere legal right arising out of the peculiar mode of emancipation which was adopted by Dismuth and Hanna. I speak of the emancipation as their joint act, for it should in fact be so regarded. Hanna indeed did less towards the liberation of the petitioner than Dismuth: for to effect it Dismuth contributed half of his value; while Hanna contributed nothing, save the trouble he took upon himself, and the risk he encountered of not being reimbursed the amount of his advance to Dismuth.

In examining the question as to the validity of the claim of the creditors of Hanna, I utterly repudiate the idea that I should, on the one hand, give a more liberal construction to the rights of the petitioner, in favor of liberty; or, on the other, that I should apply a stricter rule, because I may think that emancipation in this state ought not to be encouraged. I propose to adopt precisely the same rules of construction and decision that would apply to any other question of legal right, leaning neither to the one side nor the other.

It is objected, that the deed of emancipation has not been duly recorded, because Marshall was a citizen of Ohio, residing

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temporarily only in the county of Rockingham.

The deed describes him as being of the county of Rockingham, and it is admitted to record in that county, upon his acknowledgment before the clerk. This affords, I think, sufficient evidence that for the time, and within the meaning of the law, Rockingham was "his county." If the objection be valid, no person can emancipate a slave in Virginia, unless he has a fixed and permanent residence within the state.

263 *Such cannot be the proper construction of the law. The cases of Cales v. Miller, 8 Gratt. 6, and Hassler's lessee v. King, 9 Gratt. 115, would seem to remove all doubt on this question, if indeed any existed.

To determine whether the execution of such a contract as that between Dismuth and Hanna, by the emancipation of the slave pursuant to it, confers upon him a right to freedom superior to the claims of the creditors of the party executing the deed of emancipation, it is proper to examine into the nature of the contract, and ascertain whether it is valid and capable of being enforced.

Hanna supposed that it bound him "in conscience and morality" only: but if the facts stated by him show that it was legally binding also, his opinion to the contrary cannot affect its validity.

There was a valuable consideration moving from Dismuth to sustain the contract. He gave up half the value of the slave in consideration of the promise to emancipate. If then it was not binding between Dismuth and Hanna, it must be upon some other ground of objection to it than the want of sufficient consideration. There has been no adjudication in Virginia settling the question as to the validity of such a contract: but similar contracts have been passed upon by the courts of some of the other states of the Union.

In Tennessee, it has been held that such contracts are valid; and that they will be enforced, not only upon the application of one of the contracting parties, but also on that of the slave himself, or of any person whatever who may choose to petition for and on behalf of the slave. Elias v. Smith, 6 Humph. R. 33; Lewis v. Simonton, 8 Humph. R. 185—the latter of which cases even goes so far as to declare that a contract for emancipation made between a master and his slave is valid and enforceable.

In Louisiana, prior to the act of

264 1857 (which prohibits *emancipation in that state), a slave could make a contract relating to his own emancipation, although incapable of making a contract of any other kind. But in a case in which a testator had directed that his slaves should be sold together with the plantations on which they were employed, and that the purchaser should keep them on and attached to said plantations for a certain number of years, and then emancipate them—the slaves having been sold pursuant to the will, and upon the conditions required by it—the purchaser, before the time for emancipation had arrived, was proceeding to sell the slaves to different persons, to be removed from the plantations on which they were; and it was held that the court could not, on the application of the slaves themselves, interfere to prevent it. A suit was then brought by the heir of the testator, as representing his estate, for the purpose of enforcing the terms of the contract; and it was held that the purchaser was bound to comply with it, and a decree rendered accordingly. In delivering the opinion of the court, Martin, J., said:

"Justice requires that the defendant should not be permitted to disregard the obligation she has solemnly contracted. But it is urged that the terms and conditions of the will which are now sought to be enforced, are null and void, as destructive of the absolute power which sound policy and the laws of the land require the master should exercise over his slaves.

"So far as regards the slaves, the power of the master is indeed absolute. The slave cannot resist, or be heard if he complain of the abuse of this power: but in relation to other persons, nothing prevents the master from being compelled or coerced to comply with his engagements as vendee, which he contracted when he acquired his slave." Poydras v. Mourain, 9 Louis. R. 492, 505.

In Maryland, in a case where it ap-

265 peared that a *slave was sold for a term of years, with a power to the vendee to emancipate him at the end of the term, and that the vendor, before its expiration, sold him to another person, who got possession of him and held him in slavery, it was decided that the slave was entitled to recover his freedom, under a deed of emancipation, executed in his favor, by the first vendee, after the expiration of the term. Negro Cato v. Howard, 2 Harr. & John. R. 323.

In Kentucky (whose statutes in reference to the recordation of deeds of emancipation, and the prohibition of slaves from going at large and trading as freemen, are almost identical with our own), it has been decided that a contract such as the one now under consideration cannot be enforced at the suit of the slave; but that a specific performance of it will be decreed at the suit of the original owner, who contracted with his vendee for the future emancipation of the slave. Beall v. Joseph (a negro), Hardin's R. 51; Thompson v. Wilmot, 1 Bibb's R. 422; Willis v. Bruce & Warfield, 8 B. Monr. R. 548; Gatliffe's adm'r v. Rose, 8 B. Monr. R. 629.

I have referred to these cases as showing the view that has been taken of this question in states with institutions similar to our own. The decisions are of course to be regarded as authority here only so far as they may commend themselves by the reasons upon which they are founded. It is proper, therefore, that we should examine the question as an original one.

It is well settled that a contract between

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a master and his slave, for the future emancipation of the slave, cannot be enforced against the master, although it may have been fully performed on the part of the slave. Sawney v. Carter, 6 Rand. 173; Stevenson v. Singleton, 1 Leigh 72.

It seems to me too to be equally clear that a slave who has, under such a contract, paid his master the *stipulated price for his freedom, and who has been actually emancipated in consequence thereof, is liable to be subjected to the payment of any debt of his master, existing at the time of his emancipation. This is so, because the emancipation in such case is without any valid consideration—the price paid by the slave not constituting such consideration, inasmuch as not only the slave himself, but every thing made by or belonging to him, is in law the property of his master.

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It is true, that the opinion of a majority of the court, in Ruddle's ex'or v. Ben, appears to be in conflict with this view: but, as has been already stated, that case is not binding as authority; and the decision in this respect (as indeed is shown by Judge Tucker, who dissented on this point) is so opposed to the necessary consequences resulting from the relation of master and slave, that it cannot be regarded as law.

I think further, that a slave cannot, while remaining in the condition of slavery, enforce a contract which may have been made by other persons for his benefit. If, therefore, Hanna had refused to comply with his contract with Dismuth, the petitioner could not by any legal proceeding have compelled him to do so. But it does not follow that the contract could not have been enforced by Dismuth.

It will hardly be contended that Dismuth could not enforce a contract with Hanna, by which Hanna, having paid him a certain sum as the hire of his slave, bound himself that as soon as he received an equal amount from the proceeds of the labor of the slave, he should be returned to Dismuth, or delivered up to any person to whom Dismuth might order him to be delivered. And if such a contract as the one supposed would be valid and binding, it is difficult to perceive why a contract that the slave, instead of being returned to Dismuth, or delivered to his order, at the time agreed upon, should be emancipated, would not *also be valid and enforceable by Dismuth, unless indeed it can be made to appear that such a contract is illegal.

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Accordingly, a strenuous effort has been made, in the argument of the case, to show that such a contract is contrary to the policy of our law, and therefore void. It is insisted that it tends to destroy the proper relation between master and slave; and that by putting the slave in a position in which the fruits of his labor, instead of belonging absolutely to his master, are applied towards his own emancipation, he is made to occupy that intermediate condition between freedom and slavery that the law does not tolerate: And it must be admitted that this argument is not without force.

If, however, any contract of this character can ever be, this one is, free from the objection that the slave is put in a condition between freedom and slavery. The petitioner does not appear to have been even privy to it. He was kept until his emancipation in a state of entire servitude, not being permitted to make any contract, or to act in any respect as a freeman. Hanna having shown extreme caution in avoiding any infringement of the laws prohibiting slaves from going at large or hiring themselves out.

The objection then does not apply in this instance more forcibly than it does in all cases of prospective emancipation: and to sustain it, we must go to the length of establishing a principle which will prohibit all such emancipations. This we cannot do; for whatever may be our opinion as to the policy of permitting them, we have no right to change the law; and their validity is now too well settled to be questioned.

I think, therefore, that this contract is not void as being against public policy; and that it is one which a court of equity would, on the application of Dismuth, have enforced against Hanna, if he had refused to execute it.

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As Hanna has voluntarily complied with the obligation of his contract, the petitioner is placed in the same position that he would have occupied if he had been emancipated under a decree of a court of equity in a suit brought by Dismuth against Hanna. He is a freedman, and as such, is entitled to litigate with the creditors of Hanna their right to subject him to sale to satisfy their demands.

The question does not arise in this case as to the extent of the rights of the creditor if he had acquired a lien upon the petitioner by issuing or levying his execution before Hanna had been reimbursed the amount advanced by him; and I express no opinion upon it.

Upon the facts as they exist, I think that the emancipation was effectual to exempt the petitioner from all liability for the debt, the execution for which has been levied upon him; and that he ought to have been discharged from custody. I am therefore of opinion to reverse the judgment.

LEE, J. I am of opinion that the writ of habeas corpus is not the appropriate remedy for the assertion of the right to freedom claimed by the plaintiff in this case. It is true it was sustained by the opinion of two of the three judges who sat in the case of Buddle's ex'or v. Ben, 10 Leigh 467, but the reasons on which it was rested are to my mind quite unsatisfactory. That the claimant produces a deed of emancipation cannot, as it seems to me, change the remedy for the enforcement of the right which it is alleged to confer, and it is conceded that in general this right cannot be litigated upon a writ of habeas corpus; and although those who claim his custody, do not claim as masters that he is their slave, they do claim that to *them

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the deed of emancipation is ineffectual and that they have the right to treat him as property and subject to be sold as the slave of the debtor party. The question at last is one of freedom or slavery, absolute freedom or qualified slavery, and should be tried in a more convenient and appropriate proceeding than a habeas corpus. If the deed were assailed upon the ground that it was a forgery and was admitted to record by fraud, or was wholly invalid by reason of the insanity of the grantor or because he was otherwise incapable of making the same, I presume the writ of habeas corpus could not be regarded as a proper proceeding to try the right; and I cannot perceive that the case is different if the deed be contested upon the ground that it was made with intent to defraud creditors or because it was wholly ineffectual as to a creditor whose debt was created before it was executed. The detention grows out of the alleged status of the party as it respects the claimants under the execution; they allege that as to them he is still a slave and liable to satisfy the debt; and although they do not claim absolute property in him as masters, yet the claim which they do make is such as should render them liable to the action provided by the statute. And moreover, no reason is perceived why the party might not resort to the court of equity for an injunction upon the ground that he was not liable to the execution. The owner of a slave levied upon by an execution to which he was not liable may enjoin the sale and obtain relief upon that ground, simply, without alleging any special reason for invoking the aid of a court of equity, and the case of a freedman would certainly not be less strong where the aid of that court is sought for his protection.

I concur therefore in what appears to have been the opinion of Judge Stanard in the case above cited, and of the judges who decided this case, and think that
270 the *writ was inappropriate to the petitioner's case, and on that ground was properly dismissed.

Upon the merits also, I find myself compelled to dissent from the opinion of the majority of the court.

By the Code of Virginia (ch. 103, § 11, p. 459) it is provided that all slaves emancipated shall be liable for any debt contracted by the person emancipating them before such emancipation was made; and it can scarcely be questioned that whether the emancipation be made by an indebted owner, directly, or indirectly, through the agency of another for the purpose of preventing the liability for debts, the effect must be the same. Such indirect emancipation with such purpose would be plainly in fraudem legis, and would be as to antecedent creditors as utterly void and ineffectual as any other conveyance made with intent to hinder, delay and defraud them. And such in my judgment is the true character of the emancipation in this case. Hanna the owner of the petitioner at the time of making the conveyance to Marshall by whom the deed of emancipation was executed, was largely indebted both as principal and security and was doubtless insolvent; in the month of January previous he had executed a deed of trust upon all his property "of every kind and description" for the security of his creditors and sureties; a large amount of property is designated in the deed, but the petitioner was not specially mentioned because as he states, he was advised by his counsel not to embrace him in the deed; the deed to Marshall was executed on the 26th day of March 1859 just three days before the note on which the judgment now sought to be enforced was rendered fell due; this deed recites falsely that it was in consideration of the sum of three hundred and fifty dollars paid by Marshall whilst Hanna himself admitted on the trial of the cause that the amount actually paid was a sum some where between twenty-one and twenty-five
271 dollars *only; Marshall the grantee was a citizen of a free state on a visit to a son in law in Rockingham county and was about to return to the state in which he lived; and in May 1859, less than two months after the deed to him, and pending the suit on the note against Hanna, Marshall executes the deed of emancipation reciting falsely that it was in part consideration of the sum of three hundred and fifty dollars to him in hand paid. Considering all the circumstances of the transaction I cannot resist the conclusion that it was a plan concerted between Hanna and Marshall to enable the former to defeat the claims of creditors and to do that indirectly which Hanna believed he could not do by a direct emancipation executed by himself. It is true Hanna states that this was done in consequence of an agreement or understanding with Dismuth of whom he purchased the petitioner which however he thought only binding upon him in conscience and morality, that when he had realized the amount he had paid for him out of the wages and earnings of the petitioner, he was to emancipate him, and that when he sold him to Marshall, he had received in that way the amount of the purchase money excepting the sum agreed to be paid by Marshall, and that there was a similar understanding with Marshall that when he should have received that amount from the earnings of the petitioner, he was to set him free.

But I cannot think that such a private unrecorded agreement, even if it should be held to be valid as between the parties, would be binding upon the creditors of the vendee or would at all affect their right to subject the slave in his hands to the payment of their debts. He is at law the property of the vendee and as such subject to his debts to his full value, and no court I apprehend, would at the suit of either slave or original vendor entertain a bill to set up such secret agreement against creditors and enquire how much of
272 *the purchase money had been reimbursed to the vendee out of the earn-

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ings of the slave whilst in his possession.

I do not understand that it is claimed in the opinion of my brother Robertson that the emancipation in this case acquired any additional validity under the circumstances of the transaction from the fact that the deed was executed by Marshall and not by Hanna himself. On the contrary it seems to be fully conceded that the petitioner stands in no better position, in any respect, than he would occupy if Hanna on being reimbursed the amount paid by him to Dismuth, had himself executed the deed of emancipation. What then would have been the condition of the petitioner if the deed had been executed by Hanna?

By our law as we have seen, an emancipated slave is liable for any debt contracted by the owner before the emancipation, and the debt in this case had been contracted before the deed was executed, and perhaps (though this is left somewhat uncertain) before the agreement with Dismuth. But it is said that as the deed was executed before the creditor had acquired or could acquire any specific lien upon the property by the levy of an execution upon it, the emancipation is good and the liability created by the statute is controlled and in effect overrode by the private agreement between the owner and his vendor and the execution of the deed of emancipation under it, and that the petitioner is therefore entitled to his discharge. This is in effect to assert that the petitioner acquired an inchoate right to freedom under the contract between Dismuth and Hanna which was afterwards consummated by the deed of emancipation executed by Marshall, and that as this deed was before the actual levy of the fieri facias the creditor's right was forestalled and defeated. I think neither of these propositions can be maintained.

It has been solemnly declared as
273 *the opinion of this court, that a slave has no social or civil rights, that he has no legal capacity to make or rescind a contract, and that he is without remedy for breach of an agreement, even for his emancipation. And it was accordingly held in two successive cases, after great consideration, that where in a will emancipation of a slave was made to depend upon his election to be free, as he had no legal capacity to make an election the clause declaring such emancipation was of necessity void and of no effect. Bailey, &c. v. Poindexter, &c., 14 Gratt. 132; Williamson, &c. v. Coalter's ex'ors, Ibid. 394. This want of legal capacity had been repeatedly and distinctly affirmed in previous cases; indeed it must be of necessity a distinctive feature and characteristic of the status of slavery. It therefore seems to be very clear that a slave can acquire no right whatever under such a contract between the former owner and his vendee; and what he cannot thus acquire directly, he cannot take indirectly through his former owner. In Dunlop v. Harrison, 14 Gratt. 251, it was held that as free negroes were prohibited by statute from holding slaves, so they could not be held by another in trust for their benefit. So as a slave can acquire no property directly neither can he acquire any interest in the same by way of trust. Haywood v. Craven's ex'or, 2 Caro. L. R. 557. See also, Trotter v. Blocher, 6 Port. R. 269, 305. It would be in direct contravention of this principle if a slave could acquire any interest under a contract between his master and his vendee touching his future emancipation which could strengthen such emancipation when made or give to it any additional force and effect to that which it would have without such previous contract. And if this be correct it cannot be right to hold that pre-existing creditors are shut off because they had not levied their execution before the deed
274 was executed. *The right to subject the property is expressly reserved by the statute and does not depend upon the levy of the execution. There was no necessity for any such provision where an execution had been levied; the object of the act was to hold the slave bound for pre-existing debts where there was no lien by execution or otherwise. Unless therefore this supposed equity in favor of the vendor is to enure to the benefit of the slave, it is impossible to say that it can deprive the creditors of the right to subject the slave which they certainly would have had if there were nothing but the deed of emancipation in their way.

Let us now look a little more closely into the alleged agreement between Dismuth and Hanna. And here the first observation that occurs is upon the very unsatisfactory nature of the evidence by which it is attempted to be proved. Hanna himself is the only witness offered and he speaks of a bill of sale and of the agreement by which he was to emancipate the petitioner when he should be repaid the three hundred and fifty dollars which he agreed to give for him out of his earnings; and he states that according to his impression, speaking of what had occurred only between two and three years before, he executed and delivered a writing containing the terms of the agreement. Neither the bill of sale, nor this writing nor any of the various letters which he said he had received from Dismuth on the subject is produced, nor any reason assigned for their non-production except that he did not know where the written contract which it was his impression he had executed, then was. He does not say he had lost the bill of sale or the letters he had received from Dismuth, nor does he undertake to state the terms and conditions, if any, of the former. The case was not submitted to a jury but was heard upon the law and the facts by the judge.
275 and he no doubt *thought the evidence very unsatisfactory. But if it were less so, I incline to think that such a contract is liable to very grave objections and that its validity should not be maintained for any purpose whatever. I am aware that in some of our sister states similar contracts have been held valid, and in Tennessee,

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they have gone so far as to hold that such a contract should be enforced not only at the suit of one of the contracting parties but of any other person who may come forward as next friend of the slave; and that a contract between a master and his slave for the emancipation of the latter is good and may be enforced. Elias v. Smith, 6 Humph. R. 33; Lewis v. Simonton, 8 Humph. R. 185. But I am aware of no case in Virginia in which such a contract has been enforced or held valid. A contract between a master and his slave for the future emancipation of the slave is utterly void and cannot be enforced against the master although the slave may have fully complied with his part of the agreement; Sawney v. Carter, 6 Rand. 179; Stephenson v. Singleton, 1 Leigh 72; nor has a contract between vendor and vendee of a slave for the future emancipation of the slave, as far as I am aware, ever been sanctioned except so far as it may be supposed to be countenanced by the case of Ruddle's ex'or v. Ben, above cited. Of that case it may be remarked that while Judge Tucker concurred with Judge Parker in thinking the writ of habeas corpus the appropriate remedy, yet upon the merits, he was for remanding the petitioner to the custody of the sheriff for proceedings under the execution; and that Judge Stanard while he concurred with Judge Parker upon the merits had strong doubt whether the writ should not have been dismissed and the prisoner remanded because the remedy was inappropriate. Certainly it is not a binding authority upon any point, and if it is to be under-
276 stood as *affirming that such a contract can give any additional efficacy and effect to a deed of emancipation executed in conformity to it as against creditors that it would not have without it, I am constrained to dissent as much from the doctrine of law which it teaches as I do from the sentiment expressed by Judge Parker that the dictates of humanity and justice should prompt us to favor emancipation by maintaining the right of the master to bestow (and of course the capacity of the slave to receive) the privilege of acquiring property to serve as a foundation for a consideration which will support what the judge calls "the inestimable grant of freedom."

Such a contract for the future emancipation of a slave when the price paid shall be reimbursed out of his earnings, is I think, opposed to the general spirit of our decisions and the policy of our laws. The distinction which it implies between the slave himself and his earnings is no where recognized by them. They admit no separate interests between master and slave. The latter is to be wholly devoted to the interests of the former. Such arrangement is evasive of the provision of our statute which makes it a misdemeanor to permit a slave to go at large, trade for himself, or hire himself out for the benefit of any person whatever, if not also of that prohibiting a freed negro to remain in the state. The presence of the negro in this intermediate condition, this half way house, between freedom and slavery so plainly condemned by our law, is fraught with all or most of the evils which have rendered the departure from the state of the freed negro the imperative condition of his emancipation.

I think it is to be regretted that prospective emancipation was ever tolerated by the courts in Virginia, but its validity has been, perhaps, too often affirmed
277 *to be drawn into question at this day. But where it has been sustained, it has been declared by will or deed duly recorded, as the law requires. The proposition here goes a bow shot beyond any previous case sustaining a prospective emancipation. It is in effect to declare such emancipation good, though not declared by will or deed admitted to record, but founded only upon a private agreement between the vendor and vendee of a slave under seal or otherwise and never admitted to record, and in which the slave has and can have no legal interest whatever; and this not only as between the parties but as against the creditors of the vendee whose debts were created before the deed of emancipation subsequently made was executed and recorded.

If such an agreement is to be held valid and enforced, its effect should be restricted to the parties themselves. It should not extend to the creditors of the vendee. To give it effect as to them is to defeat the plain intent of our statute. In none of the cases cited by the counsel that I have been able to see, was the controversy between the slave and a creditor of the vendee. They were all cases between the original parties to the agreement or between the slave or those claiming by purchase: nor does it appear from those cases that in the states in which they occurred there was a statutory provision like ours, in favor of creditors. At best such a contract, as it seems to me, can only confer a right upon the vendor to recover damages for its breach against the vendee, and a mere equity to call for its specific performance; and this equity being in its nature a secret equity founded upon an agreement not recorded and the possession of the slave being with the vendee, it would as it seems to me, be against all the analogies of the law, to give it priority to the claims of cred-
278 itors who became such before it *was effectuated by the execution of the deed of emancipation; and such deed in my judgment ought to have no other or greater efficacy as against pre-existing creditors than if it had been executed without any such previous agreement.

I think the judge below did not err in remanding the petitioner to the custody of the sheriff, and am of opinion to affirm the judgment.

Decree reversed.

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279 *Alderson v. Miller.

July Term, 1859, Lewisburg.

1. **Landlord and Tenant—Denial of Landlord's Title—Fraud.***—Though as a general rule a tenant is not allowed to question his landlord's title; yet if a person in possession of land claiming title to it, is by fraud or mistake induced to believe that another has a better right to it, and to take a lease from him; in an action by the landlord to recover possession, the tenant may set up such fraud or mistake, and show that he has a good title to the property.

2. **Same—Same—Evidence—Case at Bar.**—A is in possession of land under a deed from G, made in 1829, and there is a decree in 1855 in favor of S against G for all of a large tract of land which may be in the possession of G, or which may have been conveyed by him since 1837. M induces A to take a lease of his land from him; and at the end of the term sues A to recover possession, and relies alone on the lease. A offers in evidence a copy of the decree and his deed from G, and states that he proposes to follow up this evidence with proof that the lease was obtained from him by a person claiming under the decree, by fraud or mistake. *Held*, the evidence is admissible.

3. **Evidence—Reversal as to Order of Proof—Case at Bar.**—If in such case there is any reason to believe that the decree and deed are offered merely to produce an improper impression on the jury, and that it is not intended to follow it up by evidence tending to prove the fraud or imposition, the court may require the party to reverse the order of his proofs; but this is a matter to be left in a great measure to the discretion of the court which tries the case.

4. **Inadmissible Evidence—Admitted—Instruction.**†—If in such case, the decree and deed are admitted, and the party fails to produce the proof of fraud or imposition, the court may instruct the jury to disregard them.

This was a proceeding of unlawful detainer in the County court of Greenbrier, by Andrew A. Miller against Asa Alderson. On the trial there was a verdict and judgment for the defendant Alderson; and Miller having taken two bills of exceptions pending the trial, obtained a supersedeas to the judgment from a judge of the Circuit court.

On the trial, the plaintiff introduced
280 in evidence a *covenant bearing date the 1st of March 1855, executed by Alderson, whereby he agreed to lease from the plaintiff the land in dispute, described as the land Alderson then lived on, for the term of one year, the lease to commence on the 1st day of March 1855 and to expire the 1st day of March 1856; for which he bound himself to pay to Miller five dollars; and bound himself in the penalty of five hundred dollars to render up peaceable possession to Miller at the end of the lease. And he proved that on the 1st of March 1856 he demanded a surrender of the leased premises, which was refused by the defendant.

The defendant thereupon, to establish his right to the land in controversy, as a link in his chain of title, offered in evidence a copy of a decree of the Circuit court of Henrico county, made on the 21st of April 1852, in two causes, in one of which the personal representative of Richard Smyth and David Doyle was plaintiff and Eliza L. Schermerhorn and others were defendants, and in the other George Alderson, John Anderson, William Miller and others were plaintiffs, and the parties in the first suit were defendants. By this decree the sheriff of Greenbrier was directed to deliver to Eliza L. Schermerhorn and the heirs of John F. Schermerhorn deceased, so much of a tract of twenty-eight thousand two hundred and eighty and a half acres of land in Greenbrier county as was purchased by Eliza L. Schermerhorn, under a decree made in these causes, and which had been conveyed to her by the commissioner of the court, as the sheriff should find in the possession of the said Alderson and Anderson, or either of them, or in the possession of any person or persons, who had come into possession under them since the 23d of March 1837, when the first of these suits was instituted. And the defendant stated that he expected to prove that the lease referred to was pro-
cured through mistake or fraud, and
281 that he *had himself title to the land; and that this decree was a necesssary item of proof to establish said facts. To the introduction of this testimony the plaintiff objected; but the court overruled the objection; and he excepted.

*Landlord and Tenant—Denial of Landlord's Title—Fraud or Mistake.—As a general rule a tenant is not allowed to question his landlord's title. The principal case was cited as authorizing this proposition in Suttle v. R. F. & P. R. R. Co., 76 Va. 289; Gale v. Oil, etc., Co., 6 W. Va. 210. See other cases cited in monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352. See also, monographic *note* on "Estoppel" appended to Bower v. McCormick, 23 Gratt. 310.

But this rule is subject to exceptions. For, if a person in possession of land claiming title to it, is by fraud or mistake induced to believe that another has a better right to it, and to take a lease from him; in an action by the landlord to recover possession, the tenant may set up such fraud or mistake, and show that he has a good title to the property. See the principal case cited as authority for this proposition in Turpin v. Saunders, 32 Gratt. 33; Locke v. Frasher, 79 Va. 409, 411, 412; Gale v. Oil, etc., Co., 6 W. Va. 210; Jones v. Fox, 20 W. Va. 380; Voss v. King, 33 W. Va. 241, 242, 10 S. E. Rep. 403, 404. See also, cases collected in monographic *note* on "Unlawful Detainer" appended to Dobson v. Culpepper, 23 Gratt. 352.

In Campbell v. Fetterman, 20 W. Va. 412, it was said: "As a general rule a tenant is not permitted to question his landlord's title; yet from the time that the landlord has notice that the person, who formerly held as tenant, claims to be in possession, not as tenant, but in his own right, the relation of landlord and tenant ceases. Willison v. Watkins, 3 Pet. 43; Tavener v. Emerick, 9 Gratt. 220; *Alderson v. Miller, 15 Gratt. 279.*"

†Inadmissible Evidence—Admitted—Instruction.—See principal case cited and approved in Patton v. Elk River, etc., Co., 13 W. Va. 272.

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After the introduction of the foregoing testimony, the defendant offered in evidence a deed bearing date the 15th day of December 1829, from George Alderson and John Anderson to himself, conveying to him the land in controversy. And he accompanied it with the same statement of what he expected to prove as that given above. The plaintiff objected to the evidence; but his objection was overruled by the court; and he again excepted.

When the cause came on to be heard in the Circuit court, that court reversed the judgment. Whereupon Alderson applied to this court for a supersedeas; which was awarded.

Price, for the appellant.
Gordon and Cosby, for the appellee.

ALLEN, P., delivered the opinion of the court:

This is a supersedeas to a judgment of the Circuit court reversing a judgment of the County court in favor of the plaintiff in error Alderson, upon a summons for unlawful detainer sued out against him by the defendant in error Miller. Such a proceeding involves no question of title, the question being whether the plaintiff is, as against the defendant, entitled to the possession, although for the purpose of determining who is so entitled to the possession, the title may be given in evidence. In the case under consideration, it does not appear that Miller gave any evidence of title on the trial. He seems, from the statement in the first bill of exceptions, to have rested his right to recover upon his character of
282 landlord, seeking *restitution of possession from a tenant holding over after the expiration of his term. The questions made by the bills of exception arise upon the supposition that the parties stood in the relation towards each other of landlord and tenant. On the trial Miller gave in evidence, as the bill of exceptions states, a writing purporting to be a lease, whereby Alderson rented from him the land for the term of one year, and bound himself to render up peaceable possession at the end of the term; and proved that at the end of the term he demanded a surrender of the leased premises, which was refused by Alderson. The latter thereupon offered to read in evidence a decree which is set out in the bill of exceptions, and after reading said decree, he also upon the same state of proof offered in evidence a deed to himself for the land in controversy from George Alderson and John Anderson, dated the 15th of December 1829. The deed describes the land as part of a survey of twenty-eight thousand two hundred and eighty and a half acres, made for and granted to Henry Banks, and sold by the attorney of said Banks to the said G. Alderson and J. Anderson. To the reading of the copy of the decree and the deed in evidence Miller objected; but as the defendant in the court below stated that he expected to prove the lease referred to was procured through mistake or fraud, and that he had himself title to the land; and that said decree and deed were necessary items of proof to establish said facts, the court overruled the objection, and permitted the decree and deed to be read as evidence: to which decisions the said Miller excepted.

The general rule that a tenant should not be permitted to contest his landlord's title, is too well settled to require the citation of any authorities to sustain it. The rule rests upon principles of justice and good faith.
The tenant enters under his landlord,
283 and acquires *possession by admitting his title. It would be a breach of good faith to attempt to hold a possession so obtained, by impeaching the landlord's title. In most cases at law the plaintiff's action may be defeated by showing that the right to the subject in controversy is in a third person. In a writ of right the constructive seizin conferred by a grant could be defeated by proof of a valid outstanding title in a third person; and in ejectment the lessor of the plaintiff must, in almost every case, show a good title against all persons. The exception in favor of the landlord as against his tenant, is a departure from the strict rule of law. But a principle adopted to promote justice and good faith, must not, as was said by C. J. Tilghman in Hamilton's lessee v. Marsdon, 6 Binn. R. 45, be used as an instrument of fraud and violence. In that case the tenant, to prove adverse title, was permitted to show that being in possession under a lease from a third person, the plaintiff in the ejectment came with others armed and threatened to turn him out of the premises, unless he took a lease from him, which he did. So in the case of Miller v. McBriar, 14 Serg. & Rawle 382, a person in possession was induced by the plaintiff who exhibited a patent, to enter into an agreement called a lease. The tenant offered to prove that the patent was procured by fraud. Gibson, C. J., said that a tenant may impeach his landlord's title whenever he can show that he was induced to accept the lease by misrepresentation and fraud, and the exhibition of a title founded in forgery to induce a person already in possession to accept of a lease, was an act of an unequivocal character; and the evidence was admissible to show that the agreement was obtained by imposition and deceit. To the same effect is the case of Brown v. Dysinger, 1 Rawle's R. 408,
where a lease was unfairly obtained
284 from a *person in possession of the land. The case of Ball v. Lively, 2 J. J. Marsh. R. 181, establishes the same proposition. In that case the defendant in possession against whom there had been a judgment and recovery in ejectment for part of the land in his possession, was induced by a person who had no authority to enforce the judgment, to take from him a lease, which recited that the plaintiffs in ejectment had recovered the whole of the premises. The court decided that if a person in possession of land be induced by fraud to become lessee of one having no

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claim to the land, he may disclaim the tenancy, and rely on his precedent possession, from which he has been seduced by false and delusive pretences. That was a case of forcible detainer, and so far as the facts of the present case can be collected from the bills of exception, may have been alike in its circumstances. The tenant Alderson was in possession when he executed the lease, for it describes the land as the land he then lived on. The deed to him from George Alderson and John Anderson was dated the 15th of December 1829. And the decree shows that in two suits between the widow and heirs of John F. Schermerhorn deceased, and said G. Alderson and J. Anderson and others, Alderson and Anderson were required to surrender and deliver up to the widow and heirs aforesaid possession of a portion of the tract of twenty-eight thousand two hundred and eighty and a half acres in said county of Greenbrier; and unless they should do so, the decree directed the sheriff to deliver to Mrs. Schermerhorn possession of such of the land conveyed to her by the commissioner of the court, as the sheriff should find in the possession of Alderson and Anderson, or either of them, or in the possession of any person who had come into possession under them since the 23d of March 1837, when the first of the chancery suits was
285 *instituted. The land referred to in the deed corresponds in the description of quantity and county where situated, with the tract a portion of which was conveyed by Alderson and Anderson to the plaintiff in error by the deed dated the 15th of December 1829, long prior to the 23d of March 1837, and the sheriff was not therefore authorized to deliver possession of it under the decree. How Miller the plaintiff in the court below claimed the land, does not appear. From the exception it would seem that after giving the lease in evidence and proving a demand and refusal to surrender, he there rested his case. Although he showed no title, yet if he had acquired possession and had parted with it to his lessee, good faith required he should be restored to the possession; and if the transaction had been fair, it would have been no answer to say he was not owner of the land. To lay a foundation to impeach his right to a restoration of the possession, it was incumbent on the tenant to show that he had held possession previous to the lease, under some claim of title, and that he was induced to surrender possession, if in fact he did surrender possession, and to take a lease by fraud and imposition of the landlord. To this end the deed to him was proper evidence, and the decree also as showing the exception in favor of those who came into possession under his vendors prior to the 23d of March 1837. The decree might also have been material, if any misrepresentation of its character had been made and the party in possession had not been apprised of the exception in favor of those who had come into possession under Alderson and Anderson prior to the day last aforesaid.

The proof being legal, and offered for the purpose set out in the bills of exceptions, the order in which it was offered was of no importance. In view of the object avowed, it would seem that they should have
286 *been first offered as showing an actual possession under claim of title before he surrendered possession and re-entered under the lease, and then to introduce the evidence of fraud and imposition. If any reason had existed to induce the court to believe that these papers were offered merely to produce an improper impression on the jury, and that it was not intended to follow them up by evidence tending to prove fraud or imposition, the court perhaps might have required the party to reverse the order of his proof. These are matters occurring in the progress of a trial, which must be left in a great measure to the control of the court which is supervising it. If not followed by any evidence tending to prove the fraud and imposition, the jury can be instructed to disregard it.

It was insisted that the decree should not have been admitted because it does not show on its face that it referred to the land in controversy. It is not necessary to determine that question upon this bill of exceptions. It was proof that such a decree was rendered, and whether the party offering it showed by other evidence, as he might have done by the admission of the adverse party, that the deed and decree referred to the same twenty-eight thousand two hundred and eighty and a half acres of land in Greenbrier does not appear. It does not appear that any motion was made to instruct the jury to disregard this evidence because not followed up by other evidence necessary to make it available. The objection seems to have been rested rather upon the time of offering the proof, than upon the admissibility of the proof in a different stage of the trial. A verdict was found and judgment rendered, without any exception to the rulings of the court in any other particular; there was no motion for a new trial; the facts proved were not spread on the record. The presumption there-
287 fore is that the defendant below *did show a previous possession under title which he never had surrendered, and so showed a better right to the possession than his adversary; or if he did surrrender possession and re-enter under the alleged lease, that it was procured through fraud.

It seems to me that there was no error in the judgment of the County court, and that the Circuit court, instead of reversing, should have affirmed it.

Judgment of the Circuit court reversed, and that of the County court affirmed.

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288 ***Clarkson v. Read & als.**

July Term, 1859. Lewisburg.

Judicial Sales—Purchasers—Failure to Pay Purchase Money—Rule to Show Cause.*—A judicial sale of

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***Judicial Sales—Purchasers—Failure to Pay Purchase Money—Rule to Show Cause.**—For the proposition

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land is partly on a credit, and the purchaser pays the cash payment, and executes his bonds with security for the deferred payments; and the sale is confirmed by the court. When the bonds become due the purchaser fails to pay them. He may be proceeded against by a rule made upon him to show cause why the land shall not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for a sale of the land.

In a suit in equity depending in the Circuit court of Kanawha county, in which Isaac Read, guardian, &c., was plaintiff, and E. V. Cox and others were defendants, the object of which was to have a sale of the land of certain infants, a decree was made on the 11th of January 1855, by which W. E. Gillison and William R. Cox were appointed commissioners to sell the land upon the terms of one-fourth of the purchase money in cash, and for the residue upon a credit of one, two and three years, payable by equal installments, with interest from the day of sale; the purchaser giving bonds with good security, for the payment of the deferred installments; and the title of the land to be retained as a security for their payment.

The commissioners proceeded, on the 10th of March 1855, to sell the land, when John N. Clarkson became the purchaser at the price of fifteen thousand four hundred dollars; and he complied with the terms of the sale, paying the cash payment and executing his three bonds, payable in one, two and three years, each for one-third of the deferred payments, with interest from the day of sale. And the sale was afterwards confirmed by the court.

From the reports of the commission-

289 ers made at a *special term of the court in January 1858, and at the subsequent May term, it appeared that Clarkson had paid no part of either of his bonds. That when the first bond fell due, suit was brought upon it by the commissioners, and judgment recovered against all the obligors; that an execution was issued upon this judgment and a forthcoming bond was given and forfeited: that on this forthcoming bond an execution was awarded, which was levied on slaves of Clarkson, the sale of which was enjoined by him: and that injunction was still pending.

When the second bond fell due, suit was brought upon it, and a judgment was recovered: and an execution issued upon that judgment, was returned "No property found." The commissioners reported that no suit had been brought upon the third bond, because it would only impose upon the complainants the costs and delay of another suit. That there was no reasonable expectation that the money could be made out of any of the obligors in the bonds. That it was three years since the sale, all the purchase money was due, and amounted, principal and interest, to thirteen thousand seven hundred and forty-four dollars and fifty cents; almost as much as the original purchase money; and as much, in the opinion of the commissioners, as the land would sell for.

At the May term 1858 the court made a rule upon John N. Clarkson, requiring him to show cause on the fifth day of June following, why the land should not be resold at public auction for cash, to pay the unsatisfied installments of purchase money due by him and his securities; and why a decree should not be made against him for so much of said unpaid purchase

that, where a purchaser at a judicial sale fails to pay the purchase money he may be proceeded against by rule to show cause why the land shall not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for a sale of the land, the principal case is cited and followed in Williams v. Blakey, 76 Va. 257; Hurt v. Jones, 75 Va. 847; Long v. Weller, 29 Gratt. 356, and *note*; Thornton v. Fairfax, 29 Gratt. 679, and *note*; Robertson v. Smith, 94 Va. 254, 26 S. E. Rep. 579; Stout v. Phillippi, 41 W. Va. 348, 23 S. E. Rep. 574; Glenn v. Blackford, 23 W. Va. 185; Gilmer v. Baker, 24 W. Va. 84; Berlin v. Melhorn, 75 Va. 642; Hickson v. Rucker, 77 Va. 139; Ogden v. Davidson, 81 Va. 761. See monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

In American Ass'n v. Hurst, 59 Fed. Rep. 3, it is said: "It has been held in a number of cases that a purchaser at a judicial sale becomes a *quasi* party, and that, where credit is given to him under an order of a court of equity, the court retains jurisdiction to compel payment by him of the residue through attachment, or by resale of the property. Wood v. Mann, 3 Sumn. 318; *Clarkson v. Read, 15 Gratt. 288;* Stephens v. Magruder, 31 Md. 168; Freem. Ex'ns, (2d Ed.) 313e. The statutory provision which we are considering merely gives another remedy, by which the court is required to secure to the parties in the case before it, payment of the purchase price bid at the sale had and confirmed by its decree."

In Va. Fire & Marine Ins. Co. v. Cottrell, 85 Va. 860, 9 S. E. Rep. 132, the rule laid down in the principal case is approved, but the court in this case said that a proceeding to *rescind* a sale which has been absolutely confirmed, ought to be no less formal than by a petition filed in the cause setting forth distinctly the grounds upon which the application is based, in order that the purchaser or other adverse parties to the proceeding may see clearly what they have to meet, and a summary rule to show cause is not sufficient.

In Anthony v. Kasey, 83 Va. 342, 5 S. E. Rep. 176, it is said: "In *Clarkson v. Read, 15 Gratt. 288*, this court held that the purchaser was a party to the suit as to all matters appertaining to the purchase, and might therefore be proceeded against by rule in case of default. But no such reason exists in our opinion for such a summary procedure against a surety. He does not deal directly with the court, and so become a party to the suit. His undertaking is collateral to the contract of purchase. It is that of a mere surety, and cannot be extended by construction in any respect. And to use the language of this court in Thurman v. Morgan (79 Va. 367), 'Their liability, if any, grows out of their undertaking as sureties on the bond, and can be ascertained and enforced only by suit on the bond in a common-law court, where full opportunity for making defense and the constitutional right of trial by jury can be had.'"

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money as the land, upon a resale, might not pay off and discharge.

Clarkson appeared to the rule, and objected that the court had no authority
290 to make an order for the sale of *the land, upon a rule, under the circumstances of this case. The ground of this objection is that the land had been sold upon a credit for three-fourths of the purchase money. That he had complied with all the terms of the sale, having paid in cash what he was required so to pay, and having given his bonds for the deferred payments with sureties satisfactory to the commissioners and the court, as was evident from the confirmation of the sale. That therefore he was not in contempt for failing to comply with the terms of sale; and not being a party in the suit, he could not be proceeded against, by a rule to show cause against a decree. He further insisted that he and his securities were good and ample for the balance of the purchase money still due. That though it was true that his property both real and personal was encumbered by deeds of trust to secure debts, so that executions could not be levied upon it; yet he expected in a short time to pay all his debts, including this one; and that the land which he had purchased had enhanced in value, and was and promised to continue to be, amply sufficient for the purchase money due on it. And he examined several witnesses in relation to his circumstances, from whose testimony, it may be concluded, though he was largely indebted, his property, unless greatly sacrificed, would be more than sufficient to pay his debts.

The case coming on upon the rule, and the answer thereto and the evidence, the court decreed that unless Clarkson should pay to the commissioners Gillison and Cox, within thirty days from the end of the term, the amount of the two bonds upon which judgments had been recovered, with all interest and costs due or incurred thereon, the said commissioners should proceed to sell at public auction, after advertising, &c., the land in the proceedings mentioned, requiring of the purchaser one-
third of the purchase money in
291 *cash, and the balance in nine and eighteen months, with good security, and the title to be retained for further security, &c. From this decree, Clarkson applied to a judge of the Circuit court for an appeal; which was allowed.

Miller and B. H. Smith, for the appellant.
Fitzhugh and Fry, for the appellees.

DANIEL, J., delivered the opinion of the court:

In the case of Casamajor v. Strode, 1 Cond. Eng. Ch. R. 195, the broad doctrine is laid down by the vice chancellor, Sir John Leach, that a purchaser, under a decree for the sale of lands, though not a party to the cause, does, by the act of purchase, submit himself to the jurisdiction of the court as to all matters connected with that character. The same doctrine is stated by Judge Story in the case of Wood v. Mann, 3 Sumner's R. 318, and by Chancellor Walworth in the case of Requa v. Rea, 2 Paige's R. 341. And in the second volume of Daniel's Ch. Pr. 1460-61-2, it is stated, that after the report of a sale by a master is confirmed, there are, according to the English practice, three modes of remedying the failure of the purchaser to comply with the terms of the sale. If it appears that the purchase has been made by a person unable to perform his contract, the parties interested in the sale, may, upon motion, obtain an order, simply discharging him from his purchase, and directing the estate to be resold. If the purchaser is responsible, the court will, if required, make an order that he shall within a given time pay the money into court; and if the purchaser, on being served with the order, fails to obey it, his submission to it may be enforced by attachment. Or an order will be made for the estate to be resold, and for the purchaser to pay the expenses arising from the non-completion
of the purchase and the resale, and
292 *any deficiency in price arising upon the second sale. Such an order (the author proceeds) was made by Lord Cottingham in Harding v. Harding, 18 Eng. Ch. R. 514, after consultation with the other judges of the court; and although in that case the purchaser was a defendant in the cause, it does not seem that that fact was considered as necessary in order to justify the making of the order.

In Lansdown v. Elderton, 14 Ves. R. 512, the purchaser was compelled to complete his purchase by the second of the courses just mentioned, namely, by an order to pay in his purchase money within a given period, or stand committed. Since the date of that decision (1808) it has been the constant practice of the English courts of chancery to make such orders; and repeated instances may be found in the reports of our sister states, in which the precedent has been approved and acted upon. Anderson v. Foulke, 2 Harr. & Gill R. 346; Gordon v. Sims, 2 McCord's Ch. R. 151; Brasher v. Cortlandt, 2 John. Ch. R. 505.

It is argued, however, by the counsel for the appellant, that as judicial sales in England are always made for cash, the practice regulating such sales there has no application to cases where, by the terms of the decree, the sale is upon a credit, and the payment of the purchase money is to be secured by the bond of the purchaser. And in support of this view, he cites the case of Richardson v. Jones, 3 Gill & John. R. 163, in which it was held by the Court of appeals of Maryland, that where a bond is given to the trustee, for the purchase money under an order of sale in chancery, requiring a bond to be given, and the sale has been confirmed, the purchaser and his sureties cannot be compelled to pay the bond by attachment. Buchanan, Ch. J., thus states the reasons why, in his opinion, the practice in respect to sales on credit should be different from that in respect

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to sales for cash. "When a sale
293 *is made under a decree or order in chancery, and no bond or security is given for the payment of the purchase money, a practice has grown up in chancery, and sanctioned by this court, in Anderson v. Foulke, 2 Harr. & Gill 346, to compel the purchaser to complete his purchase by an order on him in a summary way to pay or bring the money into court, and that, from a necessity arising out of the peculiar character of such transactions. No action at law will lie to enforce a decree in chancery within the territorial jurisdiction of the court in chancery. An order of the Court of chancery ratifying such a sale is considered as amounting to a decree for the payment of the money; and if that court could not enforce the execution of it, it could not be enforced at all." "A court of chancery having a clear right to enforce its own decrees, and an order of ratification being considered as amounting to a decree for the payment of the purchase money, a purchaser who neglects or refuses to comply with such decree, is in contempt, and may be dealt with accordingly by an order in the first instance (in this state) to bring the money into court as preparatory to an attachment." "But where a bond is given to the trustee for the purchase money under an order of sale from chancery requiring bond to be given, the terms of sale are complied with, and a contract entered into, not with the court, but with the trustee, on which, after ratification, he has a full and perfect remedy at law for enforcing the payment of the purchase money, that is recognized and sanctioned by the order of ratification, which, in such case, is not a decree for the payment of the purchase money, but a confirmation only of what has been done. And though the contract of sale being perfected by the order of ratification, it is thereby said to become a sale by the court; yet the terms of sale
294 being complied with and *the purchase completed, by giving to the trustee, as required, a bond to secure the purchase money, the purchaser is not in contempt by the non-payment of it. The contract on the bond not being with the court, but with the trustee under the sanction of the court, the remedy is by suit on the bond in a court of law; and chancery cannot enforce it as a mere bond for the payment of money, by which the original simple contract of purchase is extinguished. And if the payment of the bond, as such, cannot be enforced by a bill in chancery, a fortiori, can it not be enforced in a summary way by an order to bring the money into court."

However satisfactory such reasoning may seem when the effort is to enforce the payment of the purchase money by attachment, I do not perceive how it can be made to bear on the case in hand. By the decree under which the purchase in this case was made, the terms of sale were, one-fourth of the purchase money for cash, and as to the residue, upon a credit of one, two and three years, payable by equal installments, the purchaser giving bond with security for payment of the deferred installments, and the title of the land to be retained as security for the payment of such deferred installments, until the same shall be fully paid. All of the bonds for the deferred installments were due and unpaid, and judgments at law upon two of them had proved unproductive. And in this state of things, the proceeding against the purchaser asked and obtained, was not a proceeding by way of attachment, but a rule summoning him to appear to show cause why the land sold him by the commissioners should not be resold to pay the unsatisfied installments of purchase money due by him and his securities; and why a decree over should not be rendered against him for so much of said unpaid purchase money as the said land, upon a resale, might not
295 pay off *and discharge. And the interlocutory decree, from which the appeal is had, is simply a decree for the resale of the land.

Let it be that there is no decree in the cause ordering Clarkson to pay in the purchase money, and that so, he cannot strictly be treated as in contempt; still, the credit which was allowed having expired, and his bonds being wholly unpaid, he is in default in respect to the purchase money. Having by his purchase submitted himself to the jurisdiction of the court in the suit, he has not placed himself beyond the reach of the court by giving the bonds. The court still holds or controls the title, and he still owes the purchase money. In a contract of the like kind between Clarkson and a party acting in his own behalf, the execution, by Clarkson with his securities, of a bond to a third person for the benefit of the vendor, would not deprive the latter of a right to resort to a court of equity for full relief in the case of a failure by Clarkson, on the expiration of the credit, to pay the bond. The right of the vendor, in such case, to sue upon the bond at law, if he pleased, would not in any degree conflict with his right to have a decree for the sale of the land and a personal decree against Clarkson for any balance due after applying the proceeds of sale to the satisfaction of the unpaid purchase money. In cases of judicial sales in England, the court is regarded in a certain sense as the owner and principal, and the master as the mere agent; and the contract is treated as a contract substantially between the purchaser on the one side, and the court as the vendor on the other. Savile v. Savile, 1 P. Wms. R. 745; Anderson v. Foulke, already cited, 2 Harr. & Gill 346. This view is conceded by Ch. J. Buchanan in his opinion in the case of Richardson v. Jones, to be correct in regard to sales for cash; and I cannot per-
296 ceive how *the nature of the contract as a whole is altered, or the relation of the court as vendor to the purchaser is changed, by the fact that the sale is on credit, and that the purchaser has executed his bonds to the commissioner for the de-

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ferred installments. It is true, that by the execution of the bonds the purchaser has placed it in the power of the court to cause the collection of the purchase money by a suit upon the bonds at law. The jurisdiction of a court of law in respect to the bond, however, is not in exclusion of the jurisdiction of a court of equity to compel a complete performance of the contract in all its parts. The bond is but an additional security for the purchase money; and the power of the court to sue on the bond is in aid of and not in conflict with its other powers to compel the execution of the contract. Such clearly would be the law as between two parties occupying strictly the relation to each other of vendor and vendee; and I can see no reason why the same rule would not hold as between the court and the purchaser at a judicial sale.

And if the court, in the case of a failure, by the purchaser at a cash sale, to pay in the money, may without requiring the parties to the cause to file a bill, proceed, by rules and orders to sell the land, and hold the purchaser accountable for the balance due, after applying the proceeds of sale to the discharge of the purchase money, it is difficult to see why the like proceeding may not be resorted to in the case of a sale for credit, when the credit has expired and the purchase money remains unpaid. Such rules and orders would have the same foundations to rest upon in the one case as in the other.

The power of the court thus to enforce the execution of the contract is, I apprehend, wholly independent of its power to proceed against the purchaser as
297 *in contempt. In the case of Harding v. Harding (already referred to), Lord Cottenham said, that there was no reason why a person purchasing under a decree of the court should not be held to his contract, as much as a person purchasing in the ordinary way: That the court might enforce the vendor's lien against the estate: and that an order to hold the purchaser to his contract and to resell the estate in the meantime, was in strict analogy to the course the court takes against a purchaser in the ordinary case. And in the very learned and able opinion of the chancellor (Bland), delivered on rendering the decree in Anderson v. Foulke, from which the appeal in that case was taken, he treats the practice in question as one so well established that its propriety could be no longer questioned. 2 Harr. & Gill 368.

I find nothing in conflict with these views, in the decision made by the Special court in the case of Gross v. Pearcy, 2 Patt. & Heath 483; to which reference was made by the counsel for the appellant; though it is true that Judge Thompson, in delivering the opinion of the court, whilst admitting the convenience of such a practice, expresses strong doubts, whether, "tested by the usages and practice of courts of equity in Virginia," the court had in such cases power to proceed by rule against a purchaser and his sureties, to decree a resale. The proceedings in that case in the Circuit court were, I think, clearly erroneous upon the merits; and I do not understand the decree of the Special court reversing those proceedings, as going to the length of deciding that a court of equity had no power in any case to order a resale upon rule. And with very high respect for the learning and experience as a chancellor, of the judge who delivered the opinion in that case, I still think that the power in question is one in strict harmony with
298 the principles *applicable to the constitution and practice of a court of equity, and essential to the convenient and efficient dispatch of its business.

I do not mean to say that in all cases of the kind the proceeding should be by a rule rather than by a bill. It is not difficult to conceive of cases in which there might grow up, or be developed, between the direct parties to the cause and the purchaser, equities of a character such as to require that they should be discussed and considered upon regular and formal pleadings, original or supplemental. It is, however, but reasonable to believe that in a majority of cases little else would be attained by requiring the parties to go through the steps of a regular suit, instead of proceeding by a rule, except delay: delay, which, whilst furthering no just end or object of the purchaser, would work inconvenience and injustice to those entitled to receive the proceeds of the sale.

A rule in such a case apprises the purchaser of the nature of the demand against him as fully as a bill could do. And the only additional office that a bill could perform, would be to recite, in a more formal manner, matters which he already knows; or which the law presumes that he already knows. If he has any cause to resist the demand, he can set it forth as fully in an answer to the rule as in an answer to a bill. And if in his answer to the rule he should show any reason why there should be no resale of the property, it would be just as incumbent upon the court to allow him an opportunity to bring forward his proofs as it would have been, had the same matter been averred in an answer to a bill.

In the case before us, the purchaser appeared to the rule, filed his answer, and went into the examination of witnesses for the purpose of proving the justice of the causes which he assigned why he
299 should not be *subjected to the order and decree asked against him. There is nothing to show, and indeed it is not suggested, that he has, by the summary character of the proceeding, been precluded from making any resistance or defence to the decree rendered, which he would or might have made in the course of a formal suit.

I see no error in the proceedings, and am of opinion to affirm the decree.

Decree affirmed.

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300 *Yancey v. Mauck & als.

July Term, 1859, Lewisburg.

Sale of Land—Title Retained by Vendor—Subjection of Property for Purchase Money.*—Y sells land to M, and is to convey it when the first payment is made. Before this payment falls due they make an arrangement by which M executes his bond, with Y as his surety, to S, for a debt due from Y to S, equal to the whole purchase money of the land; and the bonds of M are surrendered to him and destroyed. M becomes insolvent and conveys the land to secure creditors; and afterwards Y is compelled to pay the bond to S. Y not having parted with the title, may subject the land in equity to the payment of the purchase money.

This was a bill filed in April 1857 in the Circuit court of Rockingham county, by Robert L. Yancey against R. C. Mauck, Allan C. Bryan and others, to subject an interest in a tract of land sold by Yancey to Mauck, to the payment of a debt which Yancey insisted was a lien upon the land. The facts, as they appear from the pleadings and proofs, are as follows:

Some years prior to 1850 Leyton Yancey died, leaving a widow and four children. One tract of land was assigned to the widow for her dower; and of course the reversion was in the children.

On the 20th of April 1850 Robert L. Yancey sold his interest in the tract of land which had been assigned to the widow, to Robert C. Mauck; for which Mauck bound himself to pay to Yancey one thousand dollars, of which five hundred dollars was to be paid on the 20th of April 1851, and five hundred dollars on the 20th of April 1852. And Yancey bound himself to convey the same with general warranty, when the first payment was made. At the same time Mauck purchased the interest of another of the heirs in the land, and upon the same terms: and afterwards he purchased a third interest.

301 *It appears that Zebulon Shafer had married one of the children of Leyton Yancey, and had sold his interest in some of the lands owned by his wife, to Robert L. Yancey, and that one thousand dollars of the purchase money fell due about the 1st of October 1850. This money Yancey wished to pay; and Mauck applied to Shafer to know if he wanted the money immediately, and being told he did not, Mauck proposed to give his bond for the amount. This Shafer agreed to, but required security; and although Mauck declined to give the security at the time, at the November term of the County court for 1850 he executed his bond with Yancey as his surety for one thousand and ten dollars, that being the amount of principal and interest due from Yancey to Shafer up to the 1st of December, when the bond was made payable.

Upon Mauck's executing his bond to Shafer, Yancey delivered up to him his two bonds for five hundred dollars each, which Mauck had given to him for the purchase money of the land; and they were destroyed. Some time after this, Yancey spoke to Mauck about his making a deed for his share of the land, saying he had fixed a time to do so, but was disappointed in it; when Mauck replied that it was immaterial to him when he made it, as he had no deeds for the other interests, and Yancey could take his own time to make it. Nothing further was said on the subject between them; and the deed was not made.

In 1855 Mauck had become embarrassed in his circumstances; and in April of that year he conveyed the land he had purchased from Yancey with other property to John C. Woodson in trust to secure Allan C.

*Sale of Land—Title Retained by Vendor—Subjection of Property for Purchase Money.—Where a vendor sells land but makes no conveyance of the property, it is well settled that he has recourse upon the land for the purchase money notwithstanding the vendee gave personal or other security for the same, and notwithstanding the subsequent purchaser, or incumbrance, had no notice that the purchase money or any part thereof was unpaid. The principal case was cited as authority for this proposition in Day v. Hale, 22 Gratt. 163; Coles v. Withers, 33 Gratt. 193; Stoner v. Harris, 81 Va. 460; Cleggett v. Kittle, 6 W. Va. 461; Dunlap v. Shanklin, 10 W. Va. 671, 676; Stephenson v. Rice, 12 W. Va. 586; Evans v. Johnson, 39 W. Va. 307, 19 S. E. Rep. 627. See also, principal case cited in Hempfield R. Co v. Thornburg, 1 W. Va. 267; Hurt v. Jones, 75 Va. 347. See, in accord, Hatcher v. Hatcher, 1 Rand. 53; Lewis v. Caperton, 8 Gratt. 148.

And, though the original security for the purchase money is surrendered and some other security given in its place with new parties to third persons, such new arrangement does not change the character of the debt, nor affect the lien for the purchase money; and the vendor is still at liberty to resort to the lien and enforce it even against a *bona fide* purchaser upon the failure of the proper parties to meet their obligations. For a court of equity looks to substance and not to form; it looks to the *debt* which is to be paid, not to the *hand* which may happen to hold it, and it considers a debt as never discharged until it is discharged by payment to the proper person, and by the proper person. See Summers v. Darne, 31 Gratt. 806; Coles v. Withers, 33 Gratt. 193; Gibert v. W., etc., R. Co., 33 Gratt. 597; Stimpson v. Bishop, 82 Va. 198; Mansfield v. Dameron, 42 W. Va. 795, 796, 26 S. E. Rep. 527; Frazier v. Hendren, 80 Va. 270; Fidelity Ins., etc., Co. v. S. V. R. R. Co., 86 Va. 13, 9 S. E. Rep. 759; all of which cases cite the principal case as authority on this subject. See also, in accord, Knisely v. Williams, 3 Gratt. 265, 46 Am. Dec. 193; Lewis v. Caperton, 8 Gratt. 148; Watts v. Kinney, 3 Leigh 272, 295.

Same—Same—Nature of Vendee's Possession.—Where a vendor sells land but makes no conveyance of the property and yet puts the vendee in possession, the vendee is regarded, *at law*, as the mere tenant at sufferance of the vendor holding the legal title, and the vendor, and not the vendee, is entitled at law to possession, and may recover the same by ejectment. See the principal case cited as authority for this proposition in Hawkins v. Wilson, 1 W. Va. 121, 124; Supervisors v. Ellison, 8 W. Va. 315.

On this point, see generally, monographic *note* on "Ejectment."

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Bryan and Franklin Pence as his securities. This deed described the land as having been conveyed to Mauck by Yancey, and the deed as duly recorded in the clerk's office of the County court of Rockingham.

Bryan in his answer states that at
302 the time of the conveyance *to Woodson, he had not the slightest knowledge of any prior lien upon the land, and did not hear of any such lien for a considerable time afterwards. And he states and proves by Mauck that the latter had frequently told him that Yancey had been paid in full; but that the other two had not.

It appears that on the 21st of April 1852 Mauck paid Shafer on his bond four hundred and fifty dollars. In 1855 Shafer bought suit upon the bond against Mauck and Yancey, and recovered a judgment, which was satisfied by Yancey; Mauck having then become insolvent; though at the time of executing the bond and for some time thereafter he was in good credit.

Yancey in his bill insists that Shafer had a lien on the land for the amount of Mauck's bond; and the prayer of the bill is that that lien may be enforced for his benefit, and for general relief.

When the cause came on to be heard, the court dismissed the bill. Whereupon Yancey applied to this court for an appeal; which was allowed.

Baldwin, for the appellant, referred to the facts, and insisted that the arrangement between Yancey, Mauck and Shafer was no more in effect than the assignment of Mauck's bonds for the purchase money to Shafer; and Yancey having been compelled to pay the debt, he was entitled to the vendor's lien upon the land.

He insisted further, that Yancey's right to subject the land stood on higher ground than the vendor's lien. That he never having conveyed the legal title, a court of equity will not compel him to convey it until he is paid. And whatever may have been the forms of the transaction, certainly Mauck had not paid the purchase money, nor had Yancey received it. He referred to Lewis v. Caperton's ex'or, 8 Gratt. 148, and Knisely v. Williams, 3 Gratt. 265.

He insisted further, that Bryan
303 could occupy no *higher position than Mauck. He was obliged to know that Mauck had no title; and he was therefore affected by any equity which Yancey had against Mauck. He was not a purchaser of the legal title without notice; for he was not a purchaser of the legal title at all; and he advanced no money, but was a mere surety of Mauck, and did not deal on the faith of this property as a surety.

Grattan, for the appellees, insisted:

1st. That the arrangement between Yancey and Mauck, by which Mauck's bonds were delivered up to him, effectually destroyed Yancey's lien upon the land. Buller, J., in Tatlock v. Harris, 3 T. R. 163, 180; Hutchins v. Olcott, 4 Verm. R. 549; Wiseman v. Lyman, 7 Mass. R. 286, 290; Trotter v. Crockett, 2 Porter's R. 401; Parsons v. Gaylord's adm'rs, 3 John. R. 463; Arnold v. Camp, 12 Id. 409; Waydell v. Luer, 3 Denio's R. 410; Frisbie v. Larned, 21 Wend. R. 450; Kearslake v. Morgan, 5 T. R. 514; McCandlish v. Keen, 13 Gratt. 615; White v. Wakefield, 10 Cond. Eng. Ch. R. 116; Johnson v. Thompson, 4 J. J. Marsh. R. 380; Calcord v. Seamonds, 6 B. Monr. R. 265; McClure v. Harris, 12 Id. 261.

2d. That Yancey being the plaintiff in equity, and Bryan being the defendant, and a purchaser for value without notice, the question was, which had the better equity: and he examined the facts, and insisted that Bryan's was the better equity. Cox v. Romine, 9 Gratt. 27.

3d. That Bryan being in possession and having the better equity, was entitled to the legal title; and could therefore defend himself at law under the statute, Code, ch. 135, § 20, p. 560. That in England the equitable owner may buy up an outstanding satisfied statute, mortgage or other incumbrance to protect his possession.

Bassett v. Notworthy, 2 White &
304 *Tudor's Leading Cases, p. 1, and notes. And this, though the plaintiff has the legal title. Id. 70 to 75; Pruslau v. Cooke, Freeman's Ch. Cas. 24; Jerrard v. Saunders, 2 Ves. jr. R. 454; Strode v. Blackburne, 3 Id. 222; Wallwyn v. Lee, 9 Id. 24; Joyce v. D. Moleynes, 2 Jones & Lat. 374; Bowen v. Evans, 1 Id. 264; Payne v. Compton, 2 Younge & Coll. Exch. Cas. 457; Coleman v. Cocke, 6 Rand. 618. Though there is some conflict of opinion in this country. 2 White & Tudor's Leading Cases, p. 97; Williamson v. Gordon's ex'ors, 5 Munf. 257; Tucker, P., in Mutual Assurance Society v. Stone, 3 Leigh 218.

But if the equitable owner is entitled to call for the legal title, he is protected. 2 White & Tudor 70; Willoughby v. Willoughby, 1 T. R. 763; Charlton v. Low, 3 P. Wms. 328; Ex parte Knott, 11 Ves. R. 609; Shine v. Gough, 1 Ball & Beat. R. 436; Bowen v. Evans, 1 Jones & Lat. 264.

ALLEN, P. Before our statute, Code, ch. 119, § 1, p. 510, the law was well settled that the vendor of real estate, who had parted with the legal title, had a lien on the property for the purchase money, whilst it remained in the hands of the vendee, or volunteers claiming under him, or purchasers with notice. This right of the vendor to resort to the estate, constituted an implied equitable lien, the creature of a court of equity founded on the supposed intent of the parties, from which an implied contract was inferred. But the rule was not unbending. The circumstances might show there was no such intent, and therefore no such implied contract could be raised. But what circumstances should have such effect, created the difficulty in the practical enforcement of the rule. A receipt for the purchase money endorsed on the conveyance, or taking a bond, note, bill of exchange or check or other instrument involving the mere personal

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liability, *of the vendee, did not discharge the lien. But where other security was taken, it was considered that as the party had carved out his own security, it was a substitution for the lien implied by law. The question, however, to what extent the taking a distinct security shall be regarded as a waiver, has been much controverted. So much so, that Lord Eldon seemed to consider that it could not be known in any case, without the judgment of a court, whether, under the circumstances of each case, the taking such security amounted to declaration, plain or manifest intention of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual. Owing to this uncertainty, and to the perplexing litigation growing out of the claim of the vendor to enforce this equitable claim for purchase money against purchasers of the legal title for value, the revisors recommended that the vendor's equitable lien be abolished; and the Code, ch. 119, § 1, p. 510, provides, that if any person hereafter convey any real estate, and the purchase money or any part thereof remain unpaid at the time of such conveyance, he shall not thereby have a lien for such unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance. The statute abolishes the lien where the vendor has conveyed the legal title, and has not reserved it on the face of the deed. It does not apply to the case where the title has been retained by the vendor, for the obvious reason that in such case the principles of our statutes requiring mortgages or deeds of trust to be recorded, was not infringed upon, and because purchasers for value of the legal title would not be endangered by parol proof of notice. Holding back the deed, or what is the same thing, depositing it as an escrow, until payment of the purchase money was made, was from the first regarded as evidence of an intention to resort to the land if necessary. And it was from decisions *of cases of this character that the doctrine as subsequently developed took its origin. The first case in which the principle was distinctly enounced, was the case of Chapman v. Tanner, 1 Vern. R. 267; where the chancellor said, "that there is a natural equity that the land should stand charged with so much of the purchase money as was not paid; and that without any special agreement for that purpose." Lord Eldon, in Mackreth v. Symmons, 15 Ves. R. 330, 343, says this case was imperfectly reported; and in Fawell v. Heelis, Amb. R. 724, Lord Apsley said, "that it appeared by the register's book, that the vendor retained the title deeds till he was paid. And the court said that a natural equity arose from his having the title deeds in his custody." And in the same case it is said that Pollexfen v. Moore, 3 Atk. 272, is very inaccurately reported, "as by reason that the purchase money was not paid, he kept the title deeds."

Among the circumstances to repel the presumption of an intention to resort to the estate, is the making of a conveyance of the legal title: a circumstance always sufficient to repel the presumption as against a bona fide purchaser from the vendee having the legal title. But a purchaser or incumbrancer of a mere equitable title must take the place of the person from whom he purchases. The vendor may resort to the estate whether a purchaser of the mere equitable estate from his vendee, purchased with or without notice. For want of notice, or the payment of a valuable consideration, cannot place him in a more advantageous position than his vendor. As between the vendor and vendee, the latter occupies the position of a tenant at sufferance to the former. The vendor may assert his legal title and recover possession of the premises by ejectment, and so disaffirm the executory agreement to sell; or if he elects to go into chancery, the proceeding is more correctly a bill for the specific *execution of the contract by requiring the vendee to complete his purchase by paying the price, or otherwise have the subject sold at his risk, than a bill to subject the property to a mere equitable lien.

That a vendor retaining the legal title occupies a position different from and higher than one who has parted with the legal title and relies on the mere implied equitable lien, is not only clear from the considerations aforesaid, but is shown by the authorities. Notwithstanding the doubts of Lord Eldon, it may now be considered as well established that where the vendor who has conveyed, takes a personal collateral security, binding others as well as the vendee, as a bond or note with security, the lien on the land does not exist. But in the case of Hatcher's adm'x v. Hatcher's ex'ors, 1 Rand. 53, the purchaser gave bond with security for the purchase money, but received no conveyance; and it was decided that the right of the vendor to resort to the land was not lost by having taken personal security. In that case, a suit at the instance of the security to subject the land for his indemnity, was sustained, before he had been compelled to pay himself. And upon the same principle it was held in Lewis v. Caperton's ex'or, 8 Gratt. 148, that the vendor retaining the legal title may resort to the land as against creditors and incumbrances of the vendee, although the vendee had subsequently executed a deed by which he conveyed other property to secure the purchase money.

The distinction between the implied lien where the legal title is parted with, and the right of the vendor who has retained the title to enforce a specific execution, is clearly drawn in the cases of Brush v. Kinsly and Adams v. Stillwell, 14 Ohio R. 20. The judge says, "The lien of the vendor results from the fact that equity holds the vendee clothed with the legal title, a trustee of the vendor for the payment of the *purchase money. Before the legal title passes from the vendor on a contract for the sale of land, there is no

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such lien. The vendor's remedy in such case is on the contract either to enforce a specific performance of the contract, or in an action at law. The vendee cannot compel a relinquishment of the legal title until he clothes himself with equity by the payment of the purchase money."

In Clark v. Hall, 7 Paige's R. 382, it was held, that where there is an unexecuted contract for sale, the vendor may file a bill to have specific execution, and then have the land sold for his debt. To the same effect were the cases in this court, of Hatcher v. Hatcher and Lewis v. Caperton, ubi supra, and Knisely v. Williams, 3 Gratt. 265; Hanna v. Wilson, 3 Gratt. 243; Hopkins v. Cockerell, 2 Gratt. 88; Beirne's ex'ors v. Campbell, 4 Gratt. 125; Stuart's ex'ors v. Abbott, 9 Gratt. 255.

In Hanna v. Wilson it was held, that although an action on the promissory note given for the purchase money might have been barred at law, yet as the vendor retaining the title could sue in ejectment at law, or file a bill for specific execution, and subject the land in default of payment, his right in equity was not affected by any lapse of time short of the period sufficient to raise the presumption of payment, whatever might be the operation of the statute of limitations in an action at law instituted upon the promissory note. A similar proposition was affirmed in Hopkins v. Cockerell. The cases of Lewis v. Caperton's ex'ors, Stuart's ex'ors v. Abbott and Beirne's ex'ors v. Campbell, before referred to, show that the intervention of a purchaser without notice, or a bona fide incumbrancer, does not obstruct the right of the vendor to charge the land. The case of Beirne and Campbell carried the principle so far as to hold that though a purchaser has obtained the legal title, and had no notice that there was purchase money
309 due to a previous *vendor, yet if his vendor had not the legal title when he purchased, the land is liable for the purchase money due to the previous vendor.

The cases of Hanna v. Wilson and Knisely v. Williams also determine that in such case the assignee for value of a note given for the purchase money of land, may maintain a suit against his assignor, the vendor and the vendee for a specific execution of the contract, in a case proper for such relief, and subject the land to the satisfaction of his claim, agreeing in this respect with the almost uniform current of decisions in this country where the vendor has not parted with the title; although there is more conflict of decision whether the vendor's implied lien where he has parted with the legal title accompanies the assignment of the vendee's note or bond for the purchase money. See note to Mackreth v. Symmons, 1 White & Tudor's Lead. Cas. in Equity 245, where the cases are collected.

An application of these principles to the facts of the case under consideration, leaves no doubt in my mind of the right of the appellant to resort to the land in controversy for satisfaction. The contract of sale was executory; the appellant bound himself to make a deed to the appellee R. C. Mauck when the first payment was made. Before the bonds for the purchase money fell due, an arrangement was made, by which the vendee, with his vendor the appellant as security, executed their bond to a creditor of the vendor for the amount of the purchase money, for which amount the creditor gave the appellant credit, and the bonds executed by the vendee were surrendered. The effect of the arrangement was the same as if the appellant had assigned his vendee's bonds for the purchase money in discharge of a debt, continuing responsible as assignor; or as if he had given to his creditor, in discharge of
310 his own debt, an order on his *vendee for the amount of the purchase money, and which the vendee had accepted.

These arrangements did not change the character of the debt; it still consisted of the purchase money due for the land. Whether it should be paid to the vendor directly, or to a third person for his relief, and the discharge of his debt, did not change the nature of the consideration. The vendee becoming embarrassed, executed a deed of trust upon this, with other property, to secure some of his creditors; and failing to pay the substituted bond executed for the purchase money, his security the appellant was compelled to pay it. The arrangement, to the extent of the failure to pay, fell through. The purchase money was not paid; the vendor did not obtain relief from his debt. He was compelled to pay it; nominally as the security of the vendee, in reality because it was originally his own debt which his vendee had bound himself to pay out of the purchase money due to him. Whatever might be the position he occupied at law, in equity which regards substance and not form, he stood as the unpaid vendor retaining the legal title. If the case stood alone between him and his vendee, could the latter compel him to relinquish the legal title until he had clothed himself with equity by the payment of the purchase money? Would he be heard to say that by shuffling the securities the purchase money was satisfied, though he had never paid and his vendor had never received a cent? Would he not be told, in the language of the president of this court in Watts v. Kinney, 3 Leigh 272, 295, "That a court of equity looks to substance, not to form, that it looks to the debt (here the purchase money) which is to be paid, not to the hand which may happen to hold it: that the fund (here the land) charged with its payment, shall be so applied, whosoever may be the person entitled;
311 *and that it considers a debt as never discharged, until it is discharged by payment to the proper person, and by the proper person." So this court held in Knisely v. Williams, 3 Gratt. 265; a case somewhat similar in its circumstances to the present. There the vendor of land took a bond for the purchase money and retained the title to the land. He afterwards agreed

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with the vendee to receive an order on a third person, payable at a distant day, for the amount of the bond. The order was given and the bond surrendered; but when the order was presented, the drawee refused to accept. It was held that the surrender of the bond and taking the order did not discharge the land, and that the vendor, upon the refusal to accept the order, could proceed forthwith, the purchase money being due at the date of the order, to enforce the specific execution of the contract, obtain a decree for the payment of the purchase money, and to subject the land to sale for the satisfaction thereof. Such would, as it seems to me, be the condition of these parties, if there had been no incumbrancers. As to them, the authorities show they must abide by the condition of their debtor. No fraud or misrepresentation is imputed to the vendor. They should have looked to the registry to ascertain whether their debtor had a legal title. The appellant has been guilty of no default; and their negligence can give them no equity against him.

I think the decree dismissing the bill is erroneous, and should be reversed with costs, and the cause remanded with instructions to enter a decree in conformity with the precedent in Knisely v. Williams, to execute the contract by requiring the appellant to execute a deed with general warranty to the appellee R. C. Mauck for the land contracted to be sold to him by the appellant, and acknowledge the same in order to be recorded, and file the same with the papers of the cause; and upon the same being so executed, acknowledged

312 *and filed, unless the said appellee, or some one for him, shall within thirty days pay the debt, interest and costs aforesaid, together with the costs of this suit, that then the commissioner of said court sell the land upon the usual credits.

The other judges concurred in the opinion of Allen, P.

The decree was as follows:

The court is of opinion, for reasons in writing filed with the record, that the decree of the Circuit court dismissing the bill of the appellant with costs, is erroneous. It is therefore adjudged and ordered, that the same be reversed and annulled, and that the appellees pay to the appellant his costs here expended.

And it is further decreed and ordered, that the cause be remanded to said Circuit court, with instructions to enter a decree in favor of the appellant against the appellee Robert C. Mauck for the balance of the purchase money unpaid, with interest thereon from the time the same became payable, and the costs of this suit; and furthermore to decree and order, that the appellant do make to said appellee R. C. Mauck a deed conveying his interest in the land described in the contract, dated the 20th of April 1850, filed as an exhibit in the cause, with covenants of general warranty, and acknowledge the same in order to be recorded, and file the same with the papers in the cause; and if the debt, interest and costs aforesaid be paid within thirty days after the deed shall have been so filed, that said appellee, on such payment, have leave to withdraw said deed, leaving an attested copy thereof: And unless said debt, interest and costs shall be paid by the appellee R. C. Mauck, or some one for him, to the appellant within thirty days after the filing of said deed, that a commissioner, to be

313 appointed by *said court, after giving bond according to law, shall, after duly advertising the time and place of sale, proceed to sell said land upon a credit of six, twelve and eighteen months, taking bond with security from the purchaser, and retaining a lien on the land for the security of the purchase money: And that he report his proceedings to court, in order to a final decree; which is ordered to be certified to said Circuit court of Rockingham county.

Decree reversed.

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314 *Fulton's Ex'ors v. Gracey & als.

July Term, 1859, Lewisburg.

1. **Slaves—Suit for Freedom—Evidence—Declarations.**—In a suit for freedom, the declarations of the testator of the defendants, made some fourteen or fifteen years before the trial, that the plaintiffs were then free, and declarations made some twenty odd years before the trial, that they would be free at the age of twenty-eight years, are competent evidence for the plaintiffs: And this, though the testator had but a temporary interest in the negroes.
2. **Same—Same—Same—Case at Bar.**—The plaintiffs claim their freedom as being the children of a negro woman named Nan. The registry of Nan as a free woman, and the certificate of the clerk of the County court in which Nan was registered, to the correctness of the registry, and the affidavit of the person to whom Nan had been bequeathed for the time she was to serve, by a person under whom the testator of the defendants claimed the plaintiffs, of the fact that Nan was free, which affidavit was acted on by the court, and was filed in the clerk's office, when the registry of Nan was directed by the court, are competent evidence for the plaintiffs.
3. **Same—Same—Same—Register—Quære.**—QUÆRE: If a register, made and certified according to law, is not *prima facie* evidence of every fact therein stated, in any controversy involving the freedom of the negro registered, or of any other persons claiming freedom under such negro. It is at least evidence of the negro's freedom at the time it was made.
4. **Same—Same—Same—Admissions of Defendant.**—In a suit for freedom, the plaintiff must make out his title against all the world. The admissions of the defendant that the plaintiff is free, is evidence against the defendant, whether he ever had any interest in the plaintiff as a slave or not, or whatever such interest, if any, may have been. But it is only presumptive evidence, liable to be repelled by proof that the plaintiff is the slave of the defendant or some other person.
5. **Same—Person of African Descent—Presumptions—Case at Bar.**—The presumption of law is that a

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person of African descent is a slave; but that presumption may be repelled by any evidence tending to show he is free. A deed by which the mother of such person is conveyed to another for a certain number of years, and then to be discharged from all further service; and her children born before that time to serve till twenty-eight years and then to be discharged from all service, though such deed not having been recorded, cannot confer freedom, yet it tends to repel the presumption of slavery, and is competent testimony.

315 *6. **Evidence—Entries of Age by Defendant—Admissibility.**—Entries by the testator of the defendants in a book, of the ages of the plaintiffs, made along with the ages of other slaves owned by the testator, are not competent evidence for the defendants, to show that some of the plaintiffs who were the children of another plaintiff, were born before she attained the age of twenty-eight years, and that the children had not attained that age; even if such fact were material to be proved.

This is a suit for freedom, brought under the Code, ch. 106, p. 464, by Gracey and her nine children, against John A. Dice and Thomas Fulton, executors of James Fulton deceased. Verdict and judgment were rendered for the plaintiffs. The defendants took five exceptions to rulings of the court during the trial, and a sixth exception to the refusal of the court to set aside the verdict on the ground that it was contrary to the law and evidence. The first five exceptions are sufficiently stated in the following opinion.

The sixth and last bill of exceptions sets out the facts proved on the trial, and is referred to in and adopted as a part of each of the other bills of exception, save the first and the fifth. The facts are substantially these: Thomas Richards of the town of Alexandria in the district of Columbia, by deed dated the 23d day of March 1805, and executed in the presence of three subscribing witnesses, sold and conveyed to George Bolling and Elizabeth his wife a female negro named Nan for the term of twelve years from the date of the deed, and any children she might have before the expiration of the said term, to serve, each and every of them, till they should arrive at the age of twenty-eight years; and after the expiration of the said term of twelve years the said Nan to be discharged from all further service; and each of her said children, upon arriving at the age of twenty-eight years, in like manner to be discharged from all further service. By successive assignments endorsed on the said deed, the interest thereby conveyed was assigned by said Bolling and wife to Thomas Hord, jr.

316 on the *25th of January 1806; by Hord to James Sarkins on the 2d of August 1806; by Sarkins' administrator to Price Skinner on the 23d of February 1808; by Skinner to Christian Hottle on the 23d of October 1808; and by C. Hottle to Henry Hottle on the 9th of March 1813. Neither the deed nor any of the assignments was ever recorded. But the deed and assignments, as they were successively made, appear to have been delivered, with Nan, to the assignees successively. The last assignee, Henry Hottle, by his will, gave Nan to his wife Christena, to stay with her until the time she was bound to him should be expired. The said Christena, by affidavit before a justice of the peace, bearing date the 11th day of April 1817, made oath that Nan had served out the time for which she was sold to her deceased husband Henry Hottle, and was then free, and, as affiant believed, about the age of twenty-eight years. On the 5th of May 1817 Nan was registered as No. 32 in the office of Rockingham County court; it being stated in the register that she was born free, but bound to serve a certain number of years, which she had duly served, as appeared by her papers filed in the office. And at the succeeding term of said court, the said register was by the court compared with said Nan, and found duly made, and a copy thereof ordered to be furnished her in the manner prescribed by law. The only papers found in the office were the deed, and assignments endorsed thereon, and the affidavit of Christena Hottle, on which papers was an endorsement, in the handwriting of the former clerk of the court, in these words: "No. 32—Nancy's papers." "Registered 5th May 1817."

Elizabeth Long, a witness for the plaintiffs in the court below, proved that some fifteen or sixteen years before the trial she was at the residence of James Fulton, the testator of the defendants; and while in a conversation with Fulton, some little

317 negroes, children *of Gracey, were playing about the yard. She remarked to Fulton that those little negroes seemed to have a better time of it than the children of many white people; to which he replied, that now that Gracey was free, he had told her she could leave him if she chose, but that if she chose to remain with him, he would take care of her and her children, and treat them as well as he had always done.

Joseph F. Hottle, another witness for the plaintiffs, proved that he is a son of Christian Hottle, one of the persons through whose hands Nancy (alias Nan) passed; that said Christian, who is dead, told witness he had purchased Nancy in Alexandria for Henry Hottle, father of said Christian; that witness had always understood in the family that Gracey was a daughter of Nancy; that Nancy was free at twenty-eight years of age, and that her children born before she arrived at twenty-eight years of age, were to be free at twenty-eight years of age; that she had four such children, viz: Gracey, Milly, Jerry and Jeff; that Milly died before attaining twenty-eight years of age, and that Jerry and Jeff were permitted to go free at that age; that these four children were divided by Henry Hottle among his children, Gracey having been given to Mrs. Fulton, wife of James Fulton, who was a daughter of Henry Hottle; and that witness had always heard from his father and understood in the fam-

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ily, about these negroes pretty much what is stated in the said deed.

Christian Snell proved that about twenty years before the trial he had a conversation with James Fulton, in which he remarked to Fulton that Gracey's children would make him rich; and Fulton replied, that the mischief of it was, Gracey and her children would be free at a certain age, which witness did not remember, but which was some time in twenty.

Clement Irving proved that about
318 the year 1818 *Nancy came to live upon his father's land, and continued to live there about twenty years; that she then and always after, to the present time, passed as a free woman; that Gracey, a daughter of Nancy, either was brought to his father's land with Nancy, or was sent there soon after, and remained there with Nancy some six years; after which time she was taken to James Fulton's; and that witness understood at that time that Gracey was to be free at twenty-eight years of age.

It was also proved that Gracey is a daughter of Nancy, and was born about the year 1814; that she has the children mentioned in the petition for leave to sue for freedom, of whom four were born before and the other five after Gracey attained the age of twenty-eight years, and all of whom were under that age at the time of the trial.

Henry Messersmith, a witness for the plaintiffs, proved that he had, about ten years before the trial, heard James Fulton say that his brother in law Christian Hottle had been "narrating" it about that Gracey was free, but he had been paying taxes on her, and meant to hold her.

The last mentioned witness and a number of others, neighbors and acquaintances of James Fulton, introduced by defendants, proved, that Fulton had always, so far as they knew, held and claimed Gracey and her children as slaves, treating them precisely as he did his other slaves.

The defendants also introduced an official copy of the will of James Fulton, bearing date the 25th of January 1855, and duly admitted to probate, whereby it appears that the plaintiffs were disposed of as his slaves: and also introduced the act of the general assembly, passed December 30, 1789, ceding ten miles square, or any less quantity of territory within this state, to the United States, for the permanent
319 seat of *the general government, and the act of the general assembly, passed on the 3d of February 1846, for the retrocession of Alexandria to this state, and the act of congress of the 27th of February 1808, extending the laws of Virginia over that portion of the district of Columbia ceded by Virginia to the United States.

These were all the facts proved at the trial. Fulton's ex'ors applied to this court for a supersedeas to the judgment; which was awarded.

Michie and Woodson, for the appellants.
Baldwin, for the appellees.

MONCURE, J., delivered the opinion of the court:

The questions to be decided in this case arise upon the bills of exception, and will be considered and disposed of in their order.

1. The plaintiffs, to prove their right to freedom, offered to give in evidence to the jury the declarations of James Fulton, the testator of the defendants, made some fourteen or fifteen years before the trial, that Gracey and her children were then free; and also the declarations of said testator, made some twenty odd years before the trial, that Gracey and her children would be free at the age of twenty-eight years; to which evidence the defendants objected, "on the ground that parol declarations in a suit for freedom are insufficient to establish freedom." But the court overruled the objection, and the defendants excepted.

Parol declarations are certainly insufficient, in this state, to confer freedom on a slave. But parol declarations of a defendant in a suit for freedom, that the plaintiff is free, are admissible evidence of the fact, according to the general rule that the admissions of a party to a suit are evidence against him. The declarations in such
case do not confer freedom; do not
320 *change the status of the plaintiff; but merely tend to show what that status is, to wit, that he is a free person, however his freedom may have been acquired. He may have acquired it in a variety of ways, and otherwise than by will or deed: as for example, by being born of a free mother. He and his maternal ancestors may always have been free. In many cases he might be unable to produce any muniment of his freedom; either because such muniment never existed, or because it has been lost, or is not in his possession or power. And an admission of his freedom by the party detaining him as a slave, may be the best, if not the only evidence of the fact which can be produced. Such an admission is competent evidence in any suit for freedom; its weight being dependent on the circumstances of each case, and being a matter for the consideration of the jury.

2. After the plaintiffs had introduced the declarations of James Fulton, the testator of the defendants, in regard to the right of the plaintiffs to freedom as aforesaid, and also the deed of the 23d of March 1805, from Richards to Bolling and wife, the plaintiffs offered to give in evidence to the jury the register of Nancy and the certificate of the County court of Rockingham to the correctness of said register, and also the affidavit of Christena Hottle: To which evidence the defendants objected as improper to go to the jury, "because said papers were ex parte, and not legal evidence in this case of the right of Nancy or Gracey to freedom." But the court overruled the objection; and the defendants again excepted.

The plaintiffs based their claim to freedom on the ground that they inherited it

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from Nancy, the mother of Gracey. Any legal evidence tending to prove that Nancy was free at the time of the birth of Gracey, is relevant and admissible evidence
321 in support of the *plaintiffs' claim. The evidence objected to, as mentioned in the said bill of exceptions, seems to be of that character.

The registry was made under the act passed January 25th, 1803, entitled "an act more effectually to restrain the practice of negroes going at large;" 2 Stat. at Large, new series, p. 417, ch. 21; which required every free negro to be registered in the court of the county in which he resided, by the clerk of the court of said county, in a book to be kept for that purpose; that the register should specify, among other things, in what court such negro was emancipated, or that he was born free; that the court should certify such register to have been truly made; and that a copy thereof, signed by the clerk and attested by a justice, should be delivered to the said negro. This law, with some changes not material to be here set forth, has remained in force ever since its passage. 1 Rev. Code of 1819, p. 438, § 67; Code of 1849, p. 466, § 6.

It is at least questionable whether a register, made and certified according to law, is not prima facie evidence of every fact therein stated, in any controversy involving the freedom of the negro registered, or of any other persons claiming freedom under such negro. See 1 Greenl. Ev. § 483, 485, 491, 493. If it be so, then the register of Nancy is prima facie evidence of the fact therein stated, that she was born free.

But it is unnecessary to go to that extent, in the decision of the question now under consideration. It is sufficient, for this purpose (as the reason assigned for the objection taken to the evidence concedes), that the register of Nancy is evidence of her right to freedom at the time it was made. The fact that she was free at that time, is a very important link in the chain of evidence necessary to show that she was free at the time of the birth of Gracey. Evidence of her having acted and been generally reputed as a free
322 person, is *certainly admissible evidence of her freedom. It is the strongest possible evidence of that character, that in 1817, about the time her term of service under the deed aforesaid expired, she was duly registered as a free person, and the court certified that such register was truly made; and that her right to freedom accordingly, so far as the record shows, has never since been controverted. The ninth instruction asked for by the defendants and given by the court, that the said register is only prima facie evidence that Nancy was entitled to freedom at that time, "liable to be rebutted by evidence that she was not free according to law, but that it is no evidence that she was entitled to freedom before that time, nor that any child she had before that time was entitled to freedom," is an exposition of the law, of which the defendants at least have no cause to complain; and it is sufficient to show that their objection to the register as evidence was properly overruled. See Pegram v. Isabell, 2 Hen. & Munf. 193.

The register and certificate are therefore admissible evidence; and so also is the affidavit of Christena Hottle. It was part of the evidence on which the register was founded; is referred to therein; and, with the said deed, was endorsed, filed and preserved by the clerk in his office. She was the person last entitled to the services of Nancy under the said deed, and held her when her term of service expired. Her only claim to Nancy was under the said deed, and under her husband Henry Hottle. And the only claim of the appellants' testator James Fulton to Gracey, was under the same deed, and under the said Henry Hottle. She was as much entitled to Nancy absolutely, as he was entitled to Gracey absolutely. Her admission is as much evidence of the freedom of Nancy, as his is of the freedom of Gracey. Her affidavit is nothing more than her admission
323 under oath of Nancy's freedom. *Her admission is evidence, not only against her, but against all persons claiming under her. The claim of the testator of the appellants must have been under her, if they had any claim at all to Nancy. The only persons, so far as the record shows, who appear to have had any interest in Nancy, supposing her to have been a slave, were Thomas Richards, the grantor in said deed, and the person entitled to her services under it. The admissions of these persons were competent evidence of her freedom in this suit. The deed itself is an admission of her freedom by Richards, and was admitted as evidence without objection. The affidavit, as before stated, is an admission of her freedom by the person last entitled to her services under said deed, and is, therefore, admissible evidence.

3. After all the evidence had been given, the defendants moved the court to exclude as evidence from the jury the declarations of James Fulton as to the right of Gracey to freedom, "on the ground that the plaintiffs had proved by the said deed and other evidence, that James Fulton had only a temporary interest in said Gracey and her children; and never having been the fee simple owner his declarations are not evidence for the purpose of proving a right to freedom." But the court overruled the motion; and the defendants again excepted.

A plaintiff in a suit for freedom must make out his title against all the world. The only issue in the suit is, whether he be free or not; and if he be not free, he must fail in the suit, whether he be the slave of the defendant or of some other person. The defendant's admission of the plaintiff's freedom is always evidence of the fact against the defendant, whether he ever had any interest in the plaintiff as a slave or not, and whatever such interest, if any, may have been. It is, however, only presumptive evidence, liable to be repelled by proof that the plaintiff is

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324 the slave either *of the defendant or of some other person. And the judgment which may be recovered by the plaintiff upon such evidence, cannot affect the title of any other person than the defendant and those who claim under him. The motion to exclude the evidence was therefore properly overruled.

4. After all the evidence had been given and ten instructions had been asked for by the defendants, and given by the court to the jury, the defendants moved the court to instruct the jury that the said deed of the 23d of March 1805, from Richards to Bolling and wife, "is not evidence wich tends to rebut the presumption of slavery resulting from the color and African descent of the plaintiffs and Nan, or to establish a pre-existing title to freedom." But the court refused to give the said instruction; and the defendants again excepted.

In the case of a person visibly appearing to be a negro, the presumption is that he is a slave; but in the case of a person visibly appearing to be a white man or an Indian, the presumption is that he is free. Hudgins v. Rights, 1 Hen. & Munf. 134, and opinion of Roane, J., Id. 141. In this case, any legal evidence tending to show that the plaintiffs are free, tends to repel the presumption arising from their color, that they are slaves, and is therefore admissible. The deed of the 23d of March 1805 is of that character. It does not profess to be a deed of emancipation; but is merely a conveyance by Richards to Bolling and wife of the services of Nan and her children for certain terms respectively; at the expiration of which, it declares that she and they are to be discharged from all further service. It does not describe them as slaves, but as free persons, at least at the end of their respective terms of service. And as it was plainly not intended to be a deed of emancipation, it seems to imply that Nan had previously acquired her freedom by birth, or in some other legal mode.

At all events, it is "evidence which 325 *tends to rebut the presumption of slavery resulting from the color and African descent of the plaintiffs and Nan, or to establish a pre-existing title of freedom;" and the court therefore properly refused to give the eleventh instruction asked for by the defendants.

5. After evidence had been introduced by the plaintiffs tending to prove Gracey's right to freedom upon her arrival at the age of twenty-eight years; and after the introduction by them of the deed of the 23d of March 1805, the defendants, to sustain the issue on their part, and for the purpose of showing the ages of Gracey's children, and which of them were born before she arrived at the age of twenty-eight years, offered to give in evidence to the jury an old book entitled "Select Sermons by Mr. Andrew Gray," in which book, and on 31st, 32d and 33d pages thereof, the date of the birth of Gracey's children, and also of other children of other negro women of said James Fulton, were written. It was proved that the book was said Fulton's, and was kept by him in his house to the time of his death; and that the entries therein, of the birth of said negroes, was in his handwriting, and seemed to have been made many years ago. To which evidence the plaintiffs objected, and the court sustained the objection. Whereupon the defendants again excepted.

The evidence thus excluded was not material, and would not have affected the verdict; which was in favor of all the plaintiffs, though it was proved by other evidence that four of them, children of Gracey, were born before, and her other children after she attained the age of twenty-eight years, and that all of the said children were under that age at the time of the trial. But it would have been inadmissible if it had been material. The principle upon which such entries are admitted is (in the language of Lord Eldon 326 *in Whitelocke v. Baker, 13 Ves. R. 511, 514), "that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." 1 Phil. Ev. 239; 2 Stark. Ev. 605. The very foundation on which such entries are admissible fails, where it is probable that parties who made them labored under any temptation to misrepresent the facts; when that is the case, such evidence is inadmissible. Id. If the entries excluded in this case be material to the defence, then clearly the party who made them labored under a temptation to misrepresent the facts, and therefore the said entries were inadmissible evidence, and were properly excluded.

6. The 6th and last exception taken by the defendants, was to the refusal of the court to set aside the verdict, on the ground that it was contrary to the law and evidence.

There is nothing in the case to show that Nan was ever a slave, except the fact of her color and African descent; and the presumption arising from that fact, seems to be repelled by the other facts proved in the case. The first information we have of her is, that in 1805, when the deed of the 23d of March of that year was executed, she resided in the town of Alexandria. And she and the deed were transferred from one to another in that town until 1808, when they were transferred to Christian Hottle, who purchased her for his brother, Henry Hottle of the county of Rockingham, where, it appears, she has ever since resided. She is not described as a slave in the said deed, nor in any assignment thereof, nor in the will of Henry Hottle, nor in the affidavit of Christena Hottle. The deed does not profess, and plainly was not intended, to be a deed of emancipation, but purports to be merely a conveyance of the tem- 327 porary services of Nan and of *any children she might have during her term of service, to which temporary services the grantor seems to have claimed title,

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but in what way or by what right, does not appear. The deed rather implies that she was free at the time of its execution, and states that she and her said children at the expiration of their respective terms of service were "to be discharged from all further service"—words, rather inappropriate to the purpose of emancipation, but perfectly consistent with the idea that she was already free, but bound to serve for a limited period. She was given by the will of Henry Hottle to his wife Christena Hottle, "to stay with her until the time she was bound to him should be expired." Shortly after that time expired, to wit, in April 1817, Christena Hottle made affidavit that Nan had "served out the time for which she was sold to her deceased husband," and was then free. And in the next month, May 1817, Nan was registered in the office of the County court of Rockingham as a person "born free, but bound to serve a certain number of years; which she had duly served, as appeared by her papers filed in said office;" and the court certified the register to have been truly made, and ordered a copy to be furnished her in the manner prescribed by law. It does not appear upon what information the fact was stated in the register that she was born free. It is not probable that it would have been so stated on information derived alone from Nancy, if indeed she had any knowledge on the subject. The fair presumption is, that it was stated upon information derived from some of the parties claiming under the deed—probably Christena Hottle, who seems to have furnished her with the deed and affidavit, and no doubt otherwise assisted her in obtaining the register. At all events, we find the fact thus solemnly and authentically stated in 1817; and she has enjoyed her
328 freedom, without interruption, *ever since; living all the time in the same county, and probably in the same neighborhood with the testator of the defendants, until his death in 1855. The only other children of Nan, born during her term of service, who survived the age of twenty-eight years, besides Gracey, were discharged from service at that age, according to the provisions of the deed, and have ever since enjoyed their freedom without interruption. Gracey alone and her children have been detained in slavery by the defendants, and their testator. He, on several occasions, admitted that they were free, or would be at a certain age. And after he determined to detain them as slaves, the only reason he assigned for doing so (as far as the record shows), was, "that he had been paying taxes on Gracey, and meant to hold her." He had no claim to them except under the said deed; and he certainly had no rightful claim under that, to Gracey after she attained the age of twenty-eight years, and her children thereafter born. They, at least, either belong to some other person than the defendants, or are free. No other person has ever claimed them; and it may reasonably be presumed that they are free. Upon the whole, we may well conclude that the jury were warranted by the evidence in finding the plaintiffs to be free, and therefore that the Circuit court did not err in refusing to set aside the verdict.

The court is of opinion that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

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329 *Mustard v. Wohlford's Heirs.

July Term, 1859. Lewisburg.

[76 Am. Dec. 209.]

1. **Infants' Contracts—Sale of Land—Voidable.***—An infant sells his tract of land, puts the purchaser in possession, and executes a bond in a penalty with condition to make the title. The contract is voidable but not void.

2. **Same—Same—Disaffirmance.**†—In such a case the infant on coming of age, sells the land to another person, and executes to him a bond in a penalty with condition to make the title. This is an avoiding of the first contract.

***Infants' Contracts—Sale of Land—Voidable.**—For the proposition that an infant's contract for the sale of his land is voidable and not void, and may be disaffirmed or ratified by him after he becomes of age, the principal case is cited and followed in the following cases: Gillespie v. Bailey, 12 W. Va. 92, 93; Wilson v. Branch, 77 Va. 71; Birch v. Linton, 78 Va. 590; Bedinger v. Wharton, 27 Gratt. 871, and *note*; McClanahan v. Roanoke Iron Co., 95 Va. 558, 28 S. E. Rep. 955, but in this case disaffirmance was not allowed because of the laches on the part of those entitled to disaffirm. In Dellinger v. Foltz, 93 Va. 734, 25 S. E. Rep. 998, it is said: "If it be true that one who deals with an infant in his own proper person does so at his peril, *a fortiori* is it true when he deals with one who represents himself as agent of the infant, it being well settled that an infant cannot empower an agent or attorney to act for him, and that such an appointment would be void. Nor can he affirm what one has assumed to do for him, for he cannot ratify what he could not authorize. 1 Minor's Inst. 516; *Mustard v. Wohlford's Heirs*, 15 *Gratt. 329;* Thomas v. Roberts, 16 M. & W. 778; Dexter v. Hall, 15 Wall. 9; Fonda v. Vanhorn, 15 Wendell 631; Armitage v. Widoe, 36 Mich. 124; Trueblood v. Trueblood, 8 Ind. 195."

In Kyger v. Sipe, 89 Va. 509, 16 S. E. Rep. 627, the rule laid down in the principal case as to the right of an infant to disaffirm his contract after becoming of age is approved; but it is held in that case that where the infant is bound jointly with an adult who is surety for the infant, the plea of infancy which is purely a personal plea, will not release the surety, but the contract will subsist against him in full force.

†**Same—Same—Disaffirmance.**—In Sanger v. Hibbard, 101 Fed. Rep. 457, the court said: "'The question,' says the supreme court, 'is whether the acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are

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3. **Sale of Land—By Party Out of Possession.**—In this state a party out of possession may sell and convey his interest in land; and therefore, though the first purchaser from the infant has been put in possession of the land, and has received a conveyance, the infant on coming of age, may convey, and his deed will avoid the first deed.

4. **Infants' Contracts—Effect of Disaffirmance.**—The effect of the first contract of the infant, by his sale after coming of age, is to render the first contract void; to extinguish any interest in law or equity which the first purchaser may have acquired under it; and to entitle the vendor or the second purchaser in his name to recover possession of the land at law; and hold it free from any equity of the first purchaser.

5. **Same—Same.**—If an infant after coming of age disaffirm a sale made by him whilst an infant, he becomes reinvested with the title to the property, and may demand and recover it not only from his vendee, but from any other person who may have it in possession, though he be a purchaser from his vendee.

6. **Same—Disaffirmance—Right of Purchaser.**—If an infant after coming of age avoids his contract for the sale of his property, and sues to recover it, the purchaser is entitled to recover the consideration received by the infant, or so much of it as may then remain in his hands in kind.

7. **Same—Executory—Liability of Infant for Wasted Consideration.**‡—But a contract executory on his part, if he has during infancy wasted, sold or otherwise ceased to possess the consideration, and has none of it in his hand in kind on his arrival at

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all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. Brown v. McCune, 5 Sandf. 224; Keen v. Coleman, 39 Pa. St. 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed.' Sims v. Everhardt, 102 U. S. 300, 313, 26 L. Ed. 87. The rules of law which we have stated, and which are the only ones applicable to the facts of this case, and decisive of it, are supported by all the authorities. Corey v. Burton 33 Mich. 30; Whart. Cont. § 56; Badger v. Phinney, 15 Mass. 359; Chandler v. Simmons, 97 Mass. 508; Carr v. Clough, 26 N. H. 280; Railway Co. v. Higgins, 44 Ark. 296; Ruchizky v. De Haven, 97 Pa. St. 202; *Mustard v. Wohlford's Heirs, 15 Gratt. 329;* Mortgage Co. v. Dykes, 111 Ala. 178, 18 South. 292; Brantley v. Wolf, 60 Miss. 420; Gibson v. Soper, 6 Gray 279; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906. The judgment of the United States court of appeals for the Indian Territory, and the judgment of the United States court in the Indian Territory, Northern district (53 S. W. 330), are reversed, and the cause is remanded to the latter court, with instructions to grant a new trial, and to proceed therein not inconsistently with this opinion."

In Central Land Co. v. Laidley, 32 W. Va. 139, 142, 9 S. E. Rep. 61, the deed of a married woman and her husband was void as to the married woman, because of a defective certificate of her examination and acknowledgment, and after the death of her husband she conveyed the land to another with notice of the former deed; and the court after giving the facts in the principal case, said: "That case logically by analogy rules this case. An infant's conveyance is not void, but voidable, whereas a married woman's deed, without proper certificate, is void at the start. If a man may purchase the infant's land after he becomes of age, with notice of a prior sale to another during infancy, vesting the first purchaser with title until avoided, and the second purchaser takes a better title than the first, and call on equity to enforce his right by taking from the first purchaser his legal title, acquired after the infant obtained his majority pursuant to his sale in infancy, why cannot much more a second purchaser from a married woman acquire a better title than one who took from her a deed not voidable, but void at the instant of its execution?"

See, in accord, Guffey v. Hukill, 34 W. Va. 58, 11 S. E. Rep. 756, citing the principal case.

‡**Same—Same—Rights of Parties.**—In MacGreal v. Taylor, 17 Sup. Ct. Rep. 965, it is said: "So in Chandler v. Simmons, 97 Mass. 508, 514, the court said: 'Another ground relied on by the defendant is that the deed (by the infant) cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained. Gibson v. Soper, 6 Gray 279-282; Boodey v. McKenny, 23 Me. 517. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will devest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all, so that it will no longer protect him in the retention of the consideration. Badger v. Phinney, 15 Mass. 359; Bigelow v. Kinney, 3 Vt. 353. Or, if he retains the use or dispose of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. Boyden v. Boyden, 9 Metc. (Mass.) 519; Robbins v. Eaton, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. Dana v. Stearns, 3 Cush. 372-376. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed *in statu quo.* Tucker v. Moreland, 10 Pet. 65-74; Shaw v. Boyd, 5 Serg. & R. 309.' See, also, 1 Am. Lead. Cas. (5th Ed.) 224, 232, 249, 259; *Mustard v. Wohlford's Heirs, 15 Gratt. 329-340;* Cressinger v. Welch's Lessee, 15 Ohio St. 156; Eureka Co. v. Edwards, 71 Ala. 248, 256; Corey v. Burton, 32 Mich. 30; Price v. Furman, 27 Vt. 268, 271; Robinson v. Weeks, 56 Me. 102, 107; Carpenter v. Carpenter, 45 Ind. 142, 146; Harvey v. Briggs, 68 Miss. 60, 66, 8 So. Rep. 274; Railway v. Higgins, 44 Ark. 293, 297; Reynolds v. McCurry, 100 Ill. 356, 359; Tyler, Inf. § 37, and authorities cited."

See also, Bedinger v. Wharton, 27 Gratt. 871, and *note*: Gillespie v. Bailey, 12 W. Va. 92, 93; Abernathy v. Phillips, 82 Va. 773. See generally, monographic *note* on "Infants."

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age, he is not liable therefor: and may recover the property sold by him without accounting for the consideration received.

8. **Same—Sale of Land—Resale to Another at Majority—Effect of Deed Obtained by First Purchaser.**—The purchaser from the infant, with knowledge of the sale made by him of the land after he came of age, obtains from him a deed for it. He can derive no benefit from the deed; but holds the legal title acquired under it in trust for the second purchaser; and may *be compelled by a court of equity to convey said title to such second purchaser; or if he dies, to his heirs.

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9. **Same—Same—Same—Effect of Knowledge of First Purchase.**—Though the second purchaser purchase with knowledge of the first purchase from the infant, he is not affected thereby; the same having been disaffirmed and avoided by the second sale.

10. **Same—Same—Same—Right of First Purchaser.**—Any claim which the purchaser from the infant may have on account of payments made under his contract, or to obtain the deed, is a personal claim against his vendor, and cannot be enforced in a suit brought by the second purchaser to recover the land: he has no interest in or to the land or the purchase money due from the second purchaser.

11. **Decrees—Recitals.***—The decree reciting that the suit had been revived in the name of the heirs of the plaintiff, and they being parties to the appeal as appellees, the appellant cannot object that the suit was not regularly revived in their names.

12. **Appellate Practice—Decrees—Amendment of—Case at Bar.**—The second purchaser having sued to recover the land, and the decree having directed a conveyance by the first purchaser from the infant, without providing for the payment of the purchase money appearing to be due from the plaintiff, the appellate court will amend the decree and affirm it.

Alexander Nisewander, being entitled to an undivided fifth of a tract of land, subject to his mother's life estate in one-third thereof, contracted, during his infancy, to sell his said interest to John Mustard for the sum of eight hundred dollars; and on the same day, to wit, the 16th day of January 1852, executed a title bond in the penalty of one thousand six hundred dollars, conditioned to make a good deed with general warranty to the purchaser for the said interest on the 3d of November 1853, that being the day on which the vendor would attain the age of twenty-one years. Three hundred dollars of the purchase money were paid, according to the contract, in a house and lot in Mechanicsburg. No other payment was made during the infancy of the vendor, except about forty dollars, the amount of a debt assumed for him by the vendee. For the balance of the purchase money, the vendee executed his bond, but it does not appear when it was made payable; though it was, probably, when the

331 *deed should be executed by the vendor, on or after his arrival at lawful age. It does not appear that any deed, or even title bond, was ever executed to Nisewander for the house and lot in Mechanicsburg. It seems that that property was worth about three hundred dollars, and that he might have sold it for that sum if he had been of age, or could have given security to make a good title when he became of age. But not being able to do so, and being in want of money, he offered to sell it for one hundred dollars; and among others, offered to sell it to the appellant Mustard at that price. The appellant said he did not want it, but that his son Hugh would buy it. And Nisewander did sell it to Hugh Mustard and Addison Harman for about one hundred dollars; which was accordingly paid. The same property was afterwards sold by the appellant to another person for three hundred dollars, paid partly in cash and the balance in trade. Nisewander having become dissatisfied with his sale to the appellant, determined, and often declared, that he would not, on his arrival at age, confirm the sale and make a deed according to his title bond; and these declarations were sometimes made in presence of one or two of the appellant's sons, but not of the appellant himself. After his arrival at age, he persisted in this determination, and so declared; and on the 8th day of November 1853 he contracted to sell his interest in the land to Samuel Wohlford for eight hundred dollars; of which one hundred dollars was paid in cash, and for the balance three bonds were executed, payable at future periods; and he executed a title bond, conditioned to make a deed before the last payment should become due. When Nisewander applied to Wohlford to make this purchase, the latter knew that the former had contracted during infancy to sell his interest to the appellant, and asked him if he did not intend to com-

332 ply with his said contract: and *the former replied that he did not; whereupon the latter made the purchase, and received the title bond aforesaid. A few days after this purchase the appellant endeavored to obtain from Nisewander indemnity for the money paid on their contract as aforesaid; and, failing in that, endeavored to induce Wohlford to agree to rescind his contract with Nisewander, upon the return

*Decrees—Recitals—Effect.—In Arnold v. Arnold, 11 W. Va. 457, it is said: "It does appear in the evidence, that said Reese and wife were in the west at the date of the said deeds. The circuit court having in its decree ascertained and recited that the 'process was duly executed as to the defendants,' of which said Reese and his wife were a part, it seems to me that under the authorities above cited, and the case of *Mustard v. Wohlford's Heirs*, *15 Gratt. 329*, and the principles therein established, and the circumstances and facts of this case, above stated by me, that the appellants cannot object that said Reese and his wife were not before the circuit court in said cause, at or before the rendition of said decree; although it nowhere appears in the transcript of the record before us, that they were served with process in the cause, except in and by the said recital in the said decree of the court which is appealed from. This objection and assignment of error is therefore overruled in this cause."

See also, Livesay v. Feamster, 21 W. Va. 101, citing the principal case. See *note* to principal case reported in 76 Am. Dec. 209.

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of the money and bonds received by the latter; but Wohlford refused to do so. Shortly thereafter, to wit, on the 18th of November 1853, the appellant induced Nisewander to execute a deed conveying the land to him in consideration of the sum of nine hundred dollars, being one hundred dollars more than the amount of the purchase money before agreed upon between them; which sum of one hundred dollars was paid at the time of the execution of the deed.

Very soon after the execution of the said deed, and during the same month of November 1853, Wohlford instituted this suit for the purpose of having the deed annulled as having been fraudulently obtained by the appellant with a full knowledge of the equitable rights of Wohlford, and of obtaining the legal title to the said interest, and a partition of the land and an allotment of his several portion thereof.

The appellant in his answer admits that he obtained the deed with full notice of the prior sale and title bond to Wohlford, but says, in substance, that he had long previously purchased the same property, and received a title bond therefor from Nisewander during his infancy, of which purchase and title bond, as well as of the fact that respondent had paid a considerable part of the purchase money, the plaintiff had full notice at the time he made his purchase and obtained his title bond as aforesaid; that whether the plaintiff had such notice or not, respondent insists that having acquired the first equitable title, he had a right, notwithstanding his knowledge of any subsequently acquired
333 *equity of the plaintiff, to perfect his purchase, if he could, by obtaining a conveyance of the legal title; that although Nisewander was under age at the date of the title bond to respondent, yet it was not on that account void, but only voidable, and might be affirmed or disaffirmed at the election of said vendor, after he arrived at lawful age; that the sale and title bond of Wohlford were not a disaffirmance, but the deed to respondent was an affirmance of the said title bond to respondent, notwithstanding the payment of the additional sum of one hundred dollars as aforesaid, which was not intended to change the original contract, but merely to induce its affirmance; which respondent had a right to do.

Nisewander, in his answer, admits the contracts of sale made by him with the appellant and Wohlford respectively, the former before and the latter after he became of age, and states that a considerable portion of the purchase money due under the former contract was paid, or attempted to be paid, in a house and lot for which he had no use, and owing to the advantage thus taken of him, he determined, before he became of age, and expressed the determination frequently and publicly, that he would not confirm the contract; that after he became of age he expressed the same determination to various persons, and among them to Wohlford, and offered to sell him the land, which Wohlford then bought; that after making this contract with Wohlford, he was, by the free use of liquor supplied by Powers, acting for Mustard, prevailed upon to make a deed for the land to Mustard, which he would not have done if he had been sober; that at the time of the execution of the deed Mustard paid him one hundred dollars more than the original contract price; and that the sale to Wohlford was a fair one, made when respondent was sober, for a fair consideration, and he had no desire to defeat it.

334 *The facts, as before stated, are fully proved by the evidence; which also tends to prove that the deed from Nisewander to Mustard was obtained by undue and improper means practiced by the agent of the latter: but that fact is immaterial, in the view taken of the case by the court.

On the 11th of April 1857 a decree was rendered in the cause, reciting that Wohlford having died pending the suit, it had been revived in the name of his heirs, declaring the deed from Nisewander to Mustard to be fraudulent and void, directing the same to be set aside and canceled, and that Mustard should convey to the said heirs all the title vested in him by said deed, and appointing commissioners to make partition as prayed for in the bill.

From that decree Mustard applied to this court for an appeal; which was allowed.

N. Harrison and Grattan, for the appellant, insisted:

1st. That Mustard having been in possession of the land and having the legal title, a court of equity will not compel him to surrender the possession and title, to a man who had knowledge of the fact of his purchase and possession, and his having paid a part of the purchase money, without requiring him to return to the defendant what he had paid. Payne v. Dudley, 1 Wash. 196; Lipscomb's adm'r v. Littlepage's adm'r, 1 Hen. & Munf. 454; 2 Sugd. Vend. 9 edi. p. 260, § 4; Fagg's Case, 1 Vern. R. 52. And even an infant coming into a court of equity to avoid a contract, must return what he has received. Zouch v. Parsons, 3 Burr. R. 1794; Badger v. Phinney, 15 Mass. R. 359; 2 Kent's Com. 240, marg.; Smith v. Evans, 5 Humph. R. 70; Roof v. Stafford, 7 Cow. R. 184; Roberts v. Wiggin, 1 N. Hamp. R. 73; Weeks v. Leighton, 5 Id. 348; Northwest Railway Co. v. McMichael, 5 Exch. R. 123; Addis. Cont. 87; Amer. Lead.
335 Cas. 260; Hillyer v. Bennett, *3 Edwards Ch. R. 222; Brawner v. Franklin, 4 Gill R. 463; Weed v. Beebe, 21 Verm. R. 495, 500.

2d. That it is not a case for specific performance. To entitle Wohlford to sustain his bill, he must show that his vendor was in a condition to enforce a rescission of his contract with Mustard, and that he is entitled to ask the specific execution of his contract with Nisewander. That Nisewander could not enforce a rescission, first, because he could not return the consideration he had received; and second, because, after com-

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ing of age, he had executed the contract by conveying the land to Mustard. And the plaintiff cannot sustain his bill, because he could have no better equity than Nisewander. And further, he knew when he purchased, that Mustard was in possession under a contract with Nisewander, and had paid part of the purchase money, which he would lose if his contract was avoided. At most, therefore, it was a case for compensation. Armstead v. Hundley, 7 Gratt. 52; Parrell v. McKinley, 9 Gratt. 1.

3d. That although it was true that the contract was voidable by Nisewander, and only voidable, 1 Amer. Lead. Cas. 244, 248; Abell v. Warren, 4 Verm. R. 149; Oliver v. Houdlet, 13 Mass. R. 237; Bool and wife v. Mix, 17 Wend. 119, 131; yet Mustard having been put into possession of the land, the sale of the land by Nisewander to Wohlford whilst Mustard's possession continued did not avoid the previous contract with Mustard. Jackson v. Burchin, 14 John. R. 124; Jackson v. Carpenter, 11 Id. 539; Tucker v. Moreland, 10 Peters' R. 58, 79; 1 Amer. Lead. Cas. 257.

Staples and Wade, for the appellees, insisted:

1st. That admitting the contract with Mustard to be only voidable and not void, the sale and execution of his title bond by Nisewander to Wohlford, after coming
336 *of age, was a disaffirmance of his contract with Mustard. Tucker v. Moreland, 10 Peters' R. 58; 1 Parsons' Cont. 273; Jackson v. Burchin, 14 John. R. 124; Cresinger v. Lessee of Welch, 15 Ohio R. 156; 1 Amer. Lead. Cas. 114, note. And whilst it was true that in the states where one out of possession of land cannot sell, the infant would be required to enter upon the land sold during his infancy, in order to avoid the sale; yet in this state, and under our present statute, no such entry is necessary to enable an infant to avoid his contract made during his infancy. 1 Amer. Lead. Cas. 114; 1 Parsons' Cont. 273, 274. And if the sale to Wohlford was a disaffirmance of his contract with Mustard, no subsequent act of his could affirm that contract. 1 Amer. Lead. Cas. 111.

2d. That the proposition was well established, that if during his infancy, an infant wasted or otherwise ceased to possess the property acquired by the contract, he was not thereby deprived of his right of election, and might nevertheless, on coming of age, avoid the contract, and take the property given in exchange. And that in this case, Mustard was in no situation to insist upon a different rule, since by his own act he has deprived the infant of the power to return the property acquired by the contract.

3d. That if it was true, as they contended, that the contract with Mustard was avoided by the contract with Wohlford, then Mustard had no equity either as against Nisewander or Wohlford; and having obtained the legal title with a knowledge of Wohlford's equity, he held it as trustee for Wohlford, and a court of equity would compel him to convey it to him. That not having an equity to insist upon the return of the property which he had transferred to Nisewander as against him, he could have none on that ground against Wohlford.

337 *MONCURE, J., delivered the opinion of the court:

The court is of opinion, that the contract of the 16th of January 1852, between Nisewander and the appellant, though made when the former was under age, and when that fact was known to the appellant, was not a void contract, but only voidable, and subject to be affirmed or disaffirmed by the former, after his arrival at age. "The tendency of the modern decisions (says Chancellor Kent) is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election, when they become of age, either to affirm or disavow them." 2 Kent Com. 235. The authorities on this subject are fully collected in the valuable notes of Hare & Wallace, appended to the case of Tucker, &c. v. Moreland, in 1 American Leading Cases, edition of 1857, p. 224-267. And from the numerous decisions which have been had in this country, the annotators deduce the following definite rule, as one that is subject to no exceptions. "The only contract binding on an infant, is the implied contract for necessaries: the only act which he is under a legal incapacity to perform, is the appointment of an attorney; all other acts and contracts, executed or executory, are voidable or confirmable by him at his election." Id. 244. It is not material that the title bond in this case is in a penal sum; though it has been said that a bond of an infant with a penalty is void. Coke Lit. 172 a; recognized as being still the law by Bayly, J., in 3 Maule & Sel. 482. The penalty of the bond is a mere matter of form, the substance of the contract being the condition, on which may be maintained an action of covenant at law or a suit for specific performance in equity. See also 3 Rob. Pr. (new) 221-228.

The court is further of opinion, that the said contract was disaffirmed by the
338 contract of the 8th of *November 1853, between Nisewander and Wohlford, made after the former arrived at age. There is no evidence, nor even pretence, of any affirmance of the former contract by Nisewander after he arrived at age and before he entered into the latter, which was but eight days after his arrival at age. On the contrary, he persisted, during that period, in declaring that he would not confirm the former contract. Then, the question is, Did not the latter amount to a disaffirmance of the former? A voidable act of an infant may be avoided by different means, according to the nature of the act; but, without undertaking to enumerate them, it is sufficient for the purposes of this case to say, that such an act may certainly be avoided

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by him, after he becomes of age, by an act of the same nature and dignity. Thus a feoffment may be avoided by a feoffment; a deed of bargain and sale, by a deed of bargain and sale; a title bond, by a title bond, &c.; the two acts in these cases being of the same nature and dignity. It is not necessary, in order to produce that effect, that the latter act should expressly disaffirm the former. It is enough that the two acts are inconsistent with each other; in which case the former is disaffirmed by plain and necessary implication. The case of Frost v. Wolveston, 1 Strange's R. 94, seems to have proceeded on this principle. There, an infant covenanted to levy a fine by a certain time to certain uses; and before he came of age he levied the fine, and by another deed, made at full age, he declared it to be to other uses: the court held that the last deed should be the one to lead the uses. So also did the cases of Jackson v. Carpenter, 11 John. R. 539; Jackson v. Burchin, 14 Id. 124; and Tucker v. Moreland, 10 Peters' R. 58.

In these cases, deeds of bargain and sale were avoided by deeds of the same nature to other bargainees. In the last of them,
339 Judge Story said the *first two "are directly in point, and proceed upon principles which are in perfect coincidence with the common law, and are entirely satisfactory." In these cases, the first grantee was not in actual possession when the second deed was executed, but the land was either vacant, or the grantor remained in possession. If there be an adverse possession, then, it is said, in those states where one out of possession cannot sell, there should be an entry by the grantor in order to avoid the first deed by another. 1 Am. Lead. Cas. 257, and the cases cited. But no entry is necessary in those states in which one out of possession of real estate can sell his interest therein. 1 Parsons on Cont. 273. That is the case in this state, under the Code, ch. 116, § 4, 5, p. 500; which provides, "that all real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery;" and that "any interest in or claim to real estate may be disposed of by deed or will." Carrington v. Goddin, 13 Gratt. 587. But in this case, though the first vendee appears to have been in possession when the second title bond was executed, such possession was not adverse to the vendor, but in subordination to the title which still remained in him, and which would have been conveyed by him independently of the statute, and without any actual entry. In any view of the case, therefore, the contract with Wohlford was a disaffirmance of the contract with the appellant.

The court is further of opinion, that the effect of such disaffirmance was to render the first mentioned contract void; to extinguish any interest in law or equity the appellant may have acquired under it; and to entitle Nisewander, or his vendee Wohlford in his name, to recover possession of the land in an action at law, and hold it free from any equity of the appellant. When a voidable contract of an infant is dis-
340 affirmed *by him, it is made void ab initio by relation, and the parties revert to the same situation as if the contract had not been made. 1 Am. Lead. Cas. 259; Boyden v. Boyden, &c., 9 Metc. R. 519, 521. If the contract was one of sale by the infant, he becomes reinvested with his title to the property, and may demand and recover it, not only of the vendee, but of any other person who may have it in possession. The right of an infant to avoid his contract is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against purchasers from the vendee. 1 Am. Lead. Cas. 258; citing Myers, &c. v. Sanders' heirs, 7 Dana's R. 506, 521, and Hill v. Anderson, 5 Smedes & Marsh. R. 216, 224. He who deals with an infant deals at his peril, and subject to this right of the infant to disaffirm and avoid the contract. This is the case, even though he deal in ignorance of the infancy, and on the fraudulent representation of the infant that he is of full age. Van Winckle v. Ketcham, 3 Caines' Cas. 323; Conroe v. Birdsall, 1 John. Cas. 127; and other cases cited in 1 Am. Lead. Cas. 249. A fortiori, it is the case where, as here, the dealing is with full knowledge on the part of the adult of the infancy of the other contracting party. While the effect of avoiding the contract of sale by an infant is, on the one hand, to entitle him to demand and recover the property sold, so it is, on the other hand, to entitle the other contracting party to demand and recover the consideration received by the infant, or so much of it as may then remain in his hands in kind. Indeed, if the infant, after arriving at age, and before any act of disaffirmance by him, alien any part of the consideration, or exercise any unequivocal act of ownership over it, or retain it in his hands in kind for an unreasonable length of time, he may thereby affirm the contract and render it absolutely binding. Id. 255. But if he has,
341 during infancy, wasted, sold *or otherwise ceased to possess the consideration, and has none of it in his hands in kind on his arrival at age, he is not liable therefor, and may recover possession of the property sold by him (at least if the contract of sale be executory merely on his part) without accounting for the consideration received. "The true rule," as stated in Story on Cont. § 42, "seems to be, that when articles are furnished to the infant which do not come within the definition of necessaries, and which are consumed or parted with; or when money is lent which is expended by the infant; the other party has no remedy to recover an equivalent for the goods or money; the specific consideration given by him being parted with, or not being capable of return. But when the specific consideration, whatever it be, exists, and remains in the hands of the infant at the time of the disaffirmance of the con-

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tract, and is capable of return, the infant is bound to give it up, and he is treated as a trustee of the other party, if the contract be made originally in good faith. The ground of such a distinction is, that in the first case the goods or money cannot be returned; and to make the infant liable therefor in damages, merely because they had been used by him, would be to deprive him of his privilege of affirming or avoiding his contract." See also Boody v. McKenney, 23 Maine R. 517.

In the case of an executed sale by an infant, it has been held that if he disaffirm the sale and seek to recover back the article sold, he must restore the purchase money or other consideration; Smith v. Evans, 5 Humph. R. 70; Badger v. Phinney, 15 Mass. R. 359, 363; and if he go into chancery to set aside his conveyance, he must offer in his bill to restore the purchase money; Hillyer v. Bennett, 3 Edw. Ch. R. 222. Without expressing any opinion upon this question, it is sufficient for the purposes of this case to say, that no case of an executory contract of sale by an in-
342 fant *has been found, in which the infant, disaffirming the contract after his arrival at age, has been held accountable for the consideration received and spent by him during his infancy; but all the authorities on the subject seem to be the other way. If the infant in any such case has delivered possession of land contracted to be sold by him, he has an unconditional right to recover it back in an action at law; and a court of equity will not restrain him from doing so, nor impose terms upon the exercise of his right. Such was the decision of the court in Brawner & wife v. Franklin, &c., 4 Gill's R. 463. Dorsey, J., in delivering the opinion of the court, said, "Establish the doctrine now contended for, and what is the result? Why, that the whole policy of the law as to infantile incompetency to sell, waste and dispose of their property and estates, is frustrated." "An infant may sell his patrimonial estate, prodigally waste the purchase money in extravagance, gambling and dissipation; and if, when arrived at years of maturity and discretion, he disaffirm the contract, and sue at law for the recovery of his property, a court of equity will, by injunction, arrest the arm of the law, and say to him, Before you shall further assert your claim to your estate, you must repay to the purchaser all the money you have received from him." To such a doctrine the court refused to subscribe, and, we think, rightly so.

The court is further of opinion, that the appellant having no equity in regard to the land when he obtained the deed of the 18th of November 1853, and having obtained it with full knowledge of the equity of Wohlford, can derive no benefit from the said deed, but holds the legal title acquired under it in trust for the heirs of Wohlford, and may be compelled by a court of equity to convey said title to them. A purchaser for valuable consideration without notice of a prior equity, and having the legal
343 estate, is entitled to *priority in equity as well as at law, according to the maxim, that where equities are equal, the law shall prevail. He is a great favorite of a court of equity, and has been protected to such an extent as to be allowed to take advantage of a deed which he stole out of a window by means of a ladder, and of a deed obtained by a third person without consideration and by fraud. Flagg's Case, cited in 1 Vern. R. 52; Harcourt v. Knowel, cited in 2 Vern. R. 159; and Culpeper's Case, cited in 2 Freem. R. 124. "These, however (it has been well said), were extreme cases, showing indeed how partial equity is to a purchaser, but carrying the doctrine of protection further than it would be at the present day." 2 White & Tudor's Eq. Cas. 6, notes to Basset v. Notworthy; 2 Sugd. Vend. 1020. And it has been held that a purchaser "shall not protect himself by taking a conveyance from a trustee after he had notice of the trust; for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust." Saunders v. Dehew, 2 Vern. R. 271. If, therefore, the appellant could be regarded as a bona fide purchaser when he obtained the deed from Nisewander, he could derive no protection from that deed, which was obtained from a mere trustee of the legal title for Wohlford, and with full knowledge on the part of the appellant of the existence of the trust. Indeed, if he had then been a bona fide purchaser, he would not have needed the deed for his protection against Wohlford, who, in that case, would have been a purchaser with notice of his prior equity. But the appellant cannot be regarded as a purchaser at that time. He had received no conveyance, and paid only a part of the purchase money. His purchase was never more than voidable, and had been avoided; and he ceased to have any equity, in regard to the land; but Nisewander was left free to dispose
344 of it as *if he never had sold it to the appellant. So that Wohlford's purchase, though made with notice of the prior sale to the appellant, was entirely unaffected thereby, the same having been disaffirmed and avoided. And the appellant, having obtained the deed with full notice that the person from whom he obtained it was a mere trustee of the legal title for Wohlford, became himself a mere trustee of that title, and bound therefore to convey it to Wohlford's heirs.

The court is further of opinion, that any claim which the appellant may have on account of payments made under the original contract with him, or as a consideration for the execution of the said deed, is a personal claim against Nisewander, and cannot be enforced in this suit. It has been already shown that the appellant has no interest in or claim to the land itself. Nor has he any in or to the purchase money, if any, due by Wohlford. If he

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has, he must have derived it from the deed. But that is a conveyance of the land, and not an assignment of the purchase money. It is adversary to the sale to Wohlford, and not in subordination to it. A claim founded thereon is in conflict with the specific execution of Wohlford's purchase, to which he is entitled, and which is the purpose of this suit. Such claim, therefore, cannot be enforced in this suit.

The court is further of opinion, that it sufficiently appears from the recital contained in the decree appealed from, that the cause had been duly revived in the name of the heirs of Wohlford; Craig v. Sebrell, 9 Gratt. 131; but at all events, the appellant has no right to complain of any irregularity in that respect, the said decree being in the name and in favor of said heirs, and they being parties to and defending this appeal.

The court is therefore of opinion, that there is no error in the said decree to
345 the prejudice of the appellant. *But the court is further of opinion, that as it does not appear that the whole purchase money due by Wohlford had been actually paid when the said decree was rendered, though it had then become payable; and as the said land was subject to a lien for so much of the said purchase money as may then have remained unpaid; the said decree should have been without prejudice to such lien, and to any proceedings for the enforcement thereof which the said Nisewander or his assigns might be advised to institute; and that the said decree should be amended in that respect, and as amended affirmed.

Decree amended and affirmed.

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346 *Carter v. Ramey.

July Term, 1859, Lewisburg.

Caveats—Case at Bar.*—The entry and survey of both the caveator and caveatee being upon land which had been previously granted by the commonwealth, and which had never been forfeited, the commonwealth having no interest in the land which could be vested in the caveator, he can have no right to it: and therefore cannot maintain a caveat; though the caveatee may have no better right.

This was a case of caveat in the Circuit court of Russell county, filed by Dale Carter against William Ramey. On the 1st of May 1857 Moses Ramey made an entry for two hundred and forty-eight acres of land on the Pound fork of Sandy river in the county of Russell; which was transferred to William Ramey; and on the 11th of May a survey of the land was made. The land included in this entry and survey was situated within the boundaries of a tract of four thousand acres, patented to Richard Smith by grant from the state of Virginia, dated the 21st of February 1788, which had never been forfeited to the commonwealth.

The caveator Carter claimed under an entry for seven thousand five hundred acres made by Charles A. Smith; which entry was assigned to Carter, and covered the land embraced in the entry of Ramey. The grounds on which Carter contested Ramey's right to a patent, were, that the survey had not been returned to the register's office within one year after making the survey; and because the entry was not sufficiently precise and definite. But these objections were not considered by the court.

When the case came on for trial, the parties agreed the facts and submitted it
347 to the court: And the court *dismissed the caveat. Whereupon Carter applied to this court for a supersedeas; which was awarded.

B. R. Johnston, for the appellant.
Fry, for the appellee.

LEE, J. In every caveat founded on the alleged better right of the caveator to the land in controversy, the first enquiry is as to his title or interest in the subject. He cannot recover upon the mere infirmity of the title of the caveatee, for however defective that may be, no one has a right to interpose for the purpose of preventing him from carrying his entry into grant unless he have a better right, legal or equitable in himself, except only in the class of cases provided for by § 24 and 29 of the Code (p. 483), authorizing any person in case of violation of the provisions of previous sections referred to, by a locator, to enter a caveat against the emanation of a grant. Field v. Culbreath, 2 Call 547; Currie v. Martin, 3 Call 28; Walton v. Hale, 9 Gratt. 194; Harper, &c. v. Baugh, &c., Ibid. 508. And the same rule prevails in Kentucky as shown by repeated adjudications under their statute which was taken from our act of 1779, and is believed to be in all respects substantially the same. Patterson's dev. v. Bradford, Hardin's R. 101; Hendricks v. Bell, 1 Bibb's R. 138; Justices of Allen County v. Allen, 2 A. K. Marsh. R. 30; Whitley v. Shirley, 3 Ibid. 131. In truth the rule as applied in cases of caveat on the ground of better right, is but another phase of the principle which authorizes a defendant in ejectment, not being himself

*Caveat—What it Must State.—The caveator must state in his caveat the grounds on which he claims the better right to the land in controversy, and he will not be permitted to abandon on the trial the right which he has set out in his caveat, as that under which he claims, and prove a different right. Trotter v. Newton, 30 Gratt. 588, citing the principal case; Walton v. Hale, 9 Gratt. 194; Harper v. Baugh, 9 Gratt. 508.

See, in accord, Clements v. Kyles, 13 Gratt. 468, and *foot-note*.

Same—Infirmity of Caveatee's Title.—The caveator cannot rely on any infirmity in the title of the caveatee, but can only succeed upon showing a better legal or equitable title in himself. Trotter v. Newton, 30 Gratt. 593, citing the principal case.

See also, in accord, Field v. Culbreath, 2 Call 547; Staples v. Webster, 5 Call 274; Walton v. Hale, 9 Gratt. 194; Harper v. Baugh, 9 Gratt. 508.

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a trespasser who has wrongfully entered upon the peaceable possession of the plaintiff and ousted him of it (Tapscott v. Cobbs, &c., 11 Gratt. 172), to defeat the action by showing an outstanding better title in another; Haldane v. Harvey, 4 Burr. R. 2484; Crisp v. Barber, 2 T. R. 749;
348 Martin v. Strachan, *5 T. R. 107, 110, note (a); Lyons v. Brown, Gilm. 105, 118; Bull. Nis. Pri. 110; and which even in a writ of right, when that action was in use, where the demandant relied upon a constructive seizin, permitted the tenant to disprove such seizin and prevent a recovery by showing an elder grant or a better title in another. Green v. Watkins, 7 Wheat. R. 27; Bolling v. Mayor, &c., of Petersburg, 3 Rand. 563.

In this case it is agreed that the land embraced by the caveatee's survey lies wholly within the boundaries of a tract of four thousand acres granted to one Richard Smith by patent bearing date 21st of February 1788, and that this four thousand acre tract had never been forfeited to the commonwealth under her revenue laws or otherwise. Thus it was not liable to entry, either as waste and unappropriated, or as forfeited land, and the entry of the caveator so far as it embraced the land covered by the survey of the caveatee, being wholly unauthorized by law, was simply void and could confer no equity whatever. And a grant founded upon such void entry would pass nothing, there being indeed nothing in the commonwealth upon which the grant could operate. Whittington v. Christian, 2 Rand. 353; Hannon, &c. v. Hannah, 9 Gratt. 146; Levasser v. Washburn, 11 Gratt. 572; Atkins, &c. v. Lewis, &c., 14 Gratt. 30. Having therefore no equity, the caveator fails to show the better right upon which only can he maintain his caveat; and although the caveatee's entry may be equally invalid and give him no better equity, yet in equali jure potior est conditio defendentis.

Another objection has been made to the caveator's case involving the question whether an assignment of an entry made under our act providing the mode of acquiring title to waste and unappropriated, and since the Code of 1849, to forfeited, lands, is valid so as to authorize the assignee to maintain a caveat in his own
349 *name against another who shall have obtained a survey of the same land, as the caveator in this case claims under an assignment from one Smith by whom the entry was made. As however the first objection must prove fatal to the caveator's case, I deem it unnecessary at this time to express any opinion upon this question.

I think the caveat was properly dismissed, and am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

350 *Hill & Wife v. Huston's Ex'or & Others.

July Term, 1859, Lewisburg.

1. **Legacies—Coupled with a Condition—Effect of Acceptance.***—A party accepting a legacy coupled with a condition, may bind himself to the performance of the condition, although the burden may exceed the benefit.
2. **Same—Same—What Necessary to Bind Legatee.**—But to bind a party in such a case, it must appear that he elected to accept the legacy and perform the condition with full knowledge of all the facts and circumstances necessary to enable him to make a judicious choice. To make an election conclusive, the party must be informed as to the relative values of the things he elects between.
3. **Same—Same—Effect of Acceptance under Mistake.**—Where a party has made an election without sufficient information, or under a mistake, he will be relieved against the consequences, upon the terms of restoring other persons, whose rights may be affected by his acts, to the same situation as if those acts had not been performed.
4. **Same—Legatee to Pay Testator's Debts—Liability of Legatee.**—A bequest of testator's whole property to a legatee, in consideration of which she is to pay testator's debts, though accepted, does not bind the legatee to pay the debts beyond the value of the legacy.
5. **Wills—Rule of Construction.**—In construing wills, courts are not bound to give a strict and literal interpretation to the words used, and by adhering to the letter defeat the manifest object and design of the testator.
6. **Same—Use of Property by Executrix—Liable Only for Rent.**—A case in which an executrix holding and employing the estate of testator in her business, held not to be bound for profits, but only for a rent.

In 1841 Archibald W. Huston and William W. Pollock entered into a partnership for the purpose of keeping a hotel in the town of Harrisonburg, in the county of Rockingham; and for the purpose of the partnership they purchased a house and lot, which was afterwards known as Pollock's hotel. By the terms of the partnership the house was to be kept by Pollock. In 1843 they purchased another house and lot which had been known as the Washington tavern.

In October 1844 Huston died, having
351 made a will, *by which he gave to his widow a tract of land for her life, and personal property; and directed his executors to sell all the rest of his real estate; except that they were not to sell his interest in his houses and lots in the town of Harrisonburg under five years from the period of his death; and until the real estate was sold, the executors were to rent the same, or so much as they considered it proper to rent, either by public or private contract, as they might consider proper.

At the end of the year the executors rented to Pollock, Huston's moiety of the houses and lots at three hundred dollars a

*The principal case was cited and approved in Taliaferro v. Day, 82 Va. 95, as to the proposition laid down in the first headnote.

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year. But Pollock died in February 1845, having made a will containing a single bequest, which was in the following words: "I give and bequeath to my beloved wife Jane Pollock, my whole and entire estate of every description; but for and in consideration whereof, she is to pay all my just debts." And he appointed her his executrix, with authority to qualify without giving security; which she accordingly did.

The separate estate of Pollock was appraised after his death at nine hundred and thirteen dollars and sixty-nine cents; and his debts amounted to twelve hundred and ninety-one dollars and forty-three cents. Mrs. Pollock kept the hotel on her own account; and whilst it does not appear that there was any agreement between herself and the executors of Huston, as to the terms upon which she was to hold the property, she and they seem to have considered that she held the moiety belonging to the estate of Huston, at a rent of three hundred dollars a year; that being the amount for which the executors had rented to her husband for the year 1845.

In 1850 Mrs. Pollock married John N. Hill; and in April 1852 Hill and wife filed their bill in the Circuit court of Rockingham county, against Huston's executor, and his widow and children, in which they
352 set out *the facts herein before stated; but alleged that Mrs. Pollock declined taking the property under the will of her deceased husband, though she made no record renunciation of it. That in fact there was nothing to take under the will, as the debts of her husband were greater than there were means to pay them.

They further stated that it was understood by all the parties concerned, that Huston's interest in the partnership property could not be sold for five years from his death; and to have sold the one undivided half belonging to Pollock's testate, could not have been done without a great sacrifice. That Mrs. Pollock was advised to rent the property at the former rate of six hundred dollars a year, which was assented to by Huston's executor; and she had thus continued to rent it. That she, and since her marriage her husband, had paid debts of the partnership of Pollock & Huston, amounting to near five thousand dollars; and it was feared the partnership property would not be sufficient to pay the debts of the concern; and as Pollock had no separate property after paying his individual debts, the complainants desire the court to determine who shall be compelled to make up the deficit: were the complainant Hill and the estate of Huston equally bound, or was the estate of Huston bound for the whole amount. And they prayed for a sale of the partnership property; that the amount due to Hill might be paid, and for an account of the debts of the concern.

The defendants in their answers, concur with the plaintiffs in their apprehensions that the partnership property will not be sufficient to pay the debts, and in the prayer for a sale; and the widow and children of Huston say that they were of opinion until the last year, and so understood Mrs. Pollock, that Mr. Pollock died solvent, and that the property of the firm was sufficient to pay the debts; and they always
353 understood *Mrs. Pollock and her present husband as claiming precisely the same title and ownership in the property, which was held by Pollock himself in it. And they insist that Mrs. Hill did accept the devise under her former husband's will. They say that their confident expectation for a considerable period was, that after discharging the debts there would be a surplus; and they have reason to believe that this opinion was entertained by Mrs. Hill.

In October 1852 there was a decree for the sale of the real estate of the partnership, and also for an account of the debts of the concern. And the commissioner for the sale of the real estate reported that he had sold the property called Pollock's hotel to the plaintiff Hill at the price of seven thousand seven hundred dollars, and the Washington tavern at the price of six thousand eight hundred dollars. The commissioner directed to take an account of the debts and assets of the firm, reported the amount of the debts with interest thereon up to May 5th, 1855, at twenty-four thousand eight hundred and seventy-six dollars and ninety cents; and the assets of the firm, including the proceeds of the sales of the real estate, at twenty-two thousand eight hundred and nine dollars and fifty-two cents: In this account of assets was included a rent of the property from the death of Huston at six hundred dollars a year. And according to this account the debts exceeded the assets by the sum of two thousand and sixty-seven dollars and thirty-eight cents. The debts of the firm had all been paid either by Bryan the executor of Huston, or by Mrs. Pollock before her marriage, and her husband since that event. No separate statement is made of the amount paid by these last; but there was paid by them out of the assets of the firm and out of the profits of the hotel whilst kept by them, or from other unknown sources, about fourteen thousand three
354 hundred dollars; *much the larger part of it, as the appellees contended, out of the profits of the hotel. There was no exception to the report, except by one of the creditors, whose claim was disallowed.

There was no direct proof, either written or oral, that Mrs. Pollock had ever declared in terms her acceptance of the bequest under Pollock's will. But he having left four infant children, she kept possession of the property precisely as Pollock had done, holding one moiety as rented from Huston's executor, treating and speaking of the property as her own, keeping no accounts as between herself and the children; or as executrix; but keeping an account as between herself and the firm of Pollock & Huston; and even in this case not alluding to the fact that her children were interested in the property, or making them parties in

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the cause, until it was done by an amended bill, simply bringing them before the court.

The cause came on to be finally heard on the 26th of May 1856, when the court confirmed the report; and being of opinion that the female plaintiff had accepted the devise under the will of her former husband William W. Pollock, and by her acceptance made herself individually liable for one equal moiety of the debts of the firm of Pollock & Huston; and that the plaintiff John N. Hill, by his intermarriage with the female plaintiff, became legally liable for the debts of his wife, decreed that after the social assets of the firm of Pollock & Huston were exhausted, the debts which then remained unpaid should be discharged, one-half thereof by the plaintiffs Hill and wife, and the other half by the executor of Huston out of the assets in his hands. From this decree Hill and wife applied to this court for an appeal; which was allowed.

Michie, for the appellants, admitting the principle *that a devise or bequest upon the condition of paying 355 the testator's debts, if accepted by the devisee or legatee, would bind him to pay them, insisted:

1st. That the acceptance must have been made with full knowledge of all the facts, as to the condition of the estate; or that by her own acts she had rendered it iniquitous to avoid the responsibility. And this, he insisted, was fully sustained by the case of Messenger v. Andrews, 3 Cond. Eng. Ch. R. 761; which was the only case in which the debts exceeded the value of the bequest.

2d. That Mrs. Pollock had not accepted the devise and bequest to her. And he went into a full investigation of the evidence to sustain his proposition. And he insisted further, that if she had accepted the bequest, it was done in ignorance of the condition of the estate, so that she would not be bound by it. And certainly she had done nothing which would render it iniquitous in her to avoid the responsibility. The sales which had been made showed that the property had greatly enhanced in value since the death of Pollock.

3d. That the appellants were not liable for profits. Mrs. Pollock rented the property, taking her husband's moiety at the rent which Huston's executor considered sufficient for his; and the profits made were her own, made by her own labor and management. That no question had been made in the court below as to liability for profits; but it was made in this court for the first time; and there was nothing to show that profits had been made.

Woodson and Grattan, for the appellees, insisted:

1st. That if Mrs. Pollock accepted the devise under Pollock's will, she was bound to pay his debts, though they exceeded the value of the devise. They referred to many cases, from Collier's Case, 6 356 Coke's R. 16 a; *Wellock v. Hammond, Croke Eliz. 204, down to the present day, both in England and this country, in which a devise upon a condition to pay the testator's debts was held to give the devisee a fee, upon the ground that it bound him to pay the debts. Among them were, Moone v. Heaseman, Willis' R. 138; Doe v. Richards, 3 T. R. 356; Denn v. Meller, 5 Id. 558, 1 Bos. & Pul. 558, 2 Id. 249; Baddeley v. Leppingwell, 3 Burr. R. 1533; Doe ex dem. Thorn v. Phillips, 23 Eng. C. L. R. 178; Abrams v. Winshup, 3 Cond. Eng. Ch. R. 429; Jackson v. Bull, 10 John. R. 19; Jackson v. Martin, 18 Id. 31; Gibson v. Horton, 5 Har. & John. 177; Cook v. Holmes, 11 Mass. R. 528.

They insisted further, that a court of equity would enforce this liability. Attorney General v. Christ's Hospital, 3 Bro. Ch. Cas. 165; Talbot v. Earl of Radnor, 9 Cond. Eng. Ch. R. 22; Earl of Northumberland v. Marquis of Gramby, 1 Eden's R. 489, 2 Amb. R. 540, 647; Messenger v. Andrews, 3 Cond. Eng. Ch. R. 761; Spraker v. Van Alstyne, 18 Wend. R. 200; Harris v. Fly, 7 Paige's R. 471; Gardner v. Gardner, 3 Mason's R. 178, 207-8; Wright v. Denn, 10 Wheat. R. 204; Vanmeter v. Vanmeter, 3 Gratt. 148.

And they examined the evidence, and insisted that she had accepted the devise under Pollock's will; and had held the property under it, making very large profits.

2d. That if Mrs. Pollock did not accept the devise, she held the property as executrix, and was bound to account for the profits she had made. That a surviving partner carrying on the business with the partnership effects, is bound to account for the profits. 3 Kent's Com. 64, and note c; Brown v. Litton, 1 P. Wms. R. 140; Crawshaw v. Collins, 15 Ves. R. 218, 230, 1 Jac. & Walk. 267; Featherstonhaugh v. Fenwick, 17 Ves. R. 298, 309, 310; Sigourney v. Munn, 7 Conn. R. 11, 324; Brown v. De 357 Tastet, 4 Cond. Eng. Ch. *R. 133.

And an executor carrying on trade with his testator's assets shall not be allowed to make profits, though he makes himself personally liable in the business. 2 Lomax Ex'ors 283, 284; Watson, ex parte, 2 Ves. & Bea. R. 414; Collyer Part. § 603, 604; Wightman v. Townroe, 1 Maule & Sel. R. 412; Beathcote v. Hulme, 1 Jac. & Walk. 122, 131; Thompson v. Brown, 4 John. Ch. R. 619.

ROBERTSON, J. There can be no doubt that a party may, by accepting a legacy coupled with a condition, bind himself to the performance of the condition, although the burden may exceed the benefit. But it must appear that he elected to accept the legacy and perform the condition, with full knowledge of all the facts and circumstances necessary to enable him to make a judicious choice. To make an election conclusive, the party must be informed as to the relative value of the things he elects between. And where he has made an election without sufficient information, or under a mistake, he will be relieved against the consequences upon the terms of restor-

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ing other persons, whose rights may be affected by his acts, to the same situation as if those acts had not been performed.

Hill and wife deny that she ever accepted the provisions of the will of her former husband, Pollock; but I do not consider it necessary to enter upon an examination of this question, because even if it be admitted that she did accept them, and that the construction placed upon the will by the Circuit court is correct, it seems to me to be quite clear, on applying the foregoing well established principles to the case, that she is not bound by such acceptance, and ought to be relieved from its consequences.

It cannot be pretended that she made the election with information as to the
358 condition of the estate; *that she knew it was insolvent, and that she was assuming a charge instead of deriving a benefit by taking under the will.

Nor can it be said that injury has resulted to any one from the course she has pursued. On the contrary, it appears that the property while in her possession and under her management, increased in value; and that the fund for the payment of debts was largely augmented. Pollock's creditors and the estate of his deceased partner have thus been benefited, and of course can have no right to complain that she did not make known at an earlier day her determination not to take under the will. Besides, the delay in bringing matters to a close was in a great degree attributable to the provisions of Huston's will prohibiting the sale of his interests in the partnership property from being made within five years after his death.

I think, therefore, that supposing Mrs. Hill to have made an election, she should have been permitted by the court to reconsider it, and to relieve herself from liability for the debts of her former husband, by giving up his property to his creditors.

On another ground also it seems to me that the decision of the Circuit court is erroneous.

I am of opinion, that upon a proper construction of Pollock's will, his widow was not required to make an election; and that her taking under it could not impose upon her any liability, beyond the value of the estate, for his debts.

No case of election, under a will, can ever arise, unless the intention of the testator to require the party to elect is clear and decisive. 1 Jarman on Wills 393; Crump v. Redd's adm'r, 6 Gratt. 372.

Such intention never exists, unless the testator designs a benefit for some other party, who, as well as the legatee put to the election, is the object of his bounty.

359 *In this case, the whole estate was given to the wife, to the exclusion of even the children of the testator. There was no object of his bounty in whose favor he could have designed an election to operate: For it cannot be supposed that he intended to make his creditors objects of his bounty at the expense of his wife: that, knowing his estate to be insolvent, he devised it to her, with the view of imposing upon her the obligation of paying his debts, however much their amount might exceed its value; and of thus taking from her, and from his and her children, the means of support, which after his death, she might acquire by her own industry. Yet we must believe all this before we can come to the conclusion that he intended to give her his estate only upon the condition that she should become personally bound for his debts, whatever their amount might be.

But it may be said that while it is clear he did not design this, such is the effect of his will. That he was himself mistaken as to his pecuniary condition, and did not foresee the consequences of the provision he made; and that the will, being clear and unambiguous in its language, must be carried into effect even although the result may be different from what he anticipated.

There can, I think, be no doubt that he was mistaken as to the situation of his affairs, and supposed there would be something left for his wife after the payment of his debts. This made him perhaps less cautious in his language than he might otherwise have been. If he had doubted the sufficiency of his estate to pay his debts, he would probably have used terms about which no controversy could have arisen.

But the whole question is at least one of intention: for, as has been shown, a legatee can never be required to elect unless the testator intends it: and can the fact that the testator labored under a mistake like
360 this *create an intention for him, which we know never could really have existed for an instant in his mind?

In construing wills, courts are never bound to give a strict and literal interpretation to the words used, and by adhering to the letter, defeat the manifest object and design.

When, in this case, we look at the will itself; the relative situation of the parties; the obvious purpose to benefit the wife; the improbability, nay the absurdity of the idea that the testator intended to charge her personally, beyond the value of the estate he gave her, with the payment of his debts; we cannot hesitate in deciding that the will properly construed means no more nor less than that the widow should take the whole estate subject to the payment of the debts of the testator.

But it has been insisted in the argument here, that if Hill and wife are not liable for the payment of Pollock's debts by reason of her accepting the provisions of his will, they are at least bound to account for the profits made from his estate after his death, and that those profits greatly exceed the rents with which they have been charged.

Numerous cases have been cited to show that a surviving partner carrying on business with the partnership effects, must account for the profits; and that an executor carrying on trade with the assets of his testator, is held accountable for all profits, even though he makes himself personally liable in the business.

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These are unquestionably well settled rules of law, but they have no application to this case.

No question arises as to the liability of the surviving partner for profits; for Pollock did not, after the death of Huston, continue the business as surviving partner, but became tenant of the property at a rent agreed upon between him and the executor of Huston: And there is no good
361 ground for insisting that *his executrix made herself liable for profits, either to the firm, or to his estate.

No such liability was suggested in the court below. No account of profits was asked for or ordered; and there is nothing to show that profits were in fact made. But if it be conceded that profits were made, she is not bound to account for them. She subjected the assets to no risk or hazard; and cannot be considered, in the sense of the rule referred to, as having continued them in trade. She is properly to be regarded as a tenant of the property; and least of all, have the appellees any right now to treat her otherwise.

In the account filed as an exhibit with the bill, she is charged with rent for the whole property, at the same rate which had been agreed upon as to Huston's moiety, between her husband in his lifetime and Huston's executor. This account was made out under the supervision and with the aid of Huston's executor, and of his adult children, and was admitted by them to be correct, as far as the data in the possession of the parties at the time enabled them to state it. The correctness of the charges of rent was not only then acquiesced in by all parties, but in the report of the commissioner, made under the order of court, the same charges were continued without objection from any quarter. This report was confirmed, and the decree now appealed from was entered in favor of the appellees in conformity with it.

Under these circumstances, it cannot be doubted that Mrs. Hill must be considered as having held the property as tenant, at a fair rent, for which she has duly accounted.

The appellants are in no way liable for the debts of the firm of Pollock & Huston, the estate of Huston being alone liable after the social assets shall have been exhausted, inasmuch as the whole of the in-
362 dividual *assets of Pollock's estate have been absorbed by his own debts.

To the extent that the appellants have paid debts of the firm out of their own funds, they must, after the exhaustion of the social assets, be reimbursed by the estate of Huston.

I think the decree should be reversed, and one entered in conformity with the foregoing opinion.

ALLEN, P., and MONCURE and LEE, Js., concurred in the opinion of Robertson, J.

DANIEL, J., dissented.

Decree reversed.

363 *Poindexter & Wife v. Jeffries & als.

July Term, 1859, Lewisburg.

1. **Wife's Equity—Principles Applicable.**†—The principles applicable to a wife's right to an equitable settlement out of her property, stated.
2. **Same—Real Property Subject to.**†—Real, as well as personal, estate is subject to the wife's equity.
3. **Same—Settlement—Amount.**†—The settlement should be reasonable and adequate; and may be of a part or the whole of the property, according to the sound discretion of the court, upon all the circumstances of the case.
4. **Same—When Settlement to Take Effect.**†—If the husband lives with and supports his wife, the settlement may be made to take effect when he ceases to do so, or at his death. But if he has deserted or ill treated her, or is insolvent, or unable or fails to support her, it will be directed to commence immediately.
5. **Same—*Valuable Consideration for Post-Nuptial Settlement.**†—If property of the wife which a court of equity would direct to be settled upon her, is conveyed by the husband to a trustee for her benefit, the court will sustain the deed against creditors of the husband.
6. **Same—Right to Settlement—Case at Bar.**†—The wife's portion as one of the distributees of her father, of his personal estate, though there are no debts or they are satisfied, and the administrator, who is also a distributee, files a bill for a distribution of the estate, and commissioners are appointed to divide the property, who make the division, before the wife petitions for settlement, and although the division is afterwards confirmed, but subject to the future decision of the court upon her right, is not so vested in the husband as to deprive her of her right to a settlement out of this property.
7. **Same—‡Life Estate of Husband in Real Estate Descended Not Subject to.**†—The wife's real estate descended to her from her father, though undi-

*__Wife's Equity—Valuable Consideration for Post-Nuptial Settlement.__—See principal case cited and approved in White v. Gouldin, 27 Gratt. 505; Walden v. Walden, 33 Gratt. 88, 96, and *foot-note*.

In Smith v. Bradford, 76 Va. 764, it was said: "It is settled law in Virginia that an insolvent husband may make a valid settlement upon his wife of his uncollected share of an estate of which he, in right of his wife, is a distributee. It was so decided in *Poindexter and Wife v. Jeffries and Others*, *15 Gratt. 363*; and the correctness of that decision has never been questioned."

See also, monographic *note* on "Fraudulent and Voluntary Conveyances."

†See generally, monographic *note* on "Husband and Wife."

‡__Same—Property Reduced into Possession by Husband.__—In Ware v. Ware, 28 Gratt. 676, the court said: "The last point to be considered is, whether the appellant has a valid claim to a settlement upon her of the whole or any part of the fund. The rule on that subject in this state is settled under repeated decisions of this court. It is thus laid down in *Poindexter v. Jeffries*, *15 Gratt. 363-369*. Whenever the husband, in right of his wife, has obtained possession of and title to her property, his own title *jure mariti* becomes complete, and the property to the extent of his title, is subject to his right of disposition, and to the claims of creditors, like any other property of

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vided, is immediately and before the actual entry upon possession of it by the husband, so vested in the husband to the extent of his life estate, as that the wife is not entitled to a settlement out of the life estate of the husband, though he is insolvent and doing nothing to support her; and though advancements had been made to the wife by her father in his lifetime, which render it necessary to resort to a court of equity for a settlement of accounts and for partition.

In 1851 John Bowyer of the county of Rockbridge died intestate, leaving a
364 large real and personal estate, *and a widow and eight children. One of his children was Frances H. the wife of George B. Poindexter. By deed dated the 29th of December 1851, and duly recorded on the 8th of January thereafter, Poindexter conveyed his interest in his wife's undivided portion of the real estate of her father as one of his heirs, to Fielding B. Lewis her son by a former marriage, in consideration of a decree of said Lewis against said Poindexter for the sum of eight hundred and eight dollars and fourteen cents, with interest from the 1st day of June 1851. About the same time, or shortly thereafter, a bill was filed by the administrator, being also a distributee and heir, against the widow and other distributees and heirs of Bowyer, for partition of his real and personal estate; and on the 21st of September 1852, a decree for partition was accordingly made. Before that decree was executed, to wit, on the 20th of October 1852, Poindexter, by deed dated on that day and afterwards duly recorded, conveyed his interest in his wife's portion of the personal estate of her father to William B. Poindexter and Fielding B. Lewis, trustees, for the sole and exclusive use of herself and her children. Shortly thereafter the commissioners appointed to divide the estate of Bowyer performed that duty, and made report thereof to court; from which it appears that the value of the distributive portion of each of the children, of the real and personal estate (except the dower slaves), including advancements, was eight thousand eight hundred and eighty dollars and two cents; and that the portion assigned to Poindexter and wife consisted of one hundred and forty-five and a half acres of land, valued at six thousand nine hundred and two dollars and sixty-two cents, and two slaves, valued at one thousand three hundred and fifty dollars; which, with advancements made to them amounting to six hundred and fourteen dollars, and a balance of thirteen dollars and forty
365 *cents, directed to be paid to them for owelty of partition, made up their said portion of eight thousand eight hundred and eighty dollars and two cents. On the 16th of April 1853 Mrs. Poindexter, by her next friend, filed a petition in the cause, praying that the portion of personal property constituting her distributive share of her said father's estate, might be assigned to said W. B. Poindexter and F. B. Lewis, trustees in said deed of the 20th of October 1852, in trust for the purposes expressed therein; that such additional provision might be made for her out of the life estate of her husband in the real estate descended to her from her father, as the court might deem adequate; and for general relief. And on the same day the report of partition was confirmed; but subject, and without prejudice, to the rights of the said petitioner to such future order or decree as the court might make upon said petition: and, in the meantime, Poindexter and wife were to hold said land and slaves allotted and assigned to them in said partition, subject to the future order or decree of the court in the premises.

On the 21st of June 1851 a decree was obtained by F. B. Lewis against said G. B. Poindexter, and James M. Jeffries and John Pollard as his sureties, for the sum of two thousand nine hundred and seventy-five dollars and sixteen cents, with interest from the 1st day of June 1851 till paid. And the sureties having satisfied the decree, had it duly registered for their benefit in the clerk's office of Rockbridge county on the 30th of March 1852; and having on motion for that purpose, obtained a decree against G. B. Poindexter for the money paid by them as his sureties as aforesaid, they sued out a fi. fa. thereon, which was levied on one of the slaves allotted to Poindexter and wife as aforesaid; but the sale was suspended by an injunction awarded by the court in the said cause on the
366 *11th of November 1853, on the petition of Poindexter and wife.

In this state of things, the bill in this cause was filed in January 1854, by said Jeffries and Pollard against F. B. Lewis, in his own right, the said F. B. Lewis and W. B. Poindexter, trustees in the deed of the 20th of October 1852, and G. B. Poindexter and wife, stating the facts of the case, as viewed and deemed material by the plaintiffs, and praying that the said deed might be vacated and annulled, the said injunction dissolved, the said two slaves subjected to the execution of the plaintiffs, the life interest of G. B. Poindexter in the land assigned to his wife as aforesaid, and his interest in the dower slaves subjected to the claim of the plaintiffs, and for general relief.

The answers of G. B. Poindexter and F. B. Lewis having afterwards been filed, and sundry depositions taken, the cause came on to be heard on the 18th of September 1855; when the court, being of opinion that Mrs. Poindexter's right to a settlement out of the slaves and other personal property derived to her from her father's estate was clear and unquestionable, and that the deed

his otherwise acquired. And when the property, by being reduced into the husband's possession, has once been released from the wife's equity, it can never again be subjected to it. If it be recoverable at law, and the aid of a court of equity be not invoked to recover it, her equity does not exist."

See the principal case also cited in Garland v. Pamplin, 32 Gratt. 314; Arnold v. Bunnell, 42 W. Va. 482, 26 S. E. Rep. 362; Persinger v. Simmons, 25 Gratt. 245.

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of the 20th of October 1852 was valid, to the extent of the value of her equity or right of settlement; but declining then to decide whether the said equity extended to her husband's interest in her real estate; rejected the plaintiff's motion to dissolve the injunction awarded on the 11th of November 1853, and directed a commissioner to enquire and report what settlement ought to be made upon Mrs. Poindexter and her children, and to make alternative statements, &c.

The commissioner made a report showing, among other things, that Mrs. Poindexter derived from her father's estate the land and two slaves before mentioned; that the land would rent for about three
367 hundred *dollars per annum, and one of the slaves, a man twenty or twenty-one years of age, hired for one hundred and twenty dollars or one hundred and thirty dollars per annum, and the other, a woman eighteen or nineteen years of age, hired for about fifty dollars; that she had also in her possession three women slaves, with ten or twelve children, which had come to her as dower slaves in the estate of her first husband, but had been sold and were purchased and loaned to her by her son F. B. Lewis, which slaves however were believed to be then unprofitable by reason of the number of children; that Poindexter and wife had two sons, aged respectively eighteen or nineteen and sixteen or seventeen years, who were going to Washington college; and that Poindexter was engaged in no business to afford means of support for his family, and being wholly insolvent, his family were dependent on his wife's means for a support.

On the 18th of April 1856 the cause was again heard; when the court decided, that the said deed of the 20th of October 1852, conveying Mrs. Poindexter's interest in the personal estate of her father to trustees for the benefit of her and her children, was not an excessive settlement under the circumstances of the case, but was fair and reasonable, and such as the court would have directed to be made; and the court therefore approved and confirmed the same and perpetuated the injunction aforesaid. But the court further decided, that the equitable right of Mrs. Poindexter to a settlement did not attach to her husband's life estate in the one hundred and forty-five and a half acres of land assessed as her portion of the real estate of her father; but that said life estate is subject to the lien of the plaintiffs in virtue of the said decree obtained against G. B. Poindexter on the 21st of June 1851 for the sum of two thousand nine hundred and sixty-five dollars and sixteen cents, with interest thereon from
368 *the 1st of June 1851; which said lien is, however, chargeable on said life estate, and to be paid out of the proceeds of the same ratably with a decree rendered by the same court, in the same cause and at the same time, in favor of F. B. Lewis for eight hundred and eight dollars and fourteen cents, with interest from the said 1st of June 1851 till paid; the court having previously decreed that the deed of the 29th of December 1851 conveying said interest from G. B. Poindexter to F. B. Lewis as aforesaid, is inoperative so far as it is in derogation of the plaintiffs' right to participate pro rata in the lien of said decree. And the court therefore decreed that, unless payment should be made to the plaintiffs of the said sum of two thousand nine hundred and sixty-five dollars and sixteen cents, with interest as aforesaid and the costs of the suit, on or before the 1st day of July next thereafter, the said life estate should be sold in the manner and on the terms mentioned in the decree.

From this decree Poindexter and wife applied for and obtained an appeal.

Michie, for the appellants.

The Attorney General, Gordon and William Smith, for the appellees.

MONCURE, J. This case involves the doctrine of what is familiarly called "the wife's equity;" the origin and foundation of which are involved in much doubt, but which has been long and firmly established in England; 2 Story's Eq. § 1402, 1407, &c.; and though but recently recognized in this state, is now well established here also. Gregory's adm'r v. Mark's adm'r, 1 Rand. 355; Gallego v. Gallego's ex'or, 2 Brock. R. 285; Browning v. Headley, 2 Rob. R. 340; Dodd's trustee v. Geiger's adm'r, 2 Gratt. 98; James, &c. v. Gibbs, &c., 1 Pat. &
369 Heath 277. I will not attempt to *investigate it fully, but will state only so much of it as seems to be pertinent to the present case. The authorities on the subject are collected and commented on in 1 Lead. Cas. in Eq. Am. ed. 1859, top paging, 453-501.

The doctrine may be briefly stated thus: that a wife is entitled to an equitable settlement out of her property, not only against her husband, but against all creditors of, and purchasers from him, whenever it is recoverable only in a court of equity, or the aid of that court is actually invoked for its recovery; unless the husband has become a purchaser of the property by an antenuptial contract with the wife. If it be recoverable at law, and the aid of a court of equity be not actually invoked to recover it, her equity does not exist. And it ceases to exist, though the property be recoverable in equity, whenever it has been actually recovered or received without any claim by her to a settlement. Whenever the husband, in right of his wife, has obtained possession of, and title to her property, his own title jure mariti, becomes complete; and the property, to the extent of his title, is subject to his right of disposition, and to the claims of creditors and purchasers, like any other property of his any otherwise acquired. 2 Story's Eq. § 1403. If he or they have occasion to go into a court of equity for its assistance in regard to property to which his title has thus become complete; that court cannot, as the price of its assistance, impose upon him or them the

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terms of a settlement out of it on the wife. The relief sought in such a case, being due ex debito justitiæ, must be decreed unconditionally. It may be laid down as a universal rule, that when property, by being reduced into the husband's possession, has once been released from the wife's equity, it can never again be subjected to it. I mean of course the wife's equity, technically so called; which overrides the
370 claims of the husband *and all persons claiming under or against him. 1 Lead. Cas. in Eq. 468, 498. Property acquired by the husband jure mariti, like any other property of his, may become liable to the equitable claims of the wife in a suit for a divorce a mensa et thoro, and perhaps in a suit for alimony. Id. 496–7. But such liability is subordinate to prior liens acquired under or against the husband.

It seems to have been at one time considered that real estate was not subject to the wife's equity; and, at all events, that it was not so subject if it were not a trust estate, but one in its nature legal, which becomes from collateral circumstances the subject of a suit in equity; as where the legal estate happens to be outstanding in a mortgagee. But both of these points were decided affirmatively in the case of Sturgis v. Champneys, 5 Mylne & Cr. 97; reported also in 9 Law J. N. S. p. 100. In that case the wife of an insolvent was entitled for her life to real estate which had been devised to her without the intervention of trustees; but the legal title was outstanding in certain mortgages, and the assignee of the insolvent was obliged to file a bill to make his title (subject to the incumbrances) effectual. It was held by Lord Chancellor Cottenham (reversing the decision of the vice chancellor), that the wife was entitled to a settlement out of the rents and profits of the estate during the coverture. In Hanson v. Keating, 4 Hare, 1, 30 Eng. Ch. R. 1, Vice Chancellor Wigram, who had been counsel for the assignee of the husband in Sturgis v. Champneys, remarked, that prior to that case the opinion of the profession had, he believed, become settled, that estates in land were not subject to the same equity, upon the broad and important principle of preserving a strict analogy between legal and equitable estates in land. But, in deference to that judgment, he followed it, "although (he further remarked),
371 *if that case were out of the way, I should probably have decided otherwise. There would be no difficulty (he said) in distinguishing the facts of this case from those in Sturgis v. Champneys; but the reasoning in that case would remain, and I cannot disregard it." That case has also been followed by other cases, and its authority seems to be now fully established in England. Freeman v. Fairlie, 11 Jur. 447; Newenham v. Pemberton, 17 Law J. Equity N. S. p. 99; S. C. 1 D. G. & Sm. 644. I have seen no American case in conflict with it. In Dold's trustee v. Geiger's adm'r, 2 Gratt. 98, no question was raised as to the liability of real estate to the wife's equity; but it was held not to be liable in that case, because the husband had the legal title and possession. See also Van Duzer v. Van Duzer, 6 Paige's R. 366; and Wickes v. Clarke, 8 Id. 161. In James, &c. v. Gibbs, &c., 1 Pat. & Heath 277, the Special court of appeals referred to and recognized the case of Sturgis v. Champneys, and decreed a settlement on the wife out of her real estate. It is unnecessary, however, in my view of this case, to decide the question, and I therefore express no opinion upon it, but will assume, for the purposes of the case, that the doctrine is alike applicable to real and personal estate.

As to the amount of the wife's property to be settled; the general rule at one time was, to settle upon her one-half of the subject. 1 Roper on Husband & Wife 260; 1 Leading Cas. in Eq. edition of 1859, p. 483. But this is a matter in the discretion of the court, which will take into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which may have been made. Id. Accordingly, in Coster v. Coster, 9 Sim. R. 597, three-fourths of the fund was settled on the wife by Sir L. Shadwell, V. C.; and in Napier v. Napier, 1 Drew. & Walk. 407, six hundred pounds out of a fund
372 *amounting to one thousand pounds, were settled on her by Ld. Ch. Sugden. It has been said that the court will not, except perhaps under very peculiar circumstances, settle the whole of the property on the wife. And in Beresford v. Hobson, 1 Madd. R. 362, in which the master, upon a reference, had approved of the settlement of the whole, Sir Thomas Plumer, V. C., sustained the exception taken to the report; observing, after an elaborate review of the authorities, that the question in most cases had been, how much the wife should have; and in determining that, the court had exercised a discretion, and had not tied itself down to any precise rule, but had never given the whole. But the whole has been given in many subsequent English cases, which are cited in 1 Lead. Cas. in Eq. 485. The American cases seem to be to the same effect, many of which are cited in the notes of Hare & Wallace to that valuable work, p. 499. This court, in Browning v. Headley, 2 Rob. R. 340, gave the whole to the wife. The true rule on the subject seems therefore to be, that the settlement should be reasonable and adequate, and may be of part or the whole of the property, according to the sound discretion of the court upon all the circumstances of the case. The usual practice is to refer it to a commissioner to enquire and report what would be a reasonable and adequate settlement. But the court may decide this question for itself, if there be sufficient material in the record for the purpose: and if it plainly appear that the whole property subject to the settlement is not more than adequate, a reference is of course unnecessary.

As to when the provision for the wife should take effect; this, also, is a matter

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of discretion with the court upon all the circumstances. If her husband lives with and supports her, it may be made to take effect when he ceases to do so, or at
373 his death. But *if he has deserted or ill treated her, or is insolvent, or is unable or fails to support her, it will be directed to commence immediately. 1 Lead. Cas. in Eq. 499.

The wife's equity is so substantial an interest that it will constitute a valuable consideration for a postnuptial settlement by the husband upon her (made while the equity exists), which will be sustained against his creditors, to the extent of the equity, by a court of chancery. Id. 500. "The same circumstances which would induce the court (said the V. C. in Wickes v. Clarke, 8 Paige's R. 166) to compel a settlement by the husband, or those claiming under him or in his right, will operate to uphold a deed of settlement already made, to the same extent that would be required if one should be directed to be made under the view of the court."

The equity of the wife will be administered to her, not only in a suit in which the husband or his assignee is plaintiff, seeking the aid of a court of equity to recover her property; but generally also, in a suit brought by her or her trustee for the purpose of asserting it. This was at one time doubted; it being supposed that the jurisdiction rested solely on the ground that he who asks equity should do equity; but it has long since been firmly established. 2 Story's Eq. § 1414; 1 Roper on Husb. and Wife 260; Elibank v. Montolieu, 5 Ves. R. 737; Newenham v. Pemberton, 17 Law J. Equity N. S. 99; 1 Lead. Cas. in Eq. 468.

There seems to be one exception to this general rule, and that is, where the property is in its nature legal, but the aid of a court of equity is invoked for its recovery on some collateral ground of jurisdiction; as, in the case of a mortgage debt recovered in a foreclosure suit. There, the wife's equity attaches solely on the ground that he who asks equity must do equity, and therefore cannot be asserted in a suit brought by her. 1 Roper on Husb. and Wife 258, 260.

374 *The argument of the counsel for the appellees, that the doctrine of the wife's equity, recognized and acted on by this court, is that which had been settled in England at the time of the establishment of our chancery court, and that we must therefore look only to the English decisions prior to that time to ascertain the law upon the subject, is, I think, untenable. The subsequent English decisions are, of course, not binding upon us; but they are entitled to great respect, and at least as much on this question as on any other.

Having stated so much of the doctrine as seems to be pertinent, I will now endeavor to apply the law to the facts of this case.

There can be no question but that the doctrine applies to Mrs. Poindexter's portion of her father's personal estate. That estate at his death devolved on his personal representative. His distributees at law, of whom she was one, could recover it only in equity. She asserted her claim to an equitable settlement out of her distributive portion before it was received or recovered by her husband, and before the report of partition of the estate was confirmed by the court. And though the report was confirmed and her portion received before the decree sustaining the settlement which had been made upon her by her husband, yet the confirmation was expressly subject to the future order or decree of the court upon her petition for a settlement which she had previously filed. The deed of settlement of the 20th of October 1852 was certainly executed before her husband received possession of her portion or any part of it; and that settlement, having afterwards been sustained by the decree of the court, is valid (if properly sustained), notwithstanding possession of the property was received between the dates of the deed and of the decree. The argument of the appellee's counsel, that the administrator of Bowyer, being also one of his distributees, by
375 bringing *the suit for partition, elected thenceforward to hold the subject as distributee and not as administrator; that the possession of one parcener is the possession of all; and that therefore Poindexter was in possession of his wife's portion of the personal estate before she claimed her equity, cannot be sustained. The administrator did not cease as such to hold the personal estate of his intestate, so far as the record shows, until it was actually distributed; until which time it was assets in his hands, and he was not bound to distribute it without refunding bonds.

Nor can there be any doubt as to the propriety of the decree approving and confirming the said deed. The settlement thereby made was certainly not excessive, in view of all the circumstances of the case. And the husband being insolvent and unable to support his family, it was properly provided in the deed that the property should immediately enure to the benefit and maintenance of the wife and children. The deed may not be in such form as the court would have prescribed; but the wife being satisfied with it, and having petitioned for its confirmation, the court properly confirmed it, as it did not prejudice the rights of the husband's creditors.

Then as to the real estate: Was the wife entitled to an equitable settlement out of her husband's interest in that estate (assuming the doctrine to be applicable to real estate)? She derived it by descent from her father, who at the time of his death was possessed thereof and had a legal title thereto. Her husband had no occasion to go into equity to obtain possession or complete his title. If any remedy had been necessary by reason of the act of a wrongdoer in taking or withholding possession, it would have been a legal remedy. But none was necessary. There was no interruption, either of the title or possession, both of which devolved at once upon the heirs
376 at law of her *father as coparceners.

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The possession of one was the possession of all the coparceners. 1 Lom. Dig. 489, marg. And the seizin of one was sufficient to entitle the husband of another to be tenant by the curtesy. Id. 69, marg. § 14; 1 Bright on Husb. and Wife, p. 117, ch. 10, § 1, Nos. 6 and 7. But here all were actually seized, so far as the record shows. Momentary seizin is sufficient to complete the husband's title. Id. No. 9. But in this case there has been no interruption of his seizin. A husband by becoming possessed of his wife's freehold estate of inheritance during the coverture, acquires a freehold interest during their joint lives, if there be no issue of the marriage, and during his own life, if there be such issue. In the former case, he and his wife are seized in her right, and in the latter he is seized in his own right as tenant by the curtesy initiate, and may maintain an action in respect to his freehold interest in his own name only. Id, p. 112, ch. 9, No. 1, 6, 8 and 9. In both cases, his interest is unconditional and unencumbered, and is subject to his right of disposition and liable to his debts. In this case, there being issue of the marriage, the husband became tenant by the curtesy intiate of his wife's interest in her father's real estate, and his freehold estate thus acquired is not liable to his wife's equity. That such an estate is not so liable, necessarily results from principles before stated, and has been expressly decided, not only in New York; Van Duzer v. Van Duzer, 6 Paige's R. 366; Wickes v. Clarke, 8 Id. 161; but also by this court; Dold's trustee v. Geiger's adm'r, 2 Gratt. 98. In the last mentioned case, Dold and wife brought a suit to recover her share of her father's real and personal estate on the ground that he had died intestate. After a protracted litigation, the intestacy was established and the plaintiffs succeeded. Pending the litigation the wife, by her next friend, filed a petition, praying
377 that her share of the *estate might be settled on her; and the husband by his answer assented. The Circuit court decreed accordingly; but with a proviso that the rights of the husband's creditors which may have attached upon the property before the execution of the settlement, should not be affected. The decree further confirmed a division of the real estate that had been previously made, and directed the wife's share to be delivered to the trustee, to be held for her separate use. The suit for the account and distribution of the personal and profits of the real estate, thereafter proceeded. The result of the suit showed that the share of the wife, exclusive of her share of the slaves, amounted to about four thousand five hundred dollars, much the larger part of which arose from the rents and profits of the real estate, hires of negroes and interest on personalty accruing during the pendency of the suit; and that her share of the slaves was in value about two thousand seven hundred dollars. This subject was by the decree of the Circuit court charged with a debt of the husband due by judgment, amounting in the aggregate, at the date of the decree, to about one thousand five hundred dollars. The trustee of the wife appealed from the decree, which was affirmed by this court. Judge Stanard thus concluded his able opinion in the case, in which the other judges concurred: "In respect to the rents and profits of the real estate, he (the husband) was at law and in equity absolutely entitled to them. Of that real estate there had been actual possession, by virtue of such actual possession by one or more coparceners, and they were accountable at law to the husband for the rents and profits, and he might sue therefor without joining the wife. This subject ought to have been charged, though the principal of the distributable share of the personal estate should be protected in the hands of the wife and her trustee by the relinquishment of
378 the husband. To *the tenancy by the curtesy of the husband in the real estate, he had legal title; and that was clearly chargeable with his debts, irrespective of his voluntary surrender thereof to the wife."

The husband's title as tenant by the curtesy having thus become complete, and not being liable to the wife's equity while the estate was held in coparcenary, no state of things which could afterwards arise could subject his interest to that equity. It then stood upon the same footing with his other property, and became alike subject to his right of disposition and the claims of his creditors. Therefore, he or his assigns or judgment creditors had a right to go into equity to have a partition of the real estate, and an allotment of his wife's portion thereof; and his judgment creditors had a right to the aid of that court in enforcing the lien of their judgments by a sale of his interest, without being subjected to the condition of a settlement on his wife or any other condition whatever. A parcener acquires no new right, nor is his old right enlarged by a partition. He is entitled to a partition as a legal incident to his estate in coparcenary; and it is merely a different mode of enjoying the estate, to which he may resort at his election. While the estate is held in coparcenary, his seizin is of an undivided interest, and pervades the whole estate. After the division and allotment, his seizin is confined to his several share, but as to that, is exclusive. And so too a judgment creditor of the husband coming into equity to enforce the lien of his judgment by a sale of an interest acquired by the husband in the wife's real estate, is seeking no new right nor to enlarge an old one, but is merely pursuing a remedy expressly given him by law to effectuate a legal lien upon his debtor's property. The wife having no inherent equity in such a case, can acquire none from the fact that she is a defendant to the suit. The
379 *maxim that he who asks equity must do equity, does not apply to the case. Hanson v. Keating, 30 Eng. Ch. R. 1.

The wife's equity attaches, as we have

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seen, only when resort must be, or is actually, had to a court of equity to reduce her property into her husband's possession, or complete his title thereto, and not when resort may be had to that court for any purpose after such possession has been obtained and title completed. The Special court of appeals decided otherwise in James, &c. v. Gibbs, &c., 1 Pat. & Heath 277; but, with the highest respect for the opinions of that court, I must say that I think the decision contrary to settled principles of law, if not to the decision of this court in Dold's trustee v. Geiger's adm'r, supra. And I am confirmed in this view by the fact that one of the learned judges who concurred in the decision of the Special court, afterwards decided this case otherwise in the court below, and must therefore have changed his opinion.

But it is argued by the counsel for the appellants, that as advancements had been made by the intestate to his children in his lifetime, a resort to a court of equity was indispensable to settle an account of the advancements, and ascertain the share to which each of the children was entitled in the partition of the estate; and that therefore the wife's equity attached to Mrs. Poindexter's share as well of the real as of the personal estate. I do not think this conclusion correct. Notwithstanding the fact that advancements happened to have been made to the children, the heirs had a legal title to, and were in possession of the inheritance to the extent of their respective interests, from the death of the ancestor. The title and possession of each parcener as to his undivided share was then complete. The occasion which afterwards arose to go into a court of equity for a par-
380 tition of the estate *and an allotment of the several portions, cannot affect or impair the right of any person concerned. The account of advancements is a mere incident of the partition, affecting of course the extent and amount of the several portions, but not the title of the parceners. The distinction is between going into equity to complete the husband's title, and going there for some purpose in regard to the property after the title is completed. In the former case, the wife's equity attaches; in the latter, it does not. Going into a court of equity for an account of advancements and partition of real estate descended and in possession of the heirs, is a case of the latter kind. And so is going there to enforce a judgment lien upon a husband's interest in his wife's portion of the estate.

It is further argued, that it does not appear of what the advancements consisted, whether of real or personal estate; and that Poindexter and wife may have been entitled to more personal, and less real estate than they received in the division. See Code, p. 525, ch. 123, § 15. The answer to this argument is, that the partition was fairly made, was not excepted to, and has been confirmed by the court. It must therefore now be considered that they received their due and relative portion of the real and personal estate.

I think there is no error in the decree of the Circuit court, and am for affirming it.

The other judges concurred in the opinion of Moncure, J.

Decree affirmed.

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381 *Spengler v. Davy.

July Term, 1859, Lewisburg.

1. **Continuances—Negligence in Preparing for Trial—Case at Bar.***—It is important to defendant to prove the precise sum of money paid to plaintiff and the date of payment, and he has summoned a witness to prove it, but he has not informed the witness what he was expected to prove, and though the witness was in possession of the books, which would have enabled him to give the evidence, not knowing that he would be called to give the evidence, he had not examined the books, and they were not at the place of trial. The defendant was culpably negligent in not informing the witness what was the point to which he would be examined and having had two continuances, the court properly refused to grant him a continuance in the cause.
2. **Removal of Causes—When Right Lost.**†—A cause which had been pending in a County court for more than a year, is called for trial, and a motion by the defendant for a continuance is overruled: and he then moves the court to remove the case to the Circuit court. The motion is properly overruled.‡
3. **Attachments—Probable Cause for Suing Out.**§—Justifiable probable cause for suing out an attach-

*See generally, monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676; also, *foot-note* to The Bland and Giles County Judge Case, 33 Gratt. 443.

†**Removal of Causes—When Right Lost.**—In Hogshead v. Baylor, 16 Gratt. 103, and *note*, it is said: "After the motion to continue was overruled, a motion was made to remove the cause to the circuit court because it had been pending in the county court more than twelve months. The court properly refused to remove the cause at that time, as has been decided in the case of *Spengler v. Davy, 15 Gratt. 381.*"

The principal case is cited and followed in Jelenko v. Coleman, 22 W. Va. 227, 230.

‡Code, ch. 174, § 1, p. 657; Sess. Acts 1850-51, p. 34. "Where any suit, motion or other proceeding, shall have remained pending, in a County or Corporation court more than a year without being determined, such court, on the motion of any party to such suit, motion or other proceeding, or his representative (without notice), shall order it to be removed to the Circuit court having jurisdiction over such county or corporation."

§**Attachments—Probable Cause for Suing Out.**—In Vinal v. Core, 18 W. Va. 40, it is said: "My conclusion, therefore, is that probable cause for instituting a prosecution is such a state of facts actually existing known to the prosecutor personally or by information derived from others, as would in law justify the setting on foot of the prosecution, that is, such as in the judgment of the court would lead a man of ordinary caution acting conscientiously upon these actual facts to believe the person guilty. These views are sustained in my judgment not only by

ment against the effects of a debtor, is, a belief by the attaching creditor in the existence of the facts essential to the prosecution of the attachment, founded upon such circumstances as supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to produce such belief.

4. **Malicious Prosecution—From What Malice May Be Inferred.**—The improper motive, or want of proper motive, inferrible from a wrongful act based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action for malicious prosecution.

5. **Pleading—Malicious Prosecution—Declaration—Irregularity Cured by Verdict.**—In an action for maliciously suing out an attachment against the effects of the plaintiff, the declaration alleges, that the attachment was sued out "wrongfully and without good cause," instead of "maliciously and without probable cause." Though this was irregular, it is cured by the verdict.[1]

382 *This was an action of trespass on the case, brought in September 1854 in the County court of Warren county, by William Davy against Samuel M. Spengler, for maliciously suing out an attachment against the property of the plaintiff. The declaration charged, that "the said Samuel M. Spengler wrongfully and without good cause, sued out," &c., and afterwards, to wit, on, &c., "wrongfully and without good cause caused certain property of the said William Davy to be taken and seized under said attachment."

At the November term of the court an issue was made up on the plea of "not guilty," and the cause was continued from term to term until the March term 1857. These continuances were general, except at the May and November terms 1856, when the cause was continued for the defendant. At the March term 1857, when the cause was called, the defendant by his counsel moved the court to continue it until the next term; and the counsel stated that he was credibly informed and believed that a material fact, viz: the date and amount of a certain payment made by the Manassas gap rail road company to the plaintiff (who was a contractor to build the abutments and piers of a bridge for the company over the Shenandoah river in the county of Warren) at, or a short time before, the time of the plaintiff's leaving the county of Warren, they were not able to prove by the witness, who was present on behalf of the defendant, unless he had the books of the said company, in which he had made the entry of the date and amount of the same. But there was no proof that witness had been informed what they wished to examine him about, or that he was requested to examine the books. And the counsel for the plaintiff asked what was expected to be
383 proved *by the said entry as to the date and amount aforesaid; and in reply, the counsel for the defendant said they were not able to tell the exact day or the exact amount thereof. Whereupon the counsel for the plaintiff stated they were willing to admit that the plaintiff received a large estimate a few days before Christmas, and a few days before the plaintiff left the county of Warren in the year 1853; which the defendant's counsel stated they were unwilling to receive in the place of the fact stated by the entry itself.

But the court referring to the frequent continuances of the cause as they appeared

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reason, but by the weight of the authorities. See Mowry v. Miller, 3 Leigh 561; *Spengler v. Davy, 15 Gratt. 381;* Scott & Boyd v. Shelor, 28 Gratt. 906; Munns v. Dupont *et al.*, 3 Wash., C. C. 31 (1 Am. L. C. 200); Hickman v. Griffin, 6 Mo. 37-42; Adams v. Fisher, 3 Blackf. 341; Raulston v. Jackson, 1 Sneed 182; Faris v. Starke, 3 B. Mun. 4-6; Hall v. Hawkins, 5 Humph. 257-259; Hall v. Suydam, 6 Barb. 84-99; Winebibble v. Porterfield, 9 Barr. 137; Lawrence v. Lanning, 4 Porter (Ind.) 196; Jacks v. Stimpson, 13 Ill. 701; Wheeler v. Nesbitt, 24 How. (U. S.) 544."

See also, the following cases citing the principal case for the above proposition: Burkhart v. Jennings, 2 W. Va. 257; Forbes v. Hagman, 75 Va. 180; Scott v. Shelor, 28 Gratt. 905, and *note*; Claflin v. Steenbock, 18 Gratt. 855, and *note*. See Womack v. Circle, 32 Gratt. 345, and *note*, where the principal case is cited. 1 Va. Law Reg. 233.

Malicious Prosecution—From What Malice May Be Inferred.—The improper motive, or want of proper motive, inferrible from a wrongful act based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action for malicious prosecution.

The above proposition is approved in Forbes v. Hagman, 75 Va. 183; Scott v. Shelor, 28 Gratt. 905, and *note*; Jerman v. Stewart, 12 Fed. Rep. 271, all citing the principal case. But in the last-named case the action was under a Tennessee statute which allowed the defendant in an attachment proceeding to recover from the plaintiff who fails to prosecute his suit with effect, the actual damages sustained, whether there was any malice or want of probable cause or not.

Pleading and Practice—Declaration—Irregularities Cured by Verdict.—In State v. Purcell, 31 W. Va. 44, 5 S. E. Rep. 304, it is said: "From the view we have taken of the main question in this controversy, it becomes immaterial to inquire whether special damages were sustained by the relator or not, as the judgment which the court should have rendered would have been the same in either event. Not having demurred to the declaration, whatever errors were committed by the plaintiff appearing on the face thereof are after a trial of the action by the court by consent of parties, as well as after a verdict, cured by the statute of jeofails, unless there be omitted something so essential to the action * * * that judgment according to the law and the very right of the case cannot be given. Section 3, ch. 134, and § 29, ch. 125, Code; Holliday's Ex'rs v. Myers, 11 W. Va. 282; *Spengler v. Davy, 15 Gratt. 381.*"

The principal case is also cited and approved in Burkhart v. Jennings, 2 W. Va. 257; Holliday v. Myers, 11 W. Va. 289, 292, 296.

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[1]Code, ch. 181, § 3, p. 680. "No judgment or decree shall be stayed or reversed" * * * * * "for any defect, imperfection or omission in the pleadings, which could not be regarded on demurrer, or for any other defect, imperfection or omission, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of."

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upon the record, overruled the motion. And thereupon the defendant excepted.

After the motion for a continuance of the cause had been overruled, the defendant moved the court to order the case to be removed to the Circuit court of Warren county. But the court overruled the motion, and directed the jury to be sworn therein to try the issues joined: and the defendant again excepted.

On the trial the jury found a verdict for the plaintiff for five hundred and sixty-six dollars sixty-six cents damages. And the defendant moved the court to set aside the verdict and grant him a new trial, on the grounds that it was contrary to the evidence, and that the damages were excessive. But the court overruled the motion, and entered up judgment upon the verdict: and the defendant again excepted. The facts are stated in the opinion of Judge Daniel.

The case was taken to the Circuit court of Warren county by supersedeas; but at the August term of that court for 1857, the judgment was affirmed. And thereupon the defendant applied to this court for a supersedeas; which was allowed.

The Attorney General, for the appellant.
Baldwin and Philip Williams, for the appellee.

384 *DANIEL, J. It seems to me that the plaintiff in error has failed to show good ground for reversing the judgment, in the refusal of the County court to continue the cause on his motion.

It is not to be denied that the fact, which the plaintiff in error, through his counsel, stated he expected to prove by the witness in court, if an opportunity was afforded him to refer to certain books to which he could not then have access, was one which might have a very material bearing on the case. Proof that the defendant in error, at, or a short time before the date of his leaving the county of Warren, had received a large sum of money, might, in the absence of proof that he had honestly paid it to his creditors, or other explanation, obviously go far towards establishing that the plaintiff in error had proper grounds for suing out his attachment. It appears, however, from the certificate of the judge, that there was no proof that the witness had been informed what he was to be examined about, or that he had been requested to examine the books; that, on its being demanded of the counsel of the plaintiff in error what they expected to prove by the books in respect to the amount of the money aforesaid and the date of its payment, they replied that they were not able to tell the exact day nor the exact amount; and that the counsel for the defendant in error thereupon expressed their willingness to admit that their client received a large estimate a few days before he left the county; which the counsel for the plaintiff in error stated they were unwilling to receive in place of the fact stated by the entry itself.

It does not appear that the plaintiff in error was present. It does not appear that he had informed his counsel of the date and amount of the payment in question; or that he indeed knew himself what the books would disclose in respect to that matter. It is not stated that the witness had
385 been expected to be *able to prove the exact date and amount of the payment without a reference to the books; nor is any reason suggested why there should or might have been any such expectation.

Under such circumstances, I cannot undertake to say that the County court has not properly exercised its discretion. The plaintiff in error was plainly remiss in not notifying the witness what he expected to prove by him, so that he might refer to the books if necessary; and when we take into consideration the further fact that the plaintiff in error had already been indulged with two continuances of the cause, the fair conclusion is that if he has lost the benefit of any important fact on the trial of his case, such loss is due, not to any injustice or harshness in the ruling of the court, but to his own culpable negligence.

It seems to me further, that the County court did not err in overruling the motion of the plaintiff in error to remove the case to the Circuit court of Warren county.

It must be conceded that the words of the law under which the motion was made seem to be very plain, and to leave but little room for construction. It simply declares that when any suit shall have remained pending in a County or Corporation court more than a year without being determined, such court, on the motion of any party to such suit or his representative (without notice), shall order it to be removed to the Circuit court having jurisdiction over such county or corporation. Code, ch. 174, § 1, p. 657. The pendency of the suit for more than a year without being determined, would, giving to the words of the section their full ordinary meaning, seem to be all that is required to make it imperative upon the court to remove it. Yet it would be absurd to suppose that such could have been the real intention of the legislature. It is manifest that in some instances a
386 rigid enforcement *of the law according to the letter, would conflict with other laws, and do violence to rights which we cannot for a moment suppose it was the purpose of the legislature to disturb or impair. The legislature could not have designed to vest a party with the absolute right, by his mere motion, in the midst of a trial before the jury, to arrest the progress of the cause, and have it ordered up to the Circuit court. Notwithstanding, therefore, the peremptory and unqualified language of the law, the utter want of justice and propriety manifest in a strict compliance with its letter, renders it indispensable that the courts, in administering it, should put some restrictions upon its terms, and make some exceptions to a literal observance of its requirements.

It is obvious, from the very nature of the subject, that the courts must have some con-

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trol as to the time at which, in the course and order of the proceedings in a cause, they will entertain such motions. The law embraces as well all the causes in chancery as all the cases at law which may have been depending for more than a year in the County courts. Was it the design of the legislature to give to a party the right, after the argument in a chancery cause has commenced, abitrarily, to stop the argument and remove his case to the Circuit court? Is a plaintiff, in an injunction cause, who has made an unsuccessful motion for a continuance, to be allowed, by such a step, to stay the action of the court, and avoid a dissolution of his injunction? Or, to take the case before us, has a party to a suit at law, who has made a motion to continue, which has been heard and overruled, a peremptory right to thwart and reverse the decision of the court and defeat his adversary of a trial by removing the case to the Circuit court? Each of these questions must, I think, be answered in the negative.

A reference to the provisions of the
387 1st and 2d sections *of chapter 174 of the Code, and the previous laws on the subject, renders it manifest that the true object of such legislation has been to insure to parties to suits in the County and Corporation courts, the speedy and impartial trial of their causes. The removal of a cause to the Circuit court, after it shall have been pending in a County or Corporation court for more than a year, on the motion of any one of the parties, is one of the means which the legislature has provided for attaining the ends in view. The language of the section in which this provision is made, it is true, is mandatory and not permissive; still, the nature of the subject, as I have said, forbids the idea that a court, in passing upon such a motion, has not a right to consider it in reference to the then state and condition of the cause in which it is submitted.

Upon such a reference in the present case, without instituting any further enquiry into the objects of the motion, the County court must have seen that the inevitable effect of granting it would be, not to further but to defeat the purposes of the law, and to allow the plaintiff in error to baffle and set at naught the action of the court in a matter upon which he had just before invoked its judgment, and visit his adversary with the very evil for which it was the design of the law to afford to both parties an efficient remedy. I think the motion was properly overruled.

The question next to be considered is, whether the County court erred in overruling the motion for a new trial. And in considering this question, we have to enquire, first, what it was incumbent on the defendant in error to prove; and secondly, whether he has proved it. The elements of the action are malice and the want of probable cause. In the celebrated case of Johnstone v. Sutton, 1 T. R. 493, 545, the essential ground of the action was declared to be that the proceedings complained of were had without a probable
388 *cause, inasmuch as from the want of such cause the other main ingredient, malice, may be, and most commonly is implied; whilst from the proof of express malice the want of probable cause cannot be inferred. That was the case of an action for a malicious prosecution before a court martial; but there is no material difference between such actions and actions for the malicious prosecution of civil suits in respect of the grounds on which they rest.

In the case of Manns v. Dupont & al., 3 Wash. C. C. R. 31, probable cause is said to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offence with which he is charged." In Hare & Wallace's notes to this case, 1 Amer. Lead. Cas. 213, the annotators select this as one of the best definitions of the term that has been given. Modifying the definition so as to adapt it to such a case as the one before us, we may, I think, properly define justifiable probable cause in cases of the kind to be, a belief, by the attaching creditor, in the existence of the facts essential to the prosecution of his attachment, founded upon such circumstances as, supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to induce such belief.

It is true, that in the case of Mowry v. Miller, 3 Leigh 561, Judge Tucker, in delivering the opinion of the court, said, that as no man can maintain an action for malicious prosecution, where there was probable cause, it was obvious that those words should be made to refer to the state of fact as it respects the person prosecuted, and not to the degree of knowledge of that fact in the party prosecuting. It will be perceived, on a reference to the case, that the action there was against the defendant for having procured a third person to institute a malicious prosecution for felony
389 *against the plaintiff. There was a demurrer to the declaration; and Mr. Stanard, in the course of his argument, had endeavored to show that the declaration was defective in that, according to the fair meaning of its allegations, it did not allege that the defendant, without probable cause, advised and procured the prosecutor to institute the prosecution, but that he advised and procured the prosecutor, without probable cause, to institute it. The judge, in his notice of this objection, had already shown conclusively, by a reference to the declaration, that the objection was without any sufficient foundation, inasmuch as the charges of malice and probable cause stood, in the declaration, in connection, not only with the institution of the prosecution, but with the agency of the defendant in averring and procuring it. The proposition of law under consideration, subsequently stated by him, was, therefore, obviously, in his view, not essential to the decision of

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the case, and we may hence fairly conclude, was not weighed with the same degree of care that he would have bestowed upon it had he taken a different view of the true meaning of the declaration. No case was cited by the learned judge in support of the proposition; and carried out to its full extent, it is opposed by the current of authority, and is, as I conceive, clearly inconsistent with the true theory of such actions. To refer the question of probable cause exclusively to the state of fact as it respects the person prosecuted, would be in effect to allow a party sued for a malicious prosecution to say to the plaintiff, by way of defence, "it is true you are innocent of the offence with which you were charged, and at the time of instituting the prosecution I knew of no circumstance to justify me in believing you to be guilty, and did not so believe, but I have since ascertained that there existed at the time certain
390 facts and circumstances, *which, had they been then known to me, would have warranted me in believing you guilty."

The law, in departing from the ordinary rules of pleading and proof, and imposing upon an innocent man, wronged by a criminal prosecution, the burden of negativing probable cause as the foundation of the prosecution, does not proceed upon the idea that he is in fault in having become an object of suspicion, but upon considerations of public policy, requiring to some extent a sacrifice of private rights. Crime would often go unpunished for the want of some one to set on foot its prosecution, if the prosecutor was in all cases to be held bound to make good the charge; and it is thought to be better that innocent men should sometimes have to submit without redress to the hardship and injustice of being falsely charged with crime, than that the members of the community should be deterred from the exercise of a proper diligence and activity in bringing offenders to justice, by the fear of exposing themselves to suits by persons prosecuted upon appearances of guilt which turn out to be fallacious and deceptive. No considerations of the public good, however, can require that the partial denial of redress to innocent men falsely charged with crime, on the one hand, or the protection to those who honestly engage, upon reasonable grounds, in the prosecution of supposed offenders, on the other, should be extended to the case of an innocent man visited with the evils of a criminal prosecution instituted against him by one having at the time no belief in his guilt, and ignorant of any circumstance calculated to produce such belief. Accordingly, the cases are, generally, found holding that probable cause consists in the concurrence of belief of guilt with the existence of facts and circumstances, sufficiently strong to warrant such belief; or, in other words, that probable cause
391 is, substantially, *belief of guilt founded on reasonable grounds. Cabiness v. Martin, 3 Dev. Law R. 455; Ralston v. Jackson, 1 Sneed's R. 128; Hall v. Suydam, 6 Barb. S. C. R. 83; Foshay v. Ferguson, 2 Denio R. 617; Siebert v. Price, 5 Watts & Serg. R. 438; Faris v. Starke, 3 B. Monr. R. 4; and cases cited in 1 Amer. Lead. Cas. 213-14.

Applying these principles to the facts of the case, it is difficult to conceive how the jury could well have rendered any other verdict than the one they gave.

The leading facts of the case are, that Davy had contracted with the Manassas gap rail road company to build the abutments and piers of a bridge across the south branch of the Shenandoah, abutting, on one side, on the lands of Spengler: that he had lived in Warren county about eighteen months before the suing out of the attachment, and that he had been at work on the bridge from February 1853 to the 26th of December 1853, say ten months; during which time he boarded with Spengler, the plaintiff in error: that he employed a large number of hands, and in the months of November and December had forty-two hands at work on the bridge: that he had received from the company, a few days before the 26th of December, a large estimate on account of work on the bridge, the exact amount of which was not known, and that on that day he paid out to his hands who were present, about two thousand dollars, leaving something still due to some of them, of whom he asked at the time whether the amounts severally paid to them would do; that he paid nothing to Spengler, or Richards, or Massie (who also took out attachments) at that time, neither of them being present: that on the same day he went to Winchester on his riding mare, carrying with him most probably no other property or money than enough money to pay his expenses, stating to his manager (the witness), about the time of leaving, that he was going to Winchester
392 *to purchase steel: that he left upon the lands of Spengler all the property afterwards attached, consisting of goods in a store-house, tools necessary for the prosecution of the work, &c.; of the value of which we have no further proof than that it was sufficient to pay the amount of Spengler's judgment, and that he had no other property in the state, unless something was due him from the company: that the wife of Davy at that time resided in Washington city, and that he always considered that place his home: that Davy was seen in Winchester on the day he left the work, by a witness, to whom he stated that he intended to return the next day; that on the night of the day just first mentioned, he was seen in Winchester by another witness, who states that at his request he accompanied him to two hardware stores to purchase steel, but that Davy declined buying, saying that he could get it in Alexandria at a lower price, and would purchase there: that there was a considerable fall of snow the same night, but whether it had fallen before the occurrences stated by the last witness, is not shown: that on the 2d of January after the holidays, and after the

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snow had abated, the manager of Davy went to work on the bridge with twenty-five hands, and continued at work till the 9th of January, when Spengler's attachment was levied: that on the 17th of the same month Davy returned, bringing the mare on which he had ridden off: and that after some interruptions to the work, caused by the levy upon the tools and other property, and their subsequent sale, the prosecution of the work was fully resumed in February, and continued by Davy and his hands, till it was completed in October 1854.

It was further proved, that up to the time of the suing out of the attachment the credit of Davy was good, and that he was regarded as a man of integrity.

It was also proved by the manager
393 of Davy, that *shortly before the suing out of the attachment, Spengler came to him and enquired whether he or the clerk or any of his hands had heard from Davy, and also whether he had ever known Davy on any other occasion to be so long absent from his work; and that in reply he informed Spengler that Davy had not been heard from since he left, so far as he knew; but that he supposed that owing to the snow Davy had supposed that the work would be suspended for a while, and had gone to Washington to see his wife; that he had known him once to be absent for three weeks whilst engaged on another work in Warren, and that when he then left he requested the witness to attend to the work in his absence for him, and did not fix any time for his return.

It was also proved by one of Spengler's witnesses, that he lived at Spengler's house at the time of the suing out of the attachment, and for some time before; that he had frequently heard Davy complain that he was not making any thing on the work, and wished he was away, and he seemed to be out of humor with the place.

No witness gives evidence of any other fact or any other declaration by Davy than what is disclosed in the foregoing statement, tending in any degree to show a purpose on his part to remove his property. It was all left on the premises of Spengler; and there is an entire absence of proof going to show that Davy had made any attempt to carry it away, or to sell it or assign it. The fair inference from the facts is, that the estimate he received was fairly distributed out amongst his hands, according to their claims and wants; and that he contemplated the faithful prosecution and completion of the important work on which he was employed, was to be presumed from the fact that, after the slight interruption to its progress occasioned by the holidays and the fall of the snow, his manager
394 had *resumed the work with a strong and sufficient force, and was actively engaged in its prosecution at the time the attachment was sued out.

That it was not an unusual thing for Davy to absent himself from the work on visits to Washington, is directly inferrible from the statement of one of the witnesses, that his usual mode of traveling to Alexandria and Washington was by the rail road, which was completed to a point within six miles of the bridge; and when it is considered that Davy boarded with Spengler, and that the latter could not well be ignorant of the fact that his wife resided in Washington, it is difficult to conceive why, unless he was too ready to indulge in suspicion, he should not, on a view of the facts before him, have been satisfied with the very reasonable manner in which the absence of Davy was accounted for by his manager. I can see no ground on which Spengler could have reasonably founded a belief that Davy had removed or was about to remove his effects so as to endanger the collection of his debt. In the absence of such ground, the jury had a right to infer malice; which in such cases is to be understood in its legal sense, and not in its popular signification of anger, malevolence or vindictiveness. The improper motive or want of proper motive inferrible from a wrongful act based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action; and the most charitable construction of Spengler's motives in suing out the attachment that can be given, is, that he acted upon slight circumstances of suspicion, inducing an unreasonable solicitude, on his part, for the safety of his debt, and a corresponding want of consideration as to the serious and irreparable wrong which his harsh proceeding was calculated to inflict upon the credit and other interests of his debtor.

The proposition advanced in the
395 course of the argument *here, that Davy was precluded by the judgment on the attachment from showing that Spengler had no reasonable ground to believe that he was removing or had removed his effects, &c., is met by the answer that no objection was made to the introduction of any of the evidence in the court below. Davy did not return till after the judgment against him for the debt claimed had been rendered, and an order made for the sale of the attached effects.

If, upon the rehearing of the case, irregularly obtained upon his petition, it was competent for him to have gone into the question whether the attachment had been founded on reasonable grounds (about which I express no opinion), it appears no such issue was tried or tendered. On the trial the plaintiff in error, if he could have relied on any estoppel, failed to do so, and there seems to have been a free, fair and full trial on the merits.

As to the objection that Davy was entitled to recover no damage growing out of the sale of his property, as he failed to stay the sale by giving bond, it seems to me sufficient to say that, supposing it competent for him to have pursued such a course, and that it was within his power to give such bond, he was not bound to give it. His action proceeds on the ground that the suing out and prosecution of the attachment were wrongful and malicious. The plaintiff in

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the attachment was acting at his own peril, and cannot be heard to complain that the defendant did not hinder him, in the sale which he was seeking to have, by complying with the onerous condition of giving bond and security to pay the judgment. Besides, the loss occasioned by the sale of his property was but an item in Davy's claim on account of damages, and the whole question of damage was fully before the jury.

I can see no ground for interfering with the verdict of the jury on the alleged
396 ground of excessiveness. *The law has not, and from the nature of things, cannot set up any precise standard by which the damages are in such cases to be fixed and ascertained; and the space is necessarily broad, within the limits of which the court must accept the verdict of the jury as the true and only measure of damage. In this case, the verdict is not so heavy as to induce the belief that the jury have been in any degree influenced by prejudice or passion.

The declaration in this case is irregular, in that it charges that the attachment was sued out wrongfully and without good cause, instead of maliciously and without probable cause; and doubts have been suggested since the argument of the cause, whether this irregularity is cured by the verdict. In the case of Ellis v. Thilman, 3 Call 3 (which was a case for a malicious prosecution), the allegation was that the prosecution was malicious and without any just cause. In the case of Young v. Gregorie, Id. 446 (case for the illegal suing out, &c., of an attachment), it was alleged that the proceedings were had maliciously and without any legal or justifiable cause. And in Kirtley v. Deck and others, 2 Munf. 10 (case for a conspiracy in preferring, &c., a malicious prosecution for a felony), the allegation was that the defendants falsely and maliciously conspired, &c., to prefer a false and malicious prosecution, &c.; but there was no averment that the prosecution was without probable cause. In each of these cases, it was held that the declaration was radically defective, and was not cured by the verdict. In these cases, it was said that the words without probable cause, or some equipollent expression, were essential to make a good declaration, and it was held that the words without any just cause, in the first mentioned case, and without any legal or justifiable cause, in the second, could not be received as equivalents for the words which the law required. It is to be observed, however, of all of these
397 cases, *that they were decided in the absence of some of the most sweeping of the provisions of our present statute of jeofails, and more especially of that which declares that no judgment after verdict shall be stayed "for any defect whatsoever in the declaration or pleading, whether of form or of substance, which might have been taken advantage of by a demurrer, and which shall not have been so taken advantage of;" which was first introduced at the revisal of 1819; and was re-enacted in 1849, with slight modifications, not necessary to be here noticed. See Code of 1849, p. 680.

It is true, that broad and comprehensive as is the language of the provision, this court has felt called upon, on several occasions, to set some limits to its operation, and to declare that there are some defects in declarations which are beyond its cure. Still it will be seen, on a reference to the cases alluded to, that none of them can be used as precedents for excluding this case from the benefit of said provision. The first of them (in order), Mason v. Farmers Bank at Petersburg, 12 Leigh 84, was the case of a suit by the plaintiff against the president and directors of a branch bank, in which the declaration complained of them as "the president, directors and company of the office of discount and deposit of the Farmers Bank at Petersburg." This court held, that no judgment could be rendered, as the declaration was against parties who could not be made liable to any action. There was no such corporation in existence. The declaration plainly showed that the cause of action was against the "president, directors and company of the Farmers Bank of Virginia." In the second case, that of Ross v. Milne and wife, 12 Leigh 204, the declaration plainly showed that the plaintiffs had no cause of action, and that the right demanded was in a third person. And in the third case, that of Boyle's adm'r v. Overby, 11 Gratt. 202, which was a suit against an admin-
398 istrator *for an alleged cause of action against his intestate, the declaration alleged a cause of action which from its very nature must have died with the person of the intestate.

In neither one of these cases was there any room for the inference of facts, supplementary to and consistent with those alleged by the plaintiff, that could make out a good cause of action. In each case, the allegations of the plaintiff showed affirmatively that he had no right to recover.

The distinction between such cases and the one in hand, is too marked to require comment. Proof that the attachment was prosecuted maliciously and without probable cause, would be entirely consistent with the allegation that it was prosecuted wrongfully and without good cause; and it might well be that the very same testimony relied on to establish the latter allegation, might furnish sufficient proof of the former also.

I am free to confess that I have not been able to bring my mind to a conclusion entirely satisfactory as to the precise scope of the provision under consideration. It seems to me, however, that if the present case were to be excepted out of its operation, it would be a very difficult task to say at what point such exceptions should stop. The case is plainly within the letter of the statute; and I can see no sufficient reason for supposing that it is not within its meaning; whilst I am entirely satisfied

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that the case has been fully tried and justly decided on its merits. The supposed defect does not appear to have been, in any manner, brought to the notice of the County court; it is not assigned as one of the causes of error in the petition for a supersedeas to the Circuit court; nor in the petition to this court; nor (if noticed at all) in the argument here, was it insisted on as a ground for arresting the judgment.

Under these circumstances, it seems
399 to me that the *just and proper mode of disposing of the question is simply to read and administer the law in respect to it as it is written, leaving to the court, on some future occasion, when aided by the arguments of the bar, the task of ascertaining and setting out with more fullness and precision than has been yet attempted, the exact meaning and limits of the statute.

I see no error in the judgment, and am for affirming it.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

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400 *Marks & als. v. Hill & als.

October Term, 1859, Richmond.

1. **Deeds of Trust to Secure Creditors—*Continuation of Business by Trustee.** §—A provision in a deed of trust to secure creditors, that the trustee may continue the business and replenish the stock, if intended merely as a means of realizing the trust fund, and with a view to winding up the business, is not fraudulent *per se*, so as to avoid the deed.
2. **Same—Same—†Employment of Grantor to Conduct Business.**§—In such a case a provision in the deed that one of the grantors shall attend to the business, but he being under the control of the trustee, who may at any time on his motion, and shall at the request of creditors, sell the property at auction, is not fraudulent *per se*, so as to avoid the deed.
3. **Partnership—Application of Social Effects to Pay Individual Debts.**‡—Partnership effects may be applied, by the concurrence of the partners, to pay an individual debt of one of them, if the other receives a sufficient consideration therefor, though they may be unable to pay all their partnership debts.
4. **Same—Same—Case at Bar.**—H and N form a partnership, each to put in two thousand five hundred dollars. N borrows the money on his own note with security. H is unable to borrow on his own credit; and with the consent of N gives the note of the firm for the amount. They fail, and agree that both notes shall be paid out of the partnership assets; and the assets are conveyed in trust to secure these debts as well as other partnership debts. The agreement is upon a sufficient consideration, and valid against partnership creditors not secured by the deed.
5. **Fraudulent Conveyance—Prayer for General Relief—Right to an Account.**§—In a bill by creditors to set aside a deed of trust for payment of debts, on the

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*__Deeds of Trust to Secure Creditors—Continuation of Business by Trustee.__—It seems well settled in Virginia that a provision in a deed of assignment to secure creditors, that the trustee may continue the business and replenish the stock in order to realize the trust fund, and wind up the business, is not fraudulent *per se*, so as to avoid the deed.

The principal case was cited as authorizing this proposition in Williams v. Lord, 75 Va. 401; Catt v. Knabe Mfg. Co., 93 Va. 736, 26 S. E. Rep. 246; Hurst v. Leckie, 97 Va. 555, 34 S. E. Rep. 464; Harden v. Wagner, 22 W. Va. 364; Shattuck v. Knight, 25 W. Va. 598; Kyle v. Harveys, 25 W. Va. 729; Landeman v. Wilson, 29 W. Va. 726, 2 S. E. Rep. 216 (dissenting opinion of SNYDER, J.); Ruffner v. Mairs, 33 W. Va. 662, 11 S. E. Rep. 7. See also, cases collected in *foot-note* to Gordon v. Cannon, 18 Gratt. 387.

†__Same—Same—Employment of Grantor to Conduct Business.__—So, also, a provision in the deed, that one of the grantors shall conduct the business under the control and direction of the trustee, who may at any time on his motion, and shall at request of creditors, sell the property at auction, is not fraudulent *per se*, so as to avoid the deed.

See the principal case cited in Gordon v. Cannon, 18 Gratt. 400; Catt v. Knabe Mfg. Co., 93 Va. 740, 26 S. E. Rep. 246; Harden v. Wagner, 22 W. Va. 366, 368; Landeman v. Wilson, 29 W. Va. 724, 2 S. E. Rep. 215 (dissenting opinion of SNYDER, J.); Conaway v. Stealey, 44 W. Va. 169, 28 S. E. Rep. 796; in all of which cases the principal case is cited as authority.

__Same—Inconsistent Reservation by Grantor.__—In Perry v. Shen. Nat. Bk., 27 Gratt. 757, the court said: "It was held by this court in Lang v. Lee, 3 Rand. 410, 'that a deed of trust made by the debtor professedly for the indemnity of certain preferred creditors, reserving to the grantor a power over the property conveyed, inconsistent with the avowed purposes of the trust, and adequate to the defeat thereof, was, because of such reservation, void as to any creditor thereby postponed.' This case, and the doctrines it established was affirmed and approved in the cases of Sheppards v. Turpin, 3 Gratt. 373; Addington v. Etheridge, 12 Gratt. 436; and Marks v. Hill, 15 Gratt. 400; and may now be held as the settled law of this state." See also, the principal case cited as to this proposition in Wray v. Davenport, 79 Va. 24; Saunders v. Waggoner, 82 Va. 323; Hughes v. Epling, 93 Va. 426, 25 S. E. Rep. 105. See also, *foot-note* to Perry v. Shen. Nat. Bk., 27 Gratt. 755; *foot-note* to Quarles v. Kerr, 14 Gratt. 48.

In 5 Va. Law Reg. 563, the editor says that careful practitioners are accustomed to study anew the famous case of Marks v. Hill, 15 Gratt. 400, whenever called upon to draw general deeds of assignments, particularly those covering a stock of merchandise which it is deemed desirable to close out in the course of trade, and to authorize the trustee to replenish with staple articles necessary to retain old customers and aid in disposing of the stock.* The editorial closes by saying that the Virginia practitioner, experienced or inexperienced, would do well to carefully study the two cases of Marks v. Hill, and Hurst v. Leckie, 97 Va. 550, 34 S. E. Rep. 464, before undertaking to draw elaborate deeds of assignments.

‡__Partnership—Application of Social Effects to Pay Individual Debts.__—See principal case cited in Snyder v. Lunsford, 9 W. Va. 229.

§As to assignments for the benefit of creditors, see further, monographic *note* on "Voluntary and Fraudulent Conveyances"; monographic *note* on "Assignments for the Benefit of Creditors."

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ground that it is fraudulent on its face, the bill does not ask for an account, but there is a prayer for general relief. Though the deed is sustained as valid, the plaintiffs are entitled to an account.

6. **Same—Same—Same—Appellate Practice.**—In such case, the court below having dismissed the bill generally, and it not appearing that the plaintiffs asked for an account or that the court considered the question, the appellate court will affirm the decree sustaining the deed, and reverse it as to the account; but with costs to the appellee.

This was a bill filed in the Circuit court of Petersburg in January 1856, by
401 Grandison F. Marks and *others, judgment and execution creditors of Hill & Nichols, to set aside a deed of trust executed by William R. Hill and Dudley Nichols, to R. R. Collier in June 1854, to secure certain debts therein mentioned, upon the grounds that upon its face it was fraudulent in law and void as to creditors. Hill & Nichols commenced business in Petersburg in 1853, their stock consisting of household ware, fancy articles, and "notions" generally; and in June 1854, finding the business unprofitable, they made the deed complained of in the bill; by which, to secure a debt which the deed states Hill owed to William A. Bragg of two thousand five hundred dollars, and an accommodation note for two thousand dollars, which had been discounted for Nichols at the Farmers Bank, and endorsed first by R. S. Thompson and second by Collier, and to secure debts of the firm of Hill & Nichols, contained in a schedule to the deed, they conveyed to Collier all their stock of goods, effects and credits, of which an inventory had just been taken, in trust that Collier, with the consent in writing signed by William A. Bragg and R. S. Thompson, should permit Nichols, as agent, to carry on said business, the stock of which was thereby assigned, with authority to replenish the said stock, for the purpose of paying off the debt of Hill to Bragg and the note to Nichols at the Farmers Bank. And forasmuch as the said Collier had made himself liable to pay the debt to Bragg, as was understood between Bragg and Collier, Hill surrendered all interest he had in the business of Hill & Nichols. And in trust also that Collier should proceed to dispose of the effects of the firm and collect the credits specified in a schedule annexed to the deed, and pay the debts of Hill & Nichols, specified in another schedule. And out of the collections of said credits and any sale of said effects, if any, first to pay the expenses of the trust, including for the trustee a commission
402 of five cents in the dollar, *out of all the trust subject; and then pay, first, the "borrowed money," and next pay ratably the debts in the aforesaid schedule.

An it was stipulated by the parties to the deed, that the agency of Nichols should be arrested whenever Bragg, Thompson or Collier, or any other three of the creditors, should in writing give direction to Collier to make sale of the stock of goods by auction, in such way as Collier might judge best for the benefit of all interested. And after satisfying the trust, Collier should pay over any balance of proceeds and deliver any remnant of the effects and of the stock of goods to the order of Nichols.

The bill charged, that at the time of making the deed William R. Hill and Dudley Nichols were utterly insolvent; and that the plaintiffs' executions against them were returned "no effects:" and that appeared from the return thereon. The objections to the deed were: First—That the partnership effects were conveyed to pay the individual debt of Hill to Bragg and of Nichols to the Farmers Bank; debts which were contracted by each of them to raise the capital which each was to put into the partnership. Second—That Nichols was authorized to carry on the business with the stock conveyed by the deed, without limitation as to time, and with authority ot the agent to replenish the stock. And it is charged that the trustee had continued through the agency of Nichols to carry on the business up to the time of filing the bill or a short time previous.

Hill, Nichols, Collier and Bragg answered the bill separately, though all concur in the grounds of defence. They deny all fraudulent intent in making the deed, and aver that its provisions were made with the purpose to advance the interest of the creditors; all of whom were intended to be included, though some were inadvertently omitted. They say that Hill not
403 *being able to raise the sum of money which by their agreement he was to put into the business, he, with the assent of Nichols, gave to Bragg, from whom he borrowed the money, the note of Hill & Nichols for it: and this is proved by the note which Bragg exhibited with his answer. They say further, that Nichols borrowed his capital from the Farmers Bank, with Thompson and Collier as his sureties; but that as the partnership was bound for Hill's capital, it was thought but reasonable, and it was agreed between Hill & Nichols, that the debt of the latter to the Farmers Bank should also be paid out of the partnership effects; and as both debts were for borrowed money which had been laid out in the purchase of their stock in trade, and was represented by the goods in hand and the debts due them, that it was proper these debts should be preferred. As to Collier's interest in these debts, he was not bound for that of Bragg but by his signing the deed, which he supposed furnished him the means of paying it; and he was the second endorser on the debt due to the Farmers Bank; Mr. Thompson the first endorser, having ample means to pay it.

It was further stated, that as soon as the deed of trust was executed, possession of all the property was delivered to the trustee. That the stock, consisting of miscellaneous wares, fancy goods and "notions," would have been ruinously sacrificed at public auction: many of the articles could be "worked off" in the course of trade, which

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would be thrown away if forced upon the market. That for the benefit of the creditors, the deed gave to the trustee a qualified discretion as to the time and mode of disposing of the property. That to secure custom and work off the bad stock, it was necessary to renew the supply of such articles as were in common use and would command ready sale. And that it was not for the purpose of continuing the business, but simply to enable the trustee to
404 *dispose of the whole stock to the best advantage, that he was authorized, with the consent of the cestuis que trust, to replenish the stock until opportunity should occur to sell it to advantage. That Nichols, from his acquaintance with the business, was thought best fitted to act as agent for the trustee: he retained no right under the deed to manage the property. That in fact he acted as such agent only until he obtained employment elsewhere about the 1st of January 1855.

The cause came on to be heard on the 4th of June 1855, upon the bill, answers, the replications thereto and exhibits, when the court held that the deed had been executed in good faith, and was not invalid for any thing on its face; and therefore dismissed the bill with costs. And the plaintiffs thereupon applied to this court for an appeal; which was allowed.

Joynes, for the appellants, insisted:

1st. That the deed was void, because it provided that Nichols should carry on the business. And he distinguished between the cases in which the trustee employed the grantor as his agent, to act for him, subject to his control, and for whose acts the trustee was responsible as for his own; which he admitted might be done; and the case in which it was a condition of the deed that the grantor should act; and therefore deriving his authority from the source from which the trustee derived his, he was necessarily independent of him to the extent of the authority conferred upon or retained by him. He referred to McClurg v. Lecky, 3 Penr. & Watts' R. 83; Nicholson v. Leavitt, 4 Sanf. S. C. R. 252, 273; Shattuck v. Freeman, 1 Metc. R. 10; Vernon & al. v. Morton, 8 Dana's R. 247.

2d. That the deed was void, because Nichols was authorized to continue and carry on the business, and for this purpose to replenish the stock: thus subjecting the whole trust subject to the casualties
405 incident *to the business, by which it might be lost or wasted. And again he distinguished between the cases in which the business was allowed to be carried on for a time with a view to the more advantageous disposal of the trust subject; and the case in which authority was given to carry on the business indefinitely, and to replenish the stock in order to give it vitality and success. He referred to Janes v. Whitbread, 5 Eng. Law & Equ. R. 431, as a case of the first class, and Owen & Wish v. Body & als., 31 Eng. C. L. R. 254, as establishing the principle of the other; and he insisted that this case came within the principle of Owen, &c. v. Body; Lang v. Lee, 3 Rand. 410, 425; Sheppards v. Turpin, 3 Gratt. 373; Spence v. Bagwell, 6 Gratt. 444; Addington v. Etheridge, 12 Gratt. 436; American Exchange Bank v. Inloes, 7 Maryl. R. 380; Whallon v. Scott, 10 Watts' R. 237; Hafner v. Irwin, 1 Ired. Law R. 490.

3d. That the debts to Bragg and to the Farmers Bank were the individual debts of Hill & Nichols; and they being insolvent when they made the deed, could not convey the partnership assets to pay them to the injury of the partnership creditors; and if the debt of Hill to Bragg, being secured by the partnership note, might be paid out of the partnership assets, that was not the case as to Nichols' debt to the bank; and there was no consideration to sustain Hill's conveyance to secure that debt. The deed therefore was void as to both, or at least one of these debts; and as it did not give the surplus of the fund devoted to the satisfaction of these debts to the other creditors secured by the deed, the appellants were entitled to have this fund applied to satisfy their debts. On the last point, he referred to Coly. Part. § 914 to 918; Tate v. Liggat, 2 Leigh 84. As to the power of one partner to convey assets of the partnership to pay the debts of the other, he referred to Hutchison v. Smith,
406 *7 Paige's R. 26; Nicholson v. Leavitt, 4 Sanf. S. C. R. 252; Burtus v. Tisdall, 4 Barb. S. C. R. 571; Collins v. Hood, 4 McLean's R. 186; Ferson v. Monroe, 1 Foster's New H. R. 462; Kirby v. Schoonmaker, 3 Barb. Ch. R. 46; Allen v. Chester Valley Co., 21 Conn. R. 130; Murrill v. Neill, 8 How. U. S. R. 414; McCullough v. Sommerville, 8 Leigh 415.

4th. That the court erred in dismissing the bill, the plaintiffs below being entitled to an account, and to have the surplus of the trust fund after the debts provided for in the deed were satisfied. Janney v. Barnes, 11 Leigh 100; Skipwith v. Cunningham, 8 Leigh 271. And that this might be had under the prayer for general relief, he referred to these cases, and also to Watts v. Waddell, 6 Peters' R. 389; Bailey v. Burton, 8 Wend. R. 339.

John Lyon, for the appellees, insisted:

1st. That the object of Hill & Nichols in providing for a private sale of the stock of goods, was to benefit their creditors, not themselves. They gave up everything they had, and still remained liable for their debts. That from the character of the goods, to sell them at auction was to throw them away; and if they were to be retailed, it was necessary to replenish the stock with such articles as were of common use and frequently called for. But the deed showed that the purpose was not to continue the business for profit, but to sell to the best advantage, and thus close up the trust in a way the most advantageous to the creditors. And that Bragg, Thompson or the trustee, or any three of the other cred-

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itors, could have a sale of the goods whenever they chose to require it. The case therefore came clearly within the principle of the first class of cases referred to by the counsel for the appellants. Janes v. Whitbread, 5 Eng. Law & Equ. R. 431.

407 *2d. That Nichols was simply the agent of the trustee. All would admit he was the best qualified agent that could be obtained to act whilst the goods were to be retailed at private sale, for no one questioned his integrity; and his agency could be terminated at any time by the creditors interested in the trust subject.

3d. That whilst it was true that the partners being insolvent could not make a voluntary assignment of the assets, yet they could convey the assets or their interest in them to satisfy their individual debts. Story Part. § 358 to § 363. And that in this case Bragg's debt bound the partnership; and Hill certainly received a valuable consideration in his release from that debt, for his conveyance to secure the debt of Nichols to the Farmers Bank. And he insisted that the result of the cases cited by the counsel for the appellants, was that the property of the partnership belongs to both the partners, and neither is entitled to dispose of the interest of the other, whether they are solvent or insolvent. But that where both unite they may convey the partnership property, effectually, for a valuable consideration.

4th. That the plaintiffs below could only have asked for an account under their prayer for general relief. That a party can only have relief according to the case made in his bill; and where the bill states the case for one specific object, the court will not give a different relief. Nickell & Miller v. Handly, 10 Gratt. 336. In this case, the bill does not allege that there will be a surplus of the trust fund, after satisfying the objects of the trust, but charges throughout that there would be no such surplus: And this is admitted by the defendants. He referred to Mitford's Plead. 39, note; Colton v. Ross, 2 Paige's R. 396; Foster v. Cook, 1 Hawks' R. 509; Lloyd v. Brewster, 4 Paige's R. 537; Nicholson v. Leavitt, 4 Sanf. S. C. R. 313; Story's Equ. Pl. § 40, 41, 42, 43; James v. Bird's adm'r, 8 Leigh 510.

408 *DANIEL, J. The clause in the deed, mainly assailed by the counsel of the appellants in his argument here, is that which provides that the trustee Collier, with the consent in writing of Bragg and Thompson, shall permit Nichols, one of the grantors, to carry on the mercantile business, in which he and his partner Hill had been engaged, with authority to replenish the stock of goods on hand. Such a provision, it was argued, was of itself sufficient to render the deed invalid, and the case of Owen & Wish v. Body and others, 31 Eng. C. L. R. 254, and several American cases, were mainly relied on in support of the proposition.

In the case of Owen & Wish v. Body, the debtor, who was engaged in the business of an inn-keeper, by his deed of assignment conveyed to Owen & Wish, his principal creditors, all his household goods, stock in trade, debts, estate and effects whatever, upon trust that they should, with all convenient speed, in such manner, at such time or times, and on such terms as they should think most advantageous, sell the goods and chattels; and should also, so long as they might think it advantageous to do so, continue and carry on the business of the debtor, either in his name, or in their own names. The assignees were empowered to purchase horses, carriages, and all other articles and things necessary to keeping up the stock in trade, and carrying on the business. Out of the moneys arising from a sale or the profits of the business, Owen & Wish were first to retain a sufficiency to pay their own debts, and then, from time to time, to distribute the residue ratably among such of the other creditors as should execute the deed within three months, as often as there should be sufficient money on hand to pay two shillings in the pound upon or in respect of said last mentioned debts.

The deed further provided, that the assignees, on being requested in writing by the major part in value of the other creditors, should, instead of continuing

409 *on the said business or trade, proceed to sell and convert into money immediately all the goods, stock in trade, effects, &c.

The assignment was declared invalid; Lord Denman, C. J., speaking for the court, simply stating that the ground of the decision was, that "the deed imposed such terms as might have constituted a partnership among the persons executing it, and those were terms to which creditors were not bound to submit."

That case, however, though not overruled, has been very much narrowed in its application by more recent decisions of the English courts: Janes v. Whitbread and others, 5 Eng. L. & Eq. R. 431; Coate and another v. Williams, 9 Eng. L. & Eq. R. 481. In the former of these two cases the deed, after authorizing the trustee to sell the property and pay the debts, proceeds to provide, that "it shall be lawful for the said trustee also to employ the said James Ellis (the grantor), or any other person or persons, in winding up the affairs of him the said James Ellis, and in collecting and getting in his estate hereby assigned, and in carrying on his trade, if thought expedient by him; and to allow to the said James Ellis, or any other person or persons so employed as aforesaid, out of the said trust estate, such sum and sums as to the said trustee shall seem proper." The court of common pleas sustained the deed. They construed the provision for carrying on the trade as merely authorizing the trustee to go on with the trade with a view to winding up. They said that the main object of the deed was to have the property realized; and that the carrying on the trade

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was no more than ancillary to that object: and in this they said the case was to be distinguished from the case of Owen v. Body, in which they thought it apparent that the main object of the deed was to continue the business of the debtor in a spirited manner for the benefit of the preferred creditors. In Coate v. Wil-
410 liams, *the clause in respect to carrying on the trade was almost identical in terms with that in Janes v. Whitbread. The Court of exchequer, following the decision in Janes v. Whitbread, held that there was nothing objectionable in such a provision: Pollock, C. B., observing that the deed was in precisely the same terms with a printed form which might be had at any law stationer's in London.

Deeds with like provisions have been frequently sustained by the courts of our sister states. As, in the case of De Forest v. Bacon & another, 2 Conn. R. 633; where the deed conveyed all the stock of a country store, a large quantity of boxes and brushes, finished and unfinished, in a brush and box factory, together with a quantity of raw materials for making the same; upon trust to the trustees to sell and pay the debt, and with power to the trustees to conduct and carry on the manufactory of brushes of various kinds until all the materials then on hand should be consumed, and to purchase such articles as might be necessary to manufacture and work up all the raw materials then on hand. Such a provision in a conveyance the court said did not make it fraudulent per se; it could only be evidence of fraud proper to be left to the jury; and as the question of fraud had been fairly submitted to the jury, who had negatived the fraud, there was no ground of complaint.

A like decision was made in the case of Kendall v. The New England Carpet Co. 13 Conn. R. 383. There the assignment was by the company of all its goods, materials, effects, &c., to its principal endorser, for the purpose of indemnifying him, with power to the assignee to work up the stock on hand, to make purchases of any materials necessary for that purpose, and to pay all expenses incurred from the avails of the property assigned. Williams, C. J., in delivering the opinion of the court sustaining the validity of the deed,
411 *said, that the power in question was one which might be greatly beneficial to all the parties connected with the affairs of a large manufacturing establishment; that the sudden suspension of the operations of such a concern, and the sale of the stock in the various stages of manufacture, in parcels or together, would necessarily greatly diminish the value of the property to the creditors, and impair their security; that the power, it was true, was one which might be abused, but that the interest of vigilant creditors would generally prevent or detect any improper exercise of the power.

Similar views prevailed in the cases of Cunningham v. Freeborn, 11 Wend. R. 240; Foster v. The Saco Manufacturing Co., 12 Pick. R. 451; Woodward v. Marshall, 22 Pick. R. 468; Robins & als. v. Embry & als., 1 Smedes & Marsh. Ch. R. 207; and Dunham & Dimon v. Waterman, 3 Duer's R. 166.

I have been unable to perceive that there is any necessary conflict between these decisions and the case of The American Exchange Bank v. Inloes and others, 7 Maryl. R. 380, and Whallon v. Scott, 10 Watts' R. 237, cited by the counsel for the appellants. The deed in the former case empowered the trustee to sell the property, at his discretion, gradually, in the manner and on the terms in which, in course of their business, the grantors has sold and disposed of their merchandise. No time was fixed for the winding up of the business, and no power was given to the creditors to have the trust closed. The court, after adverting to several other features in the deed which they regarded as indicating a fraudulent design on the part of the grantor, said that the deed was simply a contrivance, through the instrumentality of a trustee, to provide for carrying on the business of the concern in the same manner in which it had been before conducted, and for an indefinite period, free of all control or interference on the part of creditors; and that a debtor could not thus postpone
412 his creditors *to an indefinite period without their assent. It was, however, conceded by the court that there might be cases in which the stipulation in question would be proper, where it was designed to be ancillary to the winding up of the debtor's business, or was designed more effectually to promote the interests of the creditors, and not intended for the benefit of the debtor.

In the case of Whallon v. Scott, the deed was held to be invalid, chiefly on two grounds: First, that by the language of the assignment the assignor parted only with the possession of the effects assigned, and not with the property, for a limited time, during which the court said it was impossible to say who was the owner; and 2dly, that whilst the assignees were empowered during the interval to sell the goods by retail, no appropriation of the proceeds was provided for. I see nothing in the facts of the case, or in the language of the court, which would make the decision or the opinion of the court in that case authority for denying to a debtor, in making an assignment for the benefit of creditors, the power to enter into stipulations for the winding up of the business, as were sustained in the cases I have cited.

In the deed under consideration, the clause conferring upon Nichols, as agent, the power to carry on the business and replenish the stock, does not in terms declare (nor is it in any other part of the deed in terms declared), that the power is given for the purpose of winding up the business of the concern. But on reading this clause in connection with the other provisions of the deed, and more especially the provisions

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contained in the last paragraph, the true construction to be put on the provisions directing the manner of disposing of the goods and their proceeds, taken as a whole, is, I think, that Collier is vested with the power, as soon as he shall deem it advisable, or as soon as he shall be re-
413 quested in writing, either by *Bragg or Thompson, the preferred creditors, or by any three of the other creditors, to make sale of said goods at auction, in such way as the said Collier shall judge best for the benefit of the parties interested; and that in the meantime Collier, with the consent of said Bragg and Thompson, may employ Nichols as his agent to sell the goods by private sales, and replenish the stock whilst so carrying on the business; and that the proceeds of the sales, whether of the sales made by Collier at auction, or of those made by Nichols whilst continuing the business, are to be applied in payment of the two preferred debts. So construing the deed, I cannot see that there is any provision in it inconsistent with an honest surrender by a debtor to his creditors, of his property for the payment of his debts. The grantors have parted completely with all their property, and with all dominion and control over it. They have devoted all their goods, effects and credits to the payment of their debts. Without insisting on any release by their creditors, they make an entire surrender of their property, its profits and proceeds. It is true, that in the event of the stock being sold by Nichols privately, he would probably derive a benefit from the clause conferring the power to sell in that manner. The goods would in all probability bring higher prices, and consequently go further in discharging the debts for which he was bound, if thus sold, than if forced off immediately at public auction. Still any benefit, thus accruing to Nichols, would not be due to any reservation or stipulation in the deed on which he would have a right to insist against the consent of his creditors; but would come to him, incidentally, from the exercise of a power, the control of which, by the terms of the deed, was in no respect with him, but wholly with the creditors and the trustee.

Nor is any ground for impeaching
414 the fairness of the *deed to be found in the provision empowering Collier to employ Nichols as his agent. It is not stated in the deed nor averred in the bill what compensation Nichols was to receive for his services as agent, nor indeed that he was to receive any; and all suspicion, that it was one of the purposes of the deed to create a profitable employment or lucrative agency for one of the grantors, is entirely shut out by the consideration that the agency might be discontinued at any moment by the action of Collier, or Bragg, or Thompson, or any three of the other creditors. The power in the trustee to appoint the debtor his agent, was conferred by the deeds in each of the cases of Janes v. Whitbread and Coate v. Williams, with the further power to allow him out of the trust estate such sum as to the trustee should seem proper; and there was no suggestion in either case that such a feature vitiated the assignment. It was however argued here by the counsel of the appellants, that even though the deed should be construed as intending no especial benefit to Nichols, it yet conferred powers upon the preferred creditors to which the other creditors ought not to be bound to submit; that whilst Bragg and Thompson might be willing to encounter the hazards of continuing the business, in the hope of thereby more effectually insuring the payment of their entire debts out of the trust subject, they had no right, without the consent of the other creditors, to subject the estate of the common debtor to such vicissitudes and risks.

It seems to me, that a satisfactory answer to this is to be found in the check upon the powers of the trustee and the preferred creditors, which the deed itself provides. It is difficult to suppose that Collier or Bragg or Thompson would be willing to embark in any heavy expenditures for the purchase of a new stock of goods, in the face of a provision giving to any three of the other creditors provided for in the
415 *deed, the power at any moment to order a discontinuance of the business and a sale of the goods at auction. And hence arises fairly a very strong inference that the deed was not planned or framed with a view to speculation, or any protracted continuance of the business for the benefit of the preferred creditors. It is true, that the creditors in the second class are not invested by the deed with any interest in the surplus which might arise from the sale of the stock of goods, after paying the debts of the preferred creditors: the stock of goods alone being appropriated to the security and satisfaction of Bragg and Thompson, and the credits and other effects alone, to the security and satisfaction of the other creditors. Still, as there is no release by any of the creditors, the creditors in either class have, notwithstanding, and independent of the deed, an interest in seeing that the property devoted to the satisfaction of the creditors in the other class, is made to go as far as possible in discharging the debts of the common debtor. They also have a further interest in the subject, growing out of the fact that the expenses of the trust are to be paid out of the effects and credits. The presence of these interests in the creditors of the second class, in connection with their power over the subject before adverted to, exhibit such a check imposed by the deed, on the conduct of the preferred creditors, as goes very far, it seems to me, in explaining the deed, and in showing that it was not in the scheme of Collier or Bragg or Thompson, that the trade should be carried on any longer than might be found necessary for the judicious winding up of the concern. And giving a fair and reasonable construction to all the provisions of the deed, and looking to the nature of the subject con-

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veyed, I am of the opinion that the case, in respect of the feature under consideration, is within the influence of the several precedents I have cited, where features of
416 the kind were *held not to invalidate the assignments; that the authority given to replenish the stock of goods was merely designed, as the appellees in their answers aver it was, to enable the trustee and agent to make, occasionally, purchases of the more attractive articles, the presence of which would invite and retain custom, and thus facilitate the "working off" of the less attractive and less saleable portion of the stock; and that the carrying on of the business as provided for, was looked to by the framers of the deed not as one of its main objects and ends, but as a temporary expedient or means which, instead of delaying, would in all probability hasten the judicious conversion of the goods into money.

I do not think that either of the cases of Lang v. Lee, 3 Rand. 410; Sheppards v. Turpin, 3 Gratt. 373; and Addington v. Etheridge, 12 Gratt. 436; cited by the counsel for the appellants, can be made to apply to the deed here. In the last of these cases, the grantor retained to himself the possession of the goods, with the right to sell them until default should be made in the payment of the debts secured, and until the trustee should be requested by any of the creditors to close the deed; and though it is conceded in the second instruction asked in the case, that by the provisions of the deed the grantor was to account to the trustee, the deed in fact contained no such provisions, and was wholly silent as to the proceeds of the sales which the grantor should make during the possession retained by him. And in the other two cases, the deeds were even more obviously objectionable than the deed in Addington v. Etheridge. We should, I think, run counter to no decision of this court in declaring that the deed here is not void on the score of the objection under consideration; and for the reasons already stated, I am for so declaring.

Nor do I think that the validity of
417 the deed is either *wholly or partially destroyed by the fact that the partnership effects are conveyed for the purpose of securing the payment of the two thousand dollar note of Nichols to the Farmers Bank. Both partners were present, assenting to the whole arrangement, and uniting in the execution of the deed. There were no executions against their effects. They had done nothing to impair their dominion over their property. They were not under the operation of any bankrupt or quasi bankrupt or insolvent laws regulating the disposition of their assets. Under such circumstances, I do not doubt that the two partners combined had the same power and control over their social effects as each one had over his own individual and separate estate. Each one had a right, for a valuable and adequate consideration, to make a bona fide sale of his interest in the concern, or his share in the effects to the other. There was nothing to forbid their making a fair division of the social effects between themselves as the equities between them required; and if upon a settlement of their transactions one was indebted to the other, the former had the same right to apply his share of the effects to the payment of the debt that he had to apply his separate estate to the payment of any other debt he might owe.

Neither of them, it is true, had a right to give away his property, whether social or separate, to the prejudice of his creditors of either class, nor to pledge such property for the payment of the debts of others, for which he was in no wise bound, so as thereby to defeat the payment of debts for which he was bound. But if either of the partners had contracted a debt in his own name alone, of which the equities between the partners would require that the other should pay his share, I can see no good reason why the partners might not agree to apply the assets of the firm to the payment of such debt, or to give a deed of trust
418 upon *their partnership effects for the purpose of securing the payment, though the effect of making such an application of the assets, or of giving such a deed, might be to defeat the payment of debts contracted in the name of the firm.

As authority for these propositions, I would refer to Ex parte Ruffin, 6 Ves. R. 119; Ex parte Williams, 11 Ves. R. 3; Story on Partnership 508; and to the cases cited in the notes to Silk v. Prime, 2 Leading Cas. in Eq. (3d Am. ed.) p. 72, 331-2-3, 71 Law Libr.; and more especially, Siegel v. Childrey, 4 Casey's R. 279.

Now, it is stated in the bill that the debt from Hill to Bragg (the two thousand five hundred dollars) and the debt from Nichols to the bank (the two thousand dollars), were due for money borrowed by Hill and Nichols, respectively, to put into the business of their said partnership, as their respective shares of in-put capital. And in their answers, Hill and Nichols state that each was to put in two thousand five hundred dollars; that in order to carry out the agreement, Nichols borrowed two thousand dollars of the bank, on his individual note, endorsed by Thompson; and that Hill, being unable to raise his two thousand five hundred dollars out of his private resources, or upon his individual credit, borrowed that sum of Bragg, on the note of the firm of Hill & Nichols. Bragg makes a statement to the same effect in his answer, and files with it, as an exhibit, a copy of the record of a judgment obtained by him upon the note, by the confession of Hill and Nichols, and also a copy of the note on which the judgment was founded. The origin and character of the two debts are thus sufficiently shown; and indeed I did not understand the counsel for the appellant as contending that the record was wanting in proof in that regard. Nichols and Hill each also further state, that, such being the origin and character of the two debts, and

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419 the money derived *from each loan having gone into the capital and business of the firm, and being represented by a corresponding amount of the goods and effects of the partnership, they deemed it just and proper, and so agreed, that the two debts should be placed on the same footing, and should both be paid out of the assets of the firm. It is true, that it is not stated in the answers when this agreement was made, whether at the time when Hill borrowed the two thousand five hundred dollars and gave the note of the firm for its payment, or at the time of executing the deed, or at some point of time in the interval; and I am inclined to infer from the answers, that the agreement was, most probably, not made till about the time of their coming to the conclusion to make the deed. But I do not regard the date of the agreement as material to the rights of the parties. It is enough, in the view which I take of the case, that the equities between the parties fully justified such an agreement; that they did so agree and carry out their agreement in the deed; as sufficiently appears by the deed itself.

It would be a very harsh and unreasonable judgment, as respects Nichols, to infer from his merely allowing Hill to raise his two thousand five hundred dollars on the note of the firm, that he thereby contemplated and agreed that in a final settlement of the partnership said note should, as between him and Hill, rank as a partnership debt, and be paid out of the assets of the firm, whilst he should be left to pay the note of two thousand dollars out of his private means. So to infer, would be in effect to suppose that Nichols intended to make a donation to Hill of the half of the two thousand dollars put by him into the concern, inasmuch as Nichols would be clearly two thousand dollars in advance to the firm more than Hill, if in a settlement of their affairs the two thousand five hundred dollars should be treated as the debt of

420 the firm, *and the two thousand dollar note as the debt of Nichols alone.

It is true, as it respects the owners of the two debts, that whilst Bragg stood as the creditor of the firm, the bank stood as the creditor of Nichols alone. Yet as between the partners in settling their transactions and adjusting their burdens inter se, Nichols had, as I conceive, a clear right in equity to insist that the debt of two thousand dollars should be placed on the same footing with the debt of two thousand five hundred dollars. This being so, and there being nothing further in the record to show how the parties stood in respect of their advances to the firm, it cannot be said that the deed as to Hill is, in respect to the two thousand dollars, without consideration, or that he is appropriating his share or interest in the effects of the firm to the payment of the debt of another, for which he was not bound. And upon a view of the whole case, I am of the opinion that the appellants have failed to show that the deed is void or in any respect invalid.

The appellants, however, have a right to subject the surplus proceeds of the trust subject, if any, after the satisfaction of the debts secured in the deed, to the discharge of their judgments. The bill, it is true, does not specifically ask for such relief. It seeks to set aside the deed, and to charge the entire subject conveyed with the payment of the judgments. There is, however, a prayer for general relief, under which, according to the decisions of this court in Skipwith v. Cunningham, 8 Leigh 271, and Janney v. Barnes, 11 Leigh 100, the appellants were entitled to have the surplus applied in discharge of their demands.

In each of those cases, as here, the bill was framed with a view to the setting the deed aside; in neither was there any specific prayer for an account. Yet this court, in each case, though concurring in

421 opinion *with the court below, that the deeds were valid, held that, under the prayer for general relief, the surplus might be decreed to the appellant, reversed the decree dismissing the bill, and remanded the cause for an account.

Upon the authority of those cases, I am of the opinion that we should affirm the decree so far as it dismisses so much of the bill as seeks to avoid the deed, whether in whole or in part, and reversing on account of the error in failing to direct an account, to remand the cause with instructions to the Circuit court to order an account of the trust fund, unless the benefit of such an order is waived by the appellants, and proceed with the cause as equity shall require; but if the appellants waive an account, to dismiss the residue of the bill with costs to the appellees.

I am further of the opinion, that notwithstanding the reversal to the extent just indicated, the appellees should have their costs in this court. It appears, I think, satisfactorily, from the pleadings and the opinion and decree of the Circuit court, that the questions touching the validity of the deed were alone litigated between the parties and actually passed upon by the court; and that the failure to order an account, or to submit to the appellants whether they would have an account, was a mere omission, proceeding from an oversight on the part of the court, and not from any error of opinion: an omission consequently which we may well presume would not have occurred, or would have been promptly corrected, but for the neglect of the appellants to bring the matter directly to the notice of the court. Under such circumstances, as there may be a surplus of the fund after satisfying the purposes of the deed, whilst, in order to avoid the possible injustice which might be done to the appellants, by wholly affirming the decree dismissing the bill, it becomes necessary to reverse

422 and remand for an account, *we shall be fully justified by the decision of this court in Handly v. Snodgrass, 9 Leigh 484, and numerous cases there cited by Judge Tucker, as also by several cases since de-

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cided (see Blessing's adm'r v. Beatty, 1 Rob. R. 287; Williamson's ex'or v. Howard, 2 Rob. R. 39; and Boyce's adm'r v. Smith, 9 Gratt. 704); in decreeing the costs of the appeal to the appellees. In all of these cases, the appellants succeeded in obtaining the correcting of errors, which, if allowed to stand, might have operated to their prejudice; yet, in each case, the costs of the appeal were given to the appellee. In some instances, the decree of the Circuit court was affirmed without prejudice; in others the decree was amended, and as amended, affirmed; and in others, the decree was reversed with costs to the appellees. The last mentioned mode of correcting this error is, I think, the one most appropriate here.

The other judges concurred in the opinion of Daniel, J.

Decree reversed, with costs to the appellees.

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423 *Seaburn's Ex'or v. Seaburn & als.

October Term, 1859, Richmond.

1. **Case Approved.***—The case of *Gallego's ex'ors* v. *The Attorney General*, 3 Leigh 450, recognized as law, except so far as it may have been modified by statute.
2. **Church Property—Statute Authorizes "Conveyance" Not "Devise."**—The act, Code, ch. 77, § 8, p. 362, does not authorize a *devise* of land for the use of a religious congregation, but only a *conveyance* by deed.†
3. **Same—Statute—Bequest of Money to Build Church—Validity of.**—*A fortiori* the act does not authorize a bequest of money to be expended in building a church at a specified place, or for the support of the pastor of such church.

Nathaniel Seaburn, late of the county of Warwick, died without issue (having never been married), leaving a will bearing date the 7th day of January 1859, which, after providing for a sale of all his estate, real and personal, on certain terms therein mentioned, contains the following clauses:

"3d. I desire my executor to see to and have built, a good and comfortable brick church, on the land attached to Mulberry island church, and to pay for the same out of money arising from the sales of my estate, and I desire that said church shall have a comfortable gallery for colored persons, to be for the old side Baptist denomination.

"4th. I desire that two thousand dollars of the money arising from the sale of my estate be invested in state stock or in some other good stock, and the interest or dividend on said stock to be applied to the support of a competent minister to preach to the church desired to be built, and the church in York county called Upper Grafton,
424 provided the same minister *will have pastoral charge and preach to both churches, for the pastoral support as aforesaid. Should both churches become able to have separate pastors, then I do not withhold said support.

"5th. I desire my executor to have built, a good and comfortable brick church at the place called Upper Grafton, York county, for the benefit of the old side Baptist denomination, provided there is money enough after the church at Mulberry island is finished and the two thousand dollars invested in stock; said church to have a comfortable gallery for colored persons, and to be paid for out of any money left in the hands of my executor.

"6th. Should there be any surplus money belonging to my estate after finishing both churches which I have desired to be built, and after investing the two thousand dollars in stock as above desired, it is my desire that said surplus be invested in the same manner as the two thousand dollars, in state stock or some other good stock, and the interest or dividend on said surplus to be applied as the interest or dividend on the $2,000, that is for the payment of a minister to preach for the churches which I have desired to be built. But should the said interest or dividend amount to more than a fair compensation for the support of a preacher for said church, then it is my desire that such overplus of dividend be applied to keeping such churches in order."

In the 7th and last clause, Stafford G. Cooke the appellant is appointed executor. A codicil is annexed to the will bearing the same date, and in these words:

"It is my wish that all moneys which I may have due me by bond, note, open account or otherwise, be applied in the same way and for the same purposes, that is to say, for the two churches, as the money which will arise from the sale of both my real and personal estate."

425 *The will and codicil were admitted to probate, and the executor, having qualified, was proceeding to execute the same, when the appellees, claiming to be

*Case Approved.—In the first headnote of the principal case, Gallego v. The Attorney General, 3 Leigh 450, is recognized as law (that is that charitable trusts are void at common law) except so far as changed by statute. The following cases cite and approve the principal case: Carskadon v. Torreyson, 17 W. Va. 84, 85; Kelly v. Love, 20 Gratt. 130, and *note*; Com. v. Levy, 23 Gratt. 40; Bible Society v. Pendleton, 7 W. Va. 87; Knox v. Knox, 9 W. Va. 142, 145; Pack v. Shanklin, 43 W. Va. 316, 27 S. E. Rep. 394; Wilson v. Perry, 29 W. Va. 189, 1 S. E. Rep. 317; Wilmoth v. Wilmoth, 34 W. Va. 436, 12 S. E. Rep. 734. See Brooke v. Shacklett, 13 Gratt. 300, and *note*.

In Protestant Episcopal Education Society v. Churchman, 80 Va. 765, the case of Gallego v. The Attorney General, 3 Leigh 450, is disapproved and it is held that the bequest "to the trustees Protestant Episcopal Education Society of Virginia, said bequest to be used exclusively for educating poor young men for the Episcopal ministry upon the basis of evangelical principles as now established," is not contrary to public policy, but is valid both at common law and under Code 1873, ch. 77, and is enforceable by the chancery courts of this state.

See monographic *note* on "Charities" appended to Kelly v. Love, 20 Gratt. 124.

†See the opinion of JUDGE MONCURE for the statute.

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heirs at law and next of kin of the testator instituted a suit in chancery against the executor, for the purpose of having the devises and bequests made, or attempted to be made, by the 3d, 4th, 5th and 6th clauses of the will before recited, and by the codicil, declared null and void, and the estate divided and distributed among them. The executor demurred to the bill, and also filed an answer, to which there was no replication. And the cause coming on to be heard on the bill, demurrer and answer, the Circuit court overruled the demurrer, declared the said devises and bequests "wholly inoperative and void, on account of the indefiniteness and uncertainty of the same and of the beneficiaries" thereof, ordered the executor to render an account of the estate and his administration thereof before a commissioner of the court, and directed the commissioner to ascertain who was entitled to the estate as heirs and distributees of the testator, and in what proportions they were so entitled, and to make report to the court.

From the said decree the executor obtained an appeal to this court.

Bowden and Cosnahan, for the appellant.
Mallory and Seawell, for the appellees.

MONCURE, J., delivered the opinion of the court. After stating the case, he proceeded as follows:

In the case of Gallego's ex'ors v. The Attorney General, 3 Leigh 450, it was held, that the English doctrine in regard to indefinite charities does not prevail in this state; that it was founded, mainly if not entirely, upon the statute 43 Elizabeth, called the statute of charitable uses, which, if it ever was in force here, was
426 *repealed by the general repealing act of 1792; that charitable bequests stand on the same footing with us as all other bequests, and will alike be sustained or rejected by courts of equity; and that a bequest of money to be applied to the erection and support of a Roman Catholic chapel in Richmond, and a devise of a lot in said city to trustees in fee, upon trust to permit all and every person belonging to the Roman Catholic church, as members thereof, or professing that religion, and residing in Richmond at the time of the testator's death, to build a church on the lot for the use of themselves and all others of that religion who may thereafter reside in said city; were uncertain as to the beneficiaries, and therefore void.

The authority of that case, although some of the positions therein held have been impunged elsewhere, and although the case of The Baptist Association v. Hart's ex'ors, 4 Wheat. 1, therein much relied on, has been supposed to have been founded on a misconception of the English law (Vidal, &c. v. Girard's ex'ors, 2 How. U. S. R. 127), is still firm and stable in this state, except so far as it may have been since modified by statute; having been repeatedly recognized by this court, and expressly affirmed in the recent case of Brooke, &c. v. Shacklett, 13 Gratt. 301.

The devises and bequests contained in the will and codicil of Nathaniel Seaburn, now under consideration, would undoubtedly be void for uncertainty, according to the principles of the case of Gallego's ex'ors v. The Attorney General, before cited. Indeed, this seems not to have been controverted in the argument.

But the counsel for the appellant contended that they are valid devises and bequests, under the Code, ch. 77, § 8, p. 362; which is as follows:

"Every conveyance, devise or dedication shall be valid, which since the first day of January 1777 has been made, and every conveyance shall be valid which
427 *hereafter shall be made, of land for the use or benefit of any religious congregation as a place for public worship or as a burial place or a residence for a minister; and the land shall be held for such use or benefit and for such purpose and not otherwise."

On the other hand, the counsel for the appellees contended that the said devises and bequests are not valid, under the Code: First, because it does not authorize a devise, but only a conveyance, as contradistinguished from a devise; and, if it does, secondly, because it only authorizes land to be given for the purposes therein mentioned, and not money, though it be directed to be applied to the erection of a church on land held for such purposes; and much less, if it be directed to be applied to other purposes, as for instance, the support of a minister; and thirdly, because the devises and bequests in question are void for uncertainty, even though they might otherwise be valid under the Code.

Let us now consider the first of these objections taken by the counsel of the appellees, to wit, that a devise is not authorized by the above recited provision of the Code. If this objection be tenable, it will be unnecessary to consider the others, as this will conclude the case.

There can be no doubt but that the word "conveyance," in its comprehensive, and perhaps in its technical sense, embraces a devise; and if it had been the only word used by the legislature in the provision in question to express the mode of transfer, it might, reasonably, have been construed in that sense; especially as it is used in that sense in other parts of the Code, as in ch. 116, § 1, 11. But we know that in common parlance, the word is often used in a more restricted sense, as contradistinguished from devise; and that it has often been so used in our most important acts of legislation; as for example, in the act concerning conveyances, 1 Rev. Code
428 1819, ch. 99. It *is like the word "purchase," which, technically, embraces a devise; but is generally used in a more restricted sense, and as meaning an acquisition of property by contract only. In the provision in question, "conveyance" is not the only word used to designate the

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mode of transfer therein mentioned. The section begins, "Every conveyance, devise or dedication shall be valid, which since the 1st day of January 1777 has been made;" thus tending to show that the word "conveyance" was not used here as comprehending "devise or dedication;" otherwise, it is presumable that these latter words would not have been used. But the section immediately proceeds: "and every conveyance shall be valid which hereafter shall be made," &c.; thus dropping the words "devise or dedication," used in the first line of the section. We cannot suppose that the legislature, in three consecutive lines, in which the only stop is a comma, would have used the words "conveyance, devise or dedication," as to the past, and the word "conveyance" only as to the future, without meaning something by the change of phraseology; without meaning more by the three words first used, than by one of them repeated in the same sentence. The legislature obviously intended to use the word "conveyance" in its restricted sense; and while they sanctioned every "conveyance, devise or dedication," which since the 1st day of January 1777 had been made, they determined to establish a new rule for the future, and to authorize only a "conveyance" (that is, by deed) for the purposes mentioned in the section. That this was their intention, is rendered, if possible, more manifest by the manner in which the section, as proposed by the revisors, was amended and adopted by the legislature.

The section, as proposed by the revisors, was in this language: "Every conveyance, devise or dedication shall be valid, which since the 1st day of January
429 *1777, has been or hereafter shall be made," &c. There could be no mistake as to the meaning of the section thus proposed; which was made, if possible, still more plain by a long note appended thereto. If it had been adopted by the legislature as proposed, it would expressly have authorized a devise in future. It was so adopted by the house of delegates. But it was amended in the senate, by striking out the word "or," in the third line, and inserting, in lieu thereof, the words, "made, and every conveyance shall be valid which;" so as to make the section read: "Every conveyance, devise or dedication shall be valid, which since the 1st day of January 1777, has been made, and every conveyance shall be valid which hereafter shall be made," &c. This amendment was agreed to by the house, and the section so amended was adopted, and became a law as it now stands in the Code. It seems to be inconceivable that this amendment would thus deliberately have been made, if it had not been intended to confine the word conveyance, remaining in the section, to its restricted sense, and not to authorize for the future a devise or dedication for the use of a religious congregation. No other motive for making it has been assigned, or seems to be assignable. It could not have been made for the purpose of saving words. If that had been the purpose of the legislature, they would have struck out the words "devise or dedication," in the first line of the section, and inserted no other; thus leaving the word "conveyance" to operate in the same comprehensive sense (embracing every mode of transfer by act of the parties), as well in regard to the past as to the future. So far from saving, they increased the number of words; by striking out one and inserting eight. But their purpose being not to authorize a devise in future for the use of a religious congregation, it occurred to them as the most natural and easy mode of effecting
430 that purpose, *to let the words "conveyance, devise or dedication" stand in reference to the past, but to use the word "conveyance" alone in reference to the future. It is a word at least of equivocal import, and its meaning in this instance is sufficiently explained by the context.

It was argued by the counsel for the appellant, that the jealousy of church encroachments which existed at the time of the revolution, and for a period thereafter, has long since ceased, that the policy of the state on this subject has undergone a material change, and that we ought now to apply a liberal, and not a strict, rule of construction to a statute authorizing the acquisition of property for religious uses.

It is not perceived that there has been any such material change of the policy of the state as the counsel supposed. No trace of any such change is to be found in the first amended constitution of 1830, nor in the case of Gallego's ex'ors v. The Attorney General, decided so late as 1832. The opinion of President Tucker in that case, in which the policy of the state is so ably vindicated, has since met with general, if not universal approbation; which seems to be still unabated. In the amended constitution of 1851 it was, for the first time, provided, as a part of our organic law, that "the general assembly shall not grant a charter of incorporation to any church or religious denomination; but (it is added) may secure the title to church property to an extent to be limited by law." Art. iv, § 32. The object of this section was to prevent the accumulation of church property, and to authorize the title only to so much as might be deemed necessary, and consisted with the welfare of the state, to be secured by law to religious uses. The latter part of the section seems to have been designed to sanction and authorize such legislation as had already been adopted to secure the title to church property to a limited extent, and which had been introduced by
431 *the act of February 3, 1842, entitled "an act concerning conveyances or devises of places of public worship." Sess. Acts, p. 60, ch. 102. The revisors recommended, in their report to the legislature, a more liberal provision on this subject than had been made by that act. They proposed not only that conveyances and devises (as provided by that act), but parol dedication of land should be authorized for the use or

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benefit of any religious congregation as a place for public worship, *or for religious or other instruction*, or as a burial place or a residence for a minister. And also that books, furniture *or other things*, "given or acquired for the benefit of such congregation, to be used on the said land in the ceremonies of public worship, *or in religious or other instruction*, or at the residence of their minister," should "stand vested in the trustees having the legal title to the land, to be held by them as the land is held, for the benefit of the congregation." Rep. Rev. p. 412, § 8 and 10. And they suggested, that if the legislature should prefer it, the 10th section could readily be made more extensive in its operation, by substituting therefor the following: "When any money or other thing shall be given by will or otherwise to, or be otherwise acquired by or for, any congregation having for its use or benefit such land as before mentioned, the same shall stand vested," &c. Id. note. The legislature not only did not adopt this suggestion, but amended the 8th and 10th sections proposed by the revisors, not only by limiting the mode of future acquisition of land to a conveyance as before stated, but by striking out the words in italics above written, to wit, the words "or for religious or other instruction," in the 8th, and the words "or other things," and the words "or in religious or other instruction," in the 10th section: Thus embodying in the Code a more limited scheme of church endowment than had been provided by the act of 1842.

432 *Under these circumstances, we think we ought not to apply a very liberal rule of construction to the statute, but to construe it according to the general rule. And so construing it, we think the conveyance by which it authorizes a transfer of land to be made for the use of a religious congregation, does not embrace a devise. We think the legislature plainly intended to alter the pre-existing law, by not authorizing such a transfer of land by devise in future. Whether the reason for the alternation was good or not, is a question which it belongs not to this court to decide. We may readily conceive what that reason was. And we must admit that the danger of an excessive and inordinate alienation of property to religious uses, so jealously guarded against by the policy of our law and the provision of our constitution before referred to, would be greatly increased by authorizing such alienation to be made by will, as well as by deed. And especially so, if the argument of the appellant's counsel be correct, that a religious congregation may take and hold (by its trustees) not only land, but money, and that without limit, provided it be to be laid out in land of the quantity and for the purposes prescribed by the statute, or in the erection of a church or a residence for a minister thereon, or in repairing the same, or in the purchase of books or furniture to be used on said land in the ceremonies of public worship, or at the residence of the minister. The legislature may well have supposed that there was no necessity for encountering this increased danger; and that authority in future to convey land for the purposes aforesaid by deed only, would fully answer the object in view.

If a devise of land for the purposes aforesaid would be void, a fortiori a bequest of money, though to be laid out in building a church on land held for such purposes, and much more, to be invested in stock for the support of a minister to preach in said

433 church, *would be void. The statute says nothing about money; and the only argument used to sustain the validity of the bequest in this case, is that the money is equivalent to land, according to the doctrine of equitable conversion.

It may be proper to state that nothing in this opinion is intended to be in conflict with the opinion delivered in the case of Brooke, &c. v. Shacklett. The conveyance in that case was by deed, executed before the adoption of the present Code; and it was not intended to express any opinion upon the question, whether a devise for the use of a religious congregation is authorized by the Code, which did not arise in the case.

For the foregoing reasons, and without expressing any opinion upon the other objections taken to the validity of the devises and bequests in question by the counsel for the appellees, the court is of opinion that the said devises and bequests are void and that the decree of the Circuit court be therefore affirmed.

ALLEN, P., concurred in the results of the opinion of the court, but not in the reasons given for it. He thought that the term "conveyance" was sufficient to embrace devises. But he was of opinion that according to Gallego's ex'ors v. The Attorney General, 3 Leigh 450, affirmed as that case was by The Literary Fund v. Dawson, 10 Leigh 147, and Brooke v. Shacklett, 13 Gratt. 301, the bequest was void: and that this case was not embraced in the statute.

Decree affirmed.

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434 *Haxall, Brothers & Co. v. Willis.

October Term, 1859, Richmond.

(Absent MONCURE, J.*)

Sales—Title—Loss of Property—Case at Bar.†—W sells her crop of wheat to H, by sample, the wheat not then being cleaned from the chaff; and W is to deliver it to H at G depot of a rail road to be carried by the rail road company to Richmond: W paying the freight to Richmond, and H to take it from the depot in Richmond to his mill at his own cost, where it is to be weighed and tested by the sample, and when thus weighed and tested the price to be paid. The wheat is delivered at the depot at G and taken by the rail road company to their depot in Richmond, and all but four hun-

*He was related to one of the parties.

†See the principal case cited in Morgan v. King, 28 W. Va. 9.

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dred and forty bushels is taken away by H. This four hundred and forty bushels is consumed by fire at the depot in Richmond before it can be removed. The title to the wheat was vested in H. and he is to bear the loss.

This was an action on the case in the Circuit court of Henrico county, instituted in May 1850 by Nelly C. Willis against Haxall, Brothers & Co., to recover the price of a quantity of wheat which the plaintiff alleged she had sold and delivered to the defendants. The parties agreed to dispense with a jury and submit the whole case to the court. And when the cause came on to be tried, the court rendered a judgment for the plaintiff for the sum of four hundred and sixty-two dollars, with six per cent. interest thereon from the 24th of December 1849 until paid, and her costs. Whereupon the defendants excepted; and obtained a supersedeas to this court.

The facts as stated in the bill of exceptions are as follows:

The plaintiff, by her agent, John Willis, sold her crop of wheat by samples to
435 the defendants in the fall *of 1849, to be delivered at the Gordonsville depot of the Central rail road company, otherwise called in the proceedings, the Louisa rail road company, as soon as convenient, to be forwarded by the said rail road company, over their own road and the road of the Richmond, Fredericksburg and Potomac rail road company, to the depot of the latter company at Richmond, consigned to the defendants. The price of the wheat was to be one dollar and five cents per bushel. The freight by rail road to the depot at Richmond, was to be paid by the defendants, and charged to the account of the plaintiff; and the wheat was to be carried from the depot at Richmond to the mills of the defendants, at their own expense, and without charge to the plaintiff. No other express stipulations were made in the contract of sale; but the agent of the plaintiff understood the contract to be made with reference to the usual understanding and practice in such sales, to wit: That the crop should range in quality with the sample left with the defendants; that the quality and quantity of the wheat should be ascertained and tested by the defendants, after the receipt of the wheat at their mills, before the payment would be due; that the delivery at the depot at Gordonsville would devest the plaintiff of all control over the wheat, and invest the defendants with the control of it; but that for the purpose of payment, the delivery would not be complete until the reweighing at the mills of the defendants should fix the quantity to be paid for. The plaintiff would readily have submitted to a reduction of price, if the wheat had proved inferior to the sample in the judgment of the defendants, unless the plaintiff were fully convinced that it was equal to the sample, or thought the abatement required by the defendants unreasonable; in which event she would have felt bound by their opinion. Nothing was said in the contract about what was to be
436 done in the event *that the wheat did not correspond with the sample in the judgment of the defendants; nor was any thing said about the acceptance of the wheat at Gordonsville by the defendants, and the change of control there, nor about the risks of transportation. Very little usually passed in conversation at the making of such sales, and nothing passed on this occasion that the witness (who was the agent) could recollect, as to the terms of the contract, except enough to fix the price, and times of delivery and payment. He usually, when selling wheat, presented the samples to the defendants and at the Gallego mills, and sold for the best price offered.

It was further proved that the plaintiff, by her agent, delivered her crop, amounting to nearly seven hundred bushels, at the Gordonsville depot of the rail road first mentioned, taking receipts for the same in the following form: "G'ville, Dec'r 12, 1849.—Rec'd of John Willis 49 co.'s bags wheat, 6,010 lbs. for Haxall & Bro. J. B. Ag't." That the wheat delivered at Gordonsville, prior to the 6th December 1849, was all received by the defendants, and accounted for. That from the 6th to the 12th December, inclusive, there were delivered at Gordonsville two hundred and forty-five bags of wheat, containing, by the weights at that depot, thirty thousand one hundred and twenty pounds. That on the 21st December 1849, these two hundred and forty-five bags were received at the depot in Richmond, and twenty-five of them were delivered to the defendants, and were accounted for; and that the remaining two hundred and twenty bags were destroyed by fire in the depot at Richmond on the night of the 23d December 1849, and that the defendants had refused to account for them.

It was further proved that the wheat, when it left the barn of the plaintiff in Orange, was fully equal to the samples by which it was sold, and which were
437 *taken from different parts of the bulk, in the opinion of the agent, who was often at the barn and saw the wheat constantly, when preparing it for delivery; and that the portion of the crop which came to the hands of the defendants was accounted for without objection to the quality.

Steger and Macfarland, for the appellants, insisted:

1st. That upon the terms of the contract in this case, the action could not be maintained irrespective of the loss of the wheat. That the price was not to be paid until the quantity was ascertained and the quality tested by comparison with the sample, at the mill; and therefore no action could be maintained for the price until this was done. Brockenbrough v. Ward's adm'r, 4 Rand. 352; Kennaird v. Jones, 9 Gratt. 183.

2d. That the sale of the wheat was on a condition, and the condition was precedent to the payment of the money. That true

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the sale was by sample, and the general rule is that in such sale the condition is subsequent. But that rule does not apply where something is to be done before payment is to be made. That generally the quality of the article or commodity is ascertained when it is delivered to the carrier: but that was not so in this case, but the quality was to be ascertained by inspection at the mill. That though delivery is often confounded with the contract, and is generally the completion of it; yet that was not the case in the contract under consideration. At the time of the sale it is admitted the contract was executory, for the wheat was then in the chaff, and was to be cleaned. Nor was it executed when the wheat was delivered at Gordonsville. That there may be many things to be done after delivery, and in this case it was to be brought to the mills, and the quality and quantity were to be ascertained before payment. That there may be a sale
438 without delivery; as in Campbell *v. Chapman, 13 Gratt. 105; and that there may be delivery without a sale. Keeler v. Field, 1 Paige's R. 312; Haggerty v. Palmer, 6 John. Ch. R. 437; Lorillard v. Palmer, 13 John. R. 14; Marston v. Baldwin, 17 Mass. R. 606; Dresser Manuf. Co. v. Waterton, 3 Metc. R. 9; Williams v. Moore, 3 Munf. 310; Harris v. Smith, 3 Serg. & Rawle R. 20; Dodsley v. Varley, 40 Eng. C. L. R. 141. In Ward v. Shaw, 7 Wend. 404, there was an actual delivery, but something remained to be done to ascertain the price to be paid, and it was held there was no sale. And such was the case of Andrew v. Dieterick, 14 Wend. R. 31. And this distinction was sustained in Pettitt v. Mitchell, 41 Eng. C. L. R. 233.

3d. That the contract was executory, and the property did not pass by delivery at Gordonsville. Blackburn on Sales 121, 122, 150, 151. They insisted that the second rule laid down by this author covered the case: That is, that where any thing remains to be done, as measuring or testing the article, this is a condition precedent. Story on Sales, § 296; Pleasants v. Pendleton, 6 Rand. 423; Dixon v. Myers, 7 Gratt. 240; Outwater v. Dodge, 7 Cow. R. 85; Rapeley v. Machie, Id. 250; Young v. Austin, 6 Pick. R. 280; Joyce v. Adams, 4 Seld. S. C. R. 291; Warren v. Buckminster, 4 Foster N. Hamp. R. 336; Screws v. Rand, 22 Alab. R. 675; Hutchinson v. Hunter, 7 Pa. R. Barr 140; Woods v. McGee, 7 Ohio R. 127; Lester v. McDowell, 18 Pa. R. 91; Logan v. Le Messurier, 6 Moore's Priv. Conn. R. 116.

Andrew Johnston, for the appellee, referred to the facts proved in this case and in the case of Haxall & Co. v. Barbour (see note at the end of this case), in which it was held that the purchaser was bound for the price of the wheat; and insisted that this was a stronger case for the vendor than that. He admitted that this was an executory contract, and conditional;
439 *but he insisted that the condition was that the wheat should be delivered at Gordonsville; and that having been done, the condition was performed; and the contract was executed on the part of the vendor. Story on Sales, § 242. He insisted that the effect of a sale by sample was to create an implied warranty that the article should be equal to the sample; Story on Sales, § 348; and if it was not equal to sample, the contract might be rescinded; Id. § 376, 408, 418; but it was the rescission of an executed contract. That this was the rule as to merchants ordering goods by sample: If the goods were shipped and lost on the way, the party giving the order had to bear the loss; though if they arrived and were not equal to the sample, he might refuse to take them. Fragano v. Long, 10 Eng. C. L. R. 313; Alexander v. Gardner, 27 Id. 538. The plaintiff was only required to make out a prima facie case, and the defendant must show that the warranty was not complied with. That here was certainly a prima facie case for the plaintiff, and the defendant did not rebut it. In Street v. Blay, 22 Eng. C. L. R. 124, it was held that the vendee might rescind the contract if the vendor could be placed in the same situation he was before the contract. And in Parker v. Palmer, 6 Id. 455, it was held that in an action for a sale by sample, it was not necessary to aver the fact, which if it was a condition precedent it was necessary to do. And Story, § 306, and Blackburn 329, say that delivery to a carrier is equivalent to delivery to the vendee. Then what is the effect of delivery? Usually possession indicates ownership. Blackburn on Sales 121, 147. Story, § 295, treats of delivery; and states four forms in which it may be made. And the lowest form of delivery is sufficient to put the property at the risk of the purchaser, though it is not sufficient for some other purposes: as acceptance by the vendee as well as de-
440 livery by the vendor is necessary *to satisfy the statute of frauds. He referred to Story on Sales, § 299 to 302, and insisted that the cases referred to by the counsel for the appellants, came under one of the other three forms of delivery.

He referred to the rules for construing contracts, stated by Blackburn, 151 to 154, 171, and said that there were no traces of these rules until the time of Lord Ellenborough, about 1805; that Blackburn disapproved of the second rule; and on sound reason. And though the rule was laid down broadly, yet it had not been applied to a single case where there had been an actual delivery. And in Hind v. Whitehouse, 7 East 558; Swanwicke v. Sothern, 36 Eng. C. L. R. 321; Tansley v. Turner, 29 Id. 288; Bloxom v. Sanders, 10 Id. 477, the rule was not applied; and in fact these cases were in opposition to it. And he insisted that in America the rule was either not adopted, or was adopted in a qualified sense; as where possession had not been delivered. He referred to Wilkes v. Ferris, 5 John. R. 335; Scott v. Wells, 6 Watts & Serg. R. 357; Damon v. Osborn, 1 Pick. R. 476; McComber v. Parker, 13 Id. 178; Rid-

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dle v. Varnum, 20 Id. 280; Cunningham v. Ashbrook, 20 Missouri R. 553; Pleasants v. Pendleton, 6 Rand. 423; Haxall & Co. v. Barbour, infra, note. And as to Dixon v. Myers, 7 Gratt. 240, the vendor had not done all he was to do, and therefore he came within the first rule stated by Blackburn; and it was not necessary to apply the second rule to the case.

DANIEL, J. The reversal of the judgment is asked mainly upon the argument that the ascertainment of the quantity of the wheat by weighing it, as also the ascertainment of the correspondence between the bulk and the sample, were conditions precedent to the vesting of the property; and that as the wheat was accidentally destroyed by fire before the appellants had an opportunity of ascertaining its
441 quantity and quality in *the mode prescribed by the contract, the loss ought not to have been visited upon them, but should have been left to be borne by the appellee.

I shall first examine how far the case is affected by the consideration that the wheat at the time of the loss had not been weighed by the appellants; and, secondly, how far it is affected by the consideration that the bulk had not yet been compared by them with the sample.

And proceeding to dispose of these questions in their order, it must be conceded that the authorities furnish numerous instances in which the rules in respect to the first question are stated in a manner favorable to the views of the appellants.

Thus, Mr. Blackburn, in his treatise on the Contract of Sale, at p. 151-2-3, after stating that where the agreement is for the sale of goods and also the performance of other things, the courts have adopted certain rules of construction for the purpose of ascertaining whether the performance of any of those things is meant to precede the vesting of the property, proceeds to say, "These rules, of which there is no trace in the reports before the time of Lord Ellenborough, are laid down, since the time of that learned judge, as rules of English law, in terms nearly equivalent to those in which they are laid down as rules of the civil law. They are two-fold: the first is, that where by the agreement the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is bound to accept, or as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property. The second is, that when any thing remains to be done to the goods for the purpose of ascertaining the price, as by weigh-
442 ing, measuring or testing the *goods, where the price is to depend on the quantity or quality of the goods; the performance of those things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted."

He then proceeds to discuss the reasons of the rules; and in respect to the first he says, "It seems to be founded in reason. In general, it is for the benefit of the vendor that the property should pass; the risk of loss is thereby transferred to the purchaser; and as the vendor may still retain possession of the goods so as to retain a security for payment of the price, the transference of the property is pure gain. It is therefore reasonable, that where by the agreement the vendor is to do something before he can call upon the purchaser to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be that the vendor was to do this before he obtained the benefit of the transfer of the property. The presumption does not arise if the things might be done after the vendor had put the goods in the state in which he had a right to call upon the purchaser to accept them, and would be unreasonable where the acts were to be done by the buyer who would thus be rewarded for his own default." "The second rule (however he proceeds) seems to be adopted, somewhat hastily, from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money and an exchange for any thing else. The English law makes no such distinction, but, as it seems, has adopted the rule of the civil law, which seems to have no foundation except in that distinction. In general, the weighing, &c. must, from the nature of things, be intended to be done before the buyer takes possession of the goods; but that is quite a different thing from
443 intending it to be done before *the vesting of the property; and as it must in general be intended that both the parties concur in the act of weighing when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of the act in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided it be of value. Still both branches of the rule (he adds) seem to be now firmly established, though, as has been already stated, only within the last half century, and then, it seems, adopted directly from the civil law."

The second rule as above stated, it cannot be denied, lays down the law as contended for by the appellants. It will be seen, however, on looking into the cases referred to by the author, as establishing the rule, that, in no one of them had there been any actual change in the possession

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of the goods; that in the three cases of Rugg v. Minett, 11 East's R. 210; Zagury v. Furnell, 2 Camp. R. 240; and Simmons v. Swift, 5 Barn. & Cres. 857, 12 Eng. C. L. R. 388; on which he mainly relies as illustrations of the rules, the acts of measuring, counting and weighing, by the terms of the agreement, or the usages of the trade, were to be done either by the seller alone, or by him and the buyer concurrently; and that in neither one of these cases do the judges use any expression from which the inference can be fairly drawn, that they would have held the measuring, counting or weighing as necessary precedents to the vesting of the property, if by the
444 terms *of the agreement those acts had been left to be performed by the buyers alone.

In the first case, Lord Ellenborough said, the true enquiry was, "whether every thing had been done by the sellers, which lay upon them to perform, in order to put the goods in a deliverable state." And Bayley, J., said, that "if the sellers meant to relieve themselves from all further responsibility, they should have done what remained for them to do; and until that was done, the property remained in them." In the second, Lord Ellenborough said, that "as the enumeration of the skins was necessary to ascertain the price, this was an act for the benefit of the seller; and as the act remained to be done when the fire happened, there was not a complete transfer to the purchaser; and the skins continued at the seller's risk." And it was proved in that case, that the custom was for the seller to count the skins, to see that each bale had its complement, before delivery. And in the third case, Bayley, J., said, that "generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment on delivery, the property passes immediately, so as to cast upon the purchaser all future risks, if nothing further remains to be done to the goods, although he cannot take them away without paying the price." And he further explains himself, by immediately adding, "If any thing remains to be done on the part of the seller, until that is done the property is not changed." That the latter remark was intended as a qualification of what he had said previously, is rendered obvious, by his opinion delivered the year afterwards, in the case of Tarling v. Baxter, 6 Barn. & Cres. 360, 13 Eng. C. L. R. 159, in which he says, "The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor, as between him and the vendee, the
445 property *in the thing sold vests in the vendee; and then all the consequences resulting from the vesting of the property follow; one of which is, that if it be destroyed, the loss falls upon the vendee." And the remarks of Holroyd, J., in the same case, were to the same effect. Whilst, therefore, there appears to my mind to be great force in the reasons assigned by Mr. Blackburn against the adoption of the second of the rules stated by him, it seems to me also, that he has in fact stated the rule in terms broader than the decisions and opinions to which he refers as having established it, will justify.

There are, however, among the many cases cited by the counsel for the appellants, several, as for instance, Ward v. Shaw, 7 Wend. R. 404; Andrew v. Dieterick, 14 Wend. R. 31; and Logan v. Le Mesurier 6 Moore P. C. C. 116; in which the rule upon the subject is stated to be as they contend it is.

Still, there is, I think, a decided preponderance of authority in favor of the proposition, that where the subject matter of the contract has not only been completely ascertained and identified, but actually delivered, the mere fact that the weighing, counting or measuring, is yet to be done by the buyer, in order simply to ascertain the aggregate sum of money which he is to pay as the price, does not of itself show such a defect in the transfer of the title as will prevent the risk of loss from being cast on the buyer. Selwyn's Nisi Prius 1054; 2 Kent's Comm. 675-6; Sumner v. Hamlet, 12 Pick. R. 76; Macomber v. Parker, 13 Pick. R. 176; Riddle v. Varnum, 20 Pick. R. 280; Morgan v. Perkins, 1 Jones' (Law) N. C. R. 171; Tyler v. Strang, 21 Barb. S. C. R. 198; Crofoot v. Bennett, 2 Comst. R. 258; Page v. Carpenter, 10 N. Hamp. R. 77; and Cunningham v. Ashbrook, 20 Missouri R. 555. Of these cases, the last will be more especially noticed, as from the character of the facts it will be seen to be directly in point. It was
446 the sale of an entire drove of hogs *at a stipulated price per cwt. net weight, to be delivered at the slaughter-house of the buyer, who was to kill and weigh them. The hogs were delivered and slaughtered, and the seller notified that he might call the next day at the packing-house of the buyer, see the hogs weighed, and get his pay. That night, however, the slaughter-house was burned down, and the hogs consumed by the fire.

In the course of the opinion of the court, delivered by Leonard, Judge, sustaining the right of the seller to recover the price, the following principles, amongst others, were asserted, viz: That the rule, that in a sale of goods, no title passes while any act, such as counting, weighing or measuring remains to be done by the seller, is only applicable when such act is necessary to separate the goods from a larger mass, and does not apply to a sale upon fixed terms by weight, to be subsequently ascertained, of goods already separated; in which case, the title passes by the delivery; and as a consequence, the loss, by a destruction of the goods after they are delivered and before they are weighed, will fall upon the buyer. That although there is no sale till the price is settled, yet it is settled in the meaning of the rule, when the terms are so fixed that the sum to be paid can be ascertained by weighing, without further reference to the parties themselves; and that in a case of

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the kind, a jury would be at liberty to infer from a change of the possession, that the delivery was intended for the purpose of passing the property. "It is true (the judge said), that in determining the question as to the purpose of the parties in changing the actual possession, the fact that the price is to be subsequently ascertained by reference to the net weight, and then paid, is proper to go to the jury; but possession is so much of the essence of property, as it is that alone which enables us to enjoy a thing as property, and the natural connection between
447 *property and possession, especially in movables, is so strong, that the presumption arising from a change of actual possession, that it was intended also as a change of the property, is not overcome as a matter of law by the fact that the thing bargained for was to be paid for by weight, to be ascertained after the delivery."

The effect of an actual change of possession upon the question is very clearly and strongly stated in the opinion of the court in Macomber v. Parker. It is there said, "The general principle is, that where an operation of weight, measurement or the like, remains to be performed in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such operation is performed. Brown on Sales 44. But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery; and the weighing or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement of the price. The sale would be as complete as a sale upon credit before the actual payment of the price."

In the case of Scott v. Wells, 6 Watts & Serg. R. 357, Gibson, C. J., uses certain expressions in the course of his opinion, which seem to lean in favor of the pretensions of the appellants here. But on comparing the facts upon which the judgment in that case was founded, with the facts in this case, the decision will be seen to be one which may be very properly added to the list of cases already cited as sustaining the cause of the appellee.

The only reported cases decided by this court, in which it has become necessary to examine the principles bearing upon the question under consideration, are those of Pleasants v. Pendleton, 6 Rand. 423;
448 Campbell *v. Chapman, 13 Gratt. 105; and Dixon v. Myers & Co., 7 Gratt. 240. In none of these cases was the precise question before us decided; though in all it was necessary to consider to some extent that branch of the law under which it arises. In the first two, nothing was decided which can make in favor of the appellants. On the contrary, so far as they bear on this case, they are in favor of the appellee. In the last (Dixon v. Myers), which of the three most closely resembles this in the facts, it is true there is, in the opinion of the court, delivered by myself, a statement of the law, which, if taken alone, without reference to the special facts of the case, and unexplained by subsequent portions of the opinion, might seem to commit the court to the adoption of the second rule laid down by Mr. Blackburn. But when this reference is had and the opinion is taken as a whole, it will, I think, be seen that the case is one which cannot be regarded as an authority for the appellants. The contract there was for the purchase of an article yet to be prepared. By the terms of the agreement, Dixon was to take, at a certain price per cwt., all the stems which Myers & Co., who were manufacturers of tobacco, should prize during the year, with the exception of fifteen or twenty hogsheads, which Myers & Co. reserved the right to send to another person. Myers & Co. were to prize the stems in hogsheads, set them apart for the buyer in their store-room, weigh them and mark them, and then to present their bills and to receive their pay. Seventeen hogsheads had been set apart under the reservation just mentioned, and fifty-six hogsheads, for the price of which the suit was brought, had been prized and stored away: and a short time before the fire the agent of Dixon was at the factory, and in company with one of the superintendents in the establishment, counted them; and then urged this superintendent to press on the work as rap-
449 idly as he could, as *he wished one hundred hogsheads ready by Christmas. The fifty-six hogsheads, however, were not weighed or marked at the time of the fire.

It will be seen thus, that that case differs from this in several important particulars. There, there had been no actual change in the possession and custody of the thing bargained for. The weighing by the terms of the contract was to be done by the seller; and was not only an act necessary to be performed in order to ascertain the price, but in connection with the marking was necessary to the complete designation and identification of the property as the property of the buyer, and to the placing it in that state in which by the agreement it was to be before the seller could demand its price, or truly notify the buyer that it was then ready for him.

I do not think, therefore, that there is any thing to be found in the reported decisions of this court, which should constrain us to oppose that current of decisions which is strongly tending to the re-establishment of the common law rules upon the subject, and which, in the language of the court in Macomber v. Parker, considers such an understanding about the weighing, at least when it is to be done after an actual change of possession, "not as a part of the contract of sale, but as referring to the adjustment of the final settlement of the price."

In considering the second question in the case, I do not regard it material to enquire

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whether the understanding between the parties in respect to the quality of the wheat, is to be regarded in the light of a warranty of the quality, properly so called, or is in connection with the other parts of the negotiation to be taken as an engagement to deliver wheat corresponding in quality with the sample. As the wheat, though in esse at the time of the contract, was not in the condition in which it was to be delivered, and the buyer
450 *had then no opportunity of inspecting, it is, I think, most proper to consider the contract as upon the footing of an engagement to deliver wheat corresponding in quality with the samples which were exhibited. And this latter view is the one most favorable to the pretensions of the appellants; as in such cases it would seem to be settled that if the goods do not correspond with the sample shown, the buyer may refuse to receive or pay for them. Wells v. Hopkins, 5 Mees. & Welsb. 7; Mondel v. Steel, 8 Id. 858; and 1 Smith's Leading Cases, note 257. In their note to the case of Chandelor v. Lopus, the American annotators state as the result of the numerous authorities which they cite on the subject, that "the rule which governs sales by samples is a mere application of the general and obvious principle, that in order to fulfill a contract of sale, the vendor must deliver that which he has agreed to sell; and if he does not, the vendee may either rescind the contract altogether and return the goods, or receive them, and claim a sufficient deduction from the purchase money to make up the loss occasioned by their inferiority, in absolute or relative value." Conceding this to be a correct statement of the rule, I do not perceive how it tends to establish in any manner the point at which, in the performance of a contract for the sale and delivery of goods, the law shifts the risk of loss from the seller to the buyer.

It is essential to the force and efficacy of every contract of sale, that the buyer and seller should mutually contemplate the same subject matter of sale; and all the rules prescribing the acts and ceremonies essential to a transfer of the title of the property and of the risks attaching to the ownership, proceed necessarily upon the supposition that such acts and ceremonies have been done and performed about the subject of the contract. When a merchant orders goods of a certain kind or style to be forwarded
451 to him by a carrier, and *the party to whom the order is given undertakes to fill it by delivering to the carrier goods of a different kind or style, the merchant ordering the goods may refuse to receive them, not because a delivery to a carrier, in pursuance of a contract for the sale of goods, is not such delivery as changes the property so as to cast the risk of loss on the buyer, but because the goods delivered are not the goods ordered. If in such a case the goods are lost after the delivery to the carrier, but before they reach the hands of the buyer, the seller would be defeated in any action he might bring for the price, not because of the want of completeness in the execution of his contract, but because of the want of any contract at all in relation to the goods delivered. It is true, that if the buyer, notwithstanding the want of correspondence between the goods ordered and sent, accepts the latter and treats them as a compliance with his order, he cannot afterwards, as a general rule, set up any want of correspondence, in defeat of the seller's right to recover the price. But this does not go to show that where the goods ordered and the goods sent are the same, an acceptance by the buyer is essential to complete the bargain. On the contrary, if in such a case he refuses to accept, the authorities are clear, that the rights and remedies of the seller are just as complete as if there had been a full and formal acceptance. The authorities to which I have referred seem to place a want of correspondence in respect of quality, in sales by sample, on the same footing with a want of correspondence in respect of the kind of goods, and to allow to the buyer the like right to reject the goods and refuse to pay for them in both cases. This makes it incumbent on the seller, in all cases of the kind, where there has not been an acceptance by the buyer, to prove the correspondence in quality between the sample and the article he contracts to sell by it. But
452 *when he does this, and shows also that he has performed those acts which, in executory contracts for the sale of goods, usually denote the transfer of the property in the thing contracted for, he satisfies fully the very terms of his contract, and occupies, in respect of the question of risk and loss, the same position that he would have occupied had there been no implied warranty or agreement in regard to the quality of the goods.

It is true, that where the contract is for a sale, on trial, or if the goods shall suit the taste of the buyer, the contract is not executed till the buyer has had an opportunity to try or taste. But the difference between such cases and a mere sale by sample, is too obvious to require explanation. There is nothing in the facts of this case to furnish a pretext for the idea that the appellants were to be the sole and exclusive umpires of the quality of the wheat, and were to have the arbitrary right to reject the wheat, if upon comparing the bulk with the sample it did not suit their views in respect to the quality. The true nature of the agreement, implied from a sale in reference to samples exhibited at the time of the sale, is not that the buyer is to have the right of deciding whether there is a correspondence between the bulk and the sample, but that there shall in fact be such correspondence.

We have no reported case in this court bearing directly on this question; but the unreported case of Haxall, &c. v. Barbour, decided by this court at its October term in the year 1851, is directly in point, not only on this question, but also on the other question in this case. The only material

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difference in the two cases consists in the fact that there the sale was of an entire parcel of wheat, which at the time was in the depot of the Richmond, Fredericksburg and Potomac rail road company, and
453 which was open to *the inspection of the Haxalls, if they chose to inspect before receiving the wheat; whilst here the contract is for the sale of an entire crop which at the time was not ready for delivery, being in the chaff; and which the appellee, by her agent, contracted to transport from her barn and deliver to the Central rail road company, at their Gordonsville depot, to be carried to the Haxalls at Richmond.

The first was, strictly speaking, a contract of sale, whilst this was an executory contract for the sale of wheat. But it needs no argument to show that so soon as Mrs. Willis had separated the wheat from the chaff, transported it to Gordonsville, and there delivered it to the carrier agreed on between the parties, she occupied the same position as Barbour did in his case, when he had concluded the negotiation and given the Haxalls his order for the wheat. If not so, the similarity in the two cases becomes most obvious, from the time when the wheat in the present case had reached the depot in Richmond, and the Haxalls had in fact received a portion of the wheat, and carried it to their mills. The two cases plainly call for like judgments.

It is argued, however, that, as the case of Haxall, &c. v. Barbour was decided by a court consisting of three members only, and has never been reported, this court has not such strong reasons for adhering to it as a decision as it would have had, had the case been decided by a full court, and reported as a precedent. Whilst this is so, it is yet proper to state that that case was very fully and ably argued, was maturely considered by the court, and decided without any dissent; it was also selected as a case proper to be reported; and the absence of a report of the case is due entirely to the lamented death of Judge Baldwin, the member of the court to whom had been assigned the task of preparing the opinion of the court. Whilst, therefore,
454 *the case has been very properly regarded as not concluding the discussion and examination of the principles upon which it must have been decided, this court could not properly treat it as entitled to no weight in passing upon questions about which there is a conflict of authority. It is but proper to add also, that the case now before us has been twice argued here; on a former occasion before a court consisting of three judges, who upon conferring on the case, were unanimously of opinion to affirm the judgment; and now before a court consisting of four judges, who, upon a conference, have unanimously arrived at the same result.

Under these circumstances, whilst, owing to the conflict of the authorities and the diversity in the reasoning of judges and courts declaring the same principles, I have experienced much embarrassment and difficulty in stating, in a manner satisfactory to myself, the grounds on which to rest the case, I yet feel confident in the belief that the right and justice of the case will be attained by affirming the judgment.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

Note.—The following case of *Haxall, Brothers & Co.* v. *Barbour* was decided at the October term 1851 of this court, and is referred to by Judge DANIEL, in his opinion in the foregoing case of *Haxall* v. *Willis:*

This was an action on the case in the Circuit court of law for the county of Henrico, brought in March 1850, by Benjamin Johnson Barbour against Haxall, Brothers & Co. to recover the price of certain wheat which the plaintiff alleged he had sold to the defendants. The parties agreed to dispense with a jury, and to submit the case to the court. Upon the trial the following facts were proved:

The plaintiff sent to Deane & Brown, commission merchants in the city of Richmond by the Richmond, Fredericksburg and Potomac rail road, three hundred and seven bags of wheat, to
455 be sold by them for *him. Each bag contained more than two bushels of wheat, though the excess above two bushels was not uniformly the same. On Saturday the 22d of December 1849, between the hours of eleven and twelve o'clock in the forenoon, Dean & Brown offered the wheat for sale to the defendants, who were millers in the city of Richmond, exhibiting to them at the time a fair sample of the wheat, which was then in the depot of the rail road company in the city of Richmond, open to the inspection of the defendants, if they chose to inspect it; and the defendants agreed to purchase it at the price of one dollar for each bushel of sixty pounds: and thereupon Deane & Brown gave to the defendants an order in writing, addressed to the agents of the rail road company at the depot, requiring them to deliver the whole of the said wheat to the defendants; which order the defendants received and filed with the agents of the rail road company at the depot. The sale was intended to be a cash sale, but nothing was said at the sale of the time of payment or of the removal of the wheat from the depot, except a remark by the vendor to the vendee that he hoped he would get the wheat away from the depot as soon as possible. This remark was occasioned by the consideration that it was not usual in Richmond to send in a bill for the price of the wheat sold to a miller until it had reached the mill, and that the vendor intended to leave the city on the following Monday. And the vendees' reply to the remark was, that they had a good deal of wheat in the same depot, which they wished to get away by noon on the following Monday, which would be the day before Christmas, and did not think they could get it away sooner.

According to the usage of the trade in Richmond in such cases, which was well understood by the parties, and with reference to which they contracted, the vendor of wheat in the depot, after he gives a delivery order to the vendee, parts with all control over it; and as soon as the order is filed with the depot agent, he holds the same subject to the order of the vendee, and would not deliver it

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to the order of the vendor, or any one else except the vendee.

The wheat is removed from the depot by the vendee to his mill, the transportation being at his expense and risk; it is there inspected by the vendee, to see if it corresponds with the sample, when the sale is by sample; and if it does not correspond, the vendee has the right to refuse to take it and execute the contract: if it does correspond, then the vendee is bound to take it: and it is then weighed at the mill, and settled for by the miller's weights: and the vendee does not give a final receipt for the wheat or pay for the same until it has been inspected and weighed at his mill.

It was further proved, that the agents at the depot considered the wheat the property of the defendants from the time of the filing of the delivery order at the depot, which was done between 12 and 1 o'clock on Saturday; and the agents of the vendor considered themselves as having no further control of or responsibility for the wheat after the delivery of the order aforesaid; but no time was specified for the removal of the wheat from the depot.

456 The depot was consumed by fire on *the night of Sunday, the next day, and the three hundred and seven bags of wheat aforesaid were consumed in it.

Prior to and at the time of the purchase of the plaintiff's wheat by the defendants, they had a large quantity of wheat in the said depot, which they had been notified by the agent at the depot to remove, because it encumbered the depot and prevented the delivery of other wheat. They kept in their employment a special carrier to haul their wheat from the depot, and no wheat subject to their order would be delivered to any other carrier, unless their regular carrier was unable to carry it. The defendants had twelve wagons employed in hauling wheat from the depot on Saturday the 22d of December 1849, which were able to make only twelve loads, because there was so much other wheat in the depot beside that subject to the order of the defendants, which was in the course of delivery on that day, that the hands and agents at the depot were not able to deliver more than the twelve loads aforesaid to the wagons of the defendants, though the said wagons could have made eighty loads if promptly loaded.

Upon the trial, the court rendered a judgment for the plaintiff for six hundred and fourteen dollars, with interest thereon at six *per cent.* from the 27th day of December 1849 till paid, and his costs. And thereupon, the defendants excepted; and applied to this court for a *supersedeas*; which was awarded.

Steger and *Macfarland*, for the appellants.
Lyons, for the appellee.

The judgment of the Circuit court was unanimously affirmed.

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457 *Delaplane v. Crenshaw & Fisher.
Same v. Haxall, Crenshaw & Co.

January Term, 1860, Richmond.

1. **Custom—Case at Bar.**—If there could be in Virginia a legal, valid usage or custom, the effect of which is to operate *per se* as an exception to the general rules of the common law: a usage or custom for the inspector of flour, who by the statute is to receive a specified money compensation, to take to his own use the flour drawn from the barrel in the process of inspection, called the draft flour, as an additional compensation or perquisite, would be bad, as being unreasonable, unjust and contrary to the policy of the law.
2. **Same—Cannot Override a Statute.**—Although a custom when otherwise good, may override and displace the common law rule, yet a statute introducing a new principle with a negative either express or necessarily implied, must be strictly pursued, and no custom can be set up against it.
3. **Same—Case at Bar.**—A custom for the inspector of flour to take the draft flour, may have existed longer then the memory of any living man, yet as the statutes show the commencement of the inspection of flour in Virginia, and as this period is within the limitation prescribed for the commencement of a custom, the custom is bad.
4. **Doctrine of Presumptions—To What Applicable.**—The doctrine of presumptions cannot be applied to this custom, because, 1st, the presumption is repelled by the evidence; and 2d, because the doctrine of presumptions can only apply to things which lie in grant, and where there is a party by whom the grant could be made as well as one to receive it.
5. **Custom—Vesting a Right.***—There is no customary law in Virginia which *per se* can vest a right in a party claiming under it.
6. **Same—Effect of Recognition by Statute.**—If a custom has been recognized by a statute either expressly or by necessary implication, it will thereby receive vitality, and the right claimed under it may be asserted as conferred by the statute.
7. **Inspector of Flour—Right to Keep Draft Flour—Statute.**—The act, Code, ch. 88, p. 413, does not recognize either expressly or by implication, the right of the inspector to take the draft flour; or to use an auger or trier more than half an inch in diameter.†
8. **Same—Statute Regulating Size of Auger—Effect on Previous Custom.**—The act having directed, that an auger of not more than a half inch in diameter shall be used in inspecting flour, a custom to use a larger auger is bad, though the inspector says he cannot execute his duty satisfactorily with an auger of the size prescribed by the statute.†

458 *9. **Same—Same—Effect.**—The inspector of flour is bound to inspect it by boring through the head of the barrel, with an auger not exceeding a half inch in diameter.†

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*Custom—Vesting a Right.—In the 5th headnote of the principal case it is held that, there is no customary law in Virginia which *per se* can vest a right in a party claiming under it. For the above proposition the principal case is cited and approved in Reese v. Bates, 94 Va. 325, 26 S. E. Rep. 865.

In Southwest Va. M. Co. v. Chase, 95 Va. 56, 27 S. E. Rep. 826, it is said: "It is well settled in this state that a local custom or usage cannot be relied on where it is inconsistent with the terms of the written contract between the parties. Harris v. Carson, 7 Leigh 639; Mason v. Moyers, 2 Rob. 613; Gross v. Criss, 3 Gratt. 262; *Delaplane v. Crenshaw, 15 Gratt. 457;* Richlands, etc., Co. v. Hiltebeitel, 92 Va. 91, 22 S. E. Rep. 806; Reese v. Bates, 94 Va. 321, 26 S. E. Rep. 865, and Hansbrough v. Neal, 94 Va. 722, 27 S. E. Rep. 593."

†The act, Code, ch. 88, p. 413, embraces all articles directed to be inspected; and after providing for the

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10. **Same—Refusal to Inspect as Law Requires—Mandamus.**—An inspector of flour refusing to inspect flour by boring through the head of the barrel with a half inch auger, he will be compelled to do it, by *mandamus* from the court.

11. **Statute—Inadmissible Evidence to Ascertain Meaning of.**—The evidence of a member of the legislature is inadmissible to prove the knowledge of the members as to the existence of the custom of the inspector to take the draft flour, when the statute was enacted by them, for the purpose of ascertaining the true meaning of the statute.

12. **Civil Suits—Instructions—Right of Counsel to Discuss.**—In a civil suit (whatever may be the law in a criminal case), after the judge presiding at the trial has given an instruction to the jury, the counsel should not be allowed to discuss before the jury the same matter which the court has already decided.

The first of these cases was an action of trover in the Circuit court of the city of Richmond, brought by Crenshaw & Fisher, millers and partners, against Daniel S. Delaplane, the public inspector of flour in the city of Richmond, to recover the value of a quantity of what is called draft flour; that is, flour taken from the barrel by the inspector for the purpose of the inspection. This flour had been for many years retained by the inspector in Richmond and other cities on tide water, where flour is required by law to be inspected, as his perquisite or compensation in addition to the
459 *specific money compensation allowed by the statute; and the inspector claimed to retain it on the ground of immemorial usage.

The defendant introduced several witnesses, who either were then or had been inspectors of flour in Richmond, Petersburg, Lynchburg and Fredericksburg, all of whom stated that as far back as they had any knowledge on the subject, it had been the usage for the inspector to use an auger and trier of more than half an inch in diameter, to bore the hole in the head of the barrel for the purpose of inspecting it; and to appropriate the flour drawn from the barrel to his own use. And after having introduced certain reports of committees of the house of delegates in relation to the inspection of flour, made before the present act on the subject was passed, he introduced a witness, who stated that he was a member of the general assembly when the act was passed, and that he had been a member for several years previous to that session: and then the defendant proposed to prove by the witness that the members of the assembly who passed the act were well informed at the time, of the usage aforesaid, both as to the size of the auger and trier used by inspectors, and that they retained the flour drawn from the barrel in the process of inspection, as a part of their compensation, in addition to the fee in money allowed by law. But the plaintiffs, by their counsel, objected to the evidence; and it was excluded by the court: and the defendant excepted.

When all the evidence was submitted to the jury, both the plaintiffs and the defendant asked for instructions; but the court declining to give either as asked for, instructed the jury as follows:

If the jury shall believe from the evidence, that at the time and for a long period prior to the occasion, when the flour in controversy was inspected by the
460 *defendant, it was the custom for the inspector of flour in the city of Richmond to take to his own use the flour drawn at the inspections, and this custom was known to the plaintiffs prior to the occasion aforesaid, and had been on other previous occasions acquiesced in by them, and that the flour in controversy was taken and used by the defendant in pursuance of that custom, from a lot of flour inspected for the plaintiffs at their request, without objection on the part of the plaintiffs before the inspection was made, to the defendant's taking the flour as aforesaid, then the jury are to find for the defendant. But if the jury shall believe that the lot of flour from which the flour in controversy was taken, belonged to the plaintiffs, and that at the time the plaintiffs required the defendant to inspect the said flour, and before the same was inspected, they informed the defendant that he should not take the flour drawn at such inspection, and that the plaintiffs claimed it as their own; and that the defendant inspected the flour with the knowledge of this objection and claim on the part of the plaintiffs, and then took the flour drawn as aforesaid, to his own use, without the subsequent acquiescence of the plaintiffs, then the jury are to find for the plaintiffs, although the jury shall further believe that the defendant before and at the time he inspected the flour, claimed the right to retain to his own use the flour drawn as aforesaid: and to this instruction the defendant again excepted.

In the progress of the argument of the cause before the jury, the counsel for the defendant was proceeding to discuss the case upon the law as well as the facts before the jury, for the purpose, as he announced, of inducing the jury to find a verdict for the defendant in opposition to

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appointment and removal of inspectors, and directing in what condition the different articles must be, that are offered for inspection, and as to flour, meal and bread, that the barrels containing them, "shall have ten hoops well nailed with four nails in each chine hoop and three nails in each bilge hoop," proceeds as follows:

"§ 20. Every inspector, by himself or a deputy, shall attend when required, at such time and place, within his county or inspection district, as the owner of any commodity of which he is inspector may appoint, and examine such commodity, either by boring through the head, in case of a barrel, with an auger not exceeding half an inch in diameter, or in some other satisfactory manner as to barrels and all other parcels."

By § 36, the fees for inspections are fixed, and among them, "for each barrel of flour inspected at Richmond, one cent, and at all other places, two cents; on each barrel of corn meal or bread, two cents."

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the instruction of the court, when he was arrested by the court, who decided that he should not argue against the instruc-
461 tion of the court—the *court and not the jury being the proper exponent of the law, and the jury bound to take the law as the court had expounded it: and the defendant excepted.

There was a verdict for the plaintiffs for two thousand three hundred and sixty-one dollars and eight cents damages; and the court rendered a judgment thereon, with interest from the date of the judgment. Whereupon the defendant applied to this court for a supersedeas; which was allowed.

The second of these cases, was an application by Haxall, Crenshaw & Co. millers, to the Circuit court of the city of Richmond, for a mandamus to Daniel S. Delaplane, the inspector of flour in the city, to compel him to inspect a certain lot of flour then in barrels in their mill. To the rule which issued upon this application, the inspector made a return, in which, after setting out the provision of the statute, as requiring that the inspector shall inspect each barrel of flour which is submitted to him for inspection, by boring through the head of it with an auger not more than half an inch in diameter, or in some other satisfactory manner, he said that it had always been the custom of the inspector of flour in the city of Richmond and elsewhere in Virginia, from a time to the contrary whereof the memory of no living man runneth, to inspect flour in barrels, by boring through the head with an auger more than half an inch and less than an inch in diameter; that this had been his custom since he had been inspector; and that he was ready to inspect the flour of the plaintiffs in that manner. Or he was ready and willing to inspect the plaintiffs' flour in some other satisfactory manner, viz: without boring through the heads of the barrels, if the plaintiffs would cause a sufficient portion of the heading to be removed; but they have refused to let it be so inspected. And he averred that he could not in any
462 *other manner properly discharge the duties of his office, because he could not otherwise inspect flour so as to enable him to pronounce honestly and advisedly the judgment upon it which the law requires.

To this return the plaintiffs demurred, and the court sustained the demurrer; and the court having afterwards directed a peremptory mandamus to him, he applied to this court for a supersedeas; which was allowed.

The cases were heard together, and were very elaborately argued by Green, Joynes and Lyons, for the appellant, and Crenshaw, Randolph, Holladay and Crump, for the appellees.

For the appellant, it was insisted:

1st. That there may be customs in this country; and that the custom to take the draft flour was a good custom. And they cited 1 Thomas' Coke, p. 28; 1 Tuck. Com. Book 1, p. 23, 24; Walker v. Chichester, 2 Brevard's R. 67; Doe v. Dauncey, 7 Taunt. R. 674; Knowles v. Dow, 2 Foster's R. 387; 1 Tuck. Com. Book 2, p. 81; Hudson v. Johnson, 1 Wash. 10; Branch v. Burnley, 1 Call 147; Best on Presumptions 87, Law Libr.; 2 Greenleaf Evi. title Presumption, § 538; Archer v. Saddler, 2 Hen. & Munf. 370; Clarke v. Mayo, 4 Call 374; Coolidge v. Larned, 8 Pick. R. 504; Melvin v. Whiting, 10 Id. 295; 1 Greenleaf Evi. § 293; 1 Sugd. Vend. 178; Broome's Legal Maxims 719; Sedgwick's Const. & Statute Law 659-661, 739-747; Packard v. Richardson, 17 Mass. R. 122, 144; Edwards v. Darby, 12 Wheat. R. 206; Isaacs v. Steel, 3 Scam. R. 97; Steiner v. Coxe, 4 Penn. R. 13; Attorney Gen'l North Car. v. Bank of Cape Fear, 5 Ired. Equ. R. 71; Schoff v. Bloomfield, 8 Verm. R. 472; Boyden v. Town of Brookline, Id. 284; Kemion v. Hills, 1 Louis. Annual R. 419; Baring v. Reeder, 1 Hen. & Munf. 154, 161, 163; Findlay v. Smith, 6 Munf. 134, 148; Bodfish
463 *v. Fox, 23 Maine R. 90; Desha v. Holland, 12 Alab. R. 513; Knowles v. Dow, 2 Foster R. 384; Harris v. Nicholas, 5 Munf. 483; Sedg. Const. & Stat. Law, p. 3, 5, 8, 9, 12, 13, 17, 20, 21.

2d. That the usage both as to the draft flour and the auger and trier, had been recognized by the general assembly; and that the money compensation had been reduced by the act of 1849 from two cents to one cent in Richmond, because of the draft flour received by the inspector. They referred to the reports of the committees of the general assembly, to show that the usage was known to the general assembly, and that the law was based upon that usage. And they insisted that the parol evidence offered by the defendant to prove the knowledge of the members of the legislature, was improperly excluded. They cited Rogers v. Goodwin, 2 Mass. R. 475; Stuart v. Laird, 1 Cranch's R. 299; McKeen v. Delancy, 5 Id. 22; S. C. 1 Wash. C. C. R. 525; Steiner v. Coxe, 4 Penn. R. 13; Meriam v. Harsen, 2 Barb. Ch. R. 232, 269-272; Walworth Ch.; Brown v. Farran, 3 Hamm. R. 140; Chesnut v. Shane, 16 Ohio R. 599; Regina v. Ballivos, &c., de Bewdley, 1 P. Wms. R. 207, 214, 224; Myrick v. Hazey, 27 Maine R. 9; Hatch v. Vermont Cent. R. R. Co., 25 Verm. R. 49; Parramore v. Taylor, 11 Gratt. 220; Sorresby v. Hollins, 9 Mod. R. 223; 2 Burns Eccl. Law 481; 1 Collectanea Juridica 327, Dublin edi.; Houghton v. Rushby, Skinner's R. 257; 2 Vin. Abr. 476, p. 12; Ash v. Abdy, 3 Swanst. R. 664; Lilly's Case, 1 Leigh 525; Davis v. Rowe, 6 Rand. 355, 367; Heydon's Case, 3 Coke R. 7 b; Cow. & Hill's notes to Phillipps' Evi. 1408; Sibley v. Smith, 2 Mich. R. 486, 493; Staniels v. Raymond, 4 Cush. R. 314; The King v. Hog, 1 T. R. 721.

For the appellees, it was insisted:

1st. That though there are usages
464 in Virginia in *reference to which parties may contract, and thus be

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bound by them, yet in the legal sense of the terms, there are no customs, which bind a party independent of contract. And that if there might be a custom, the custom set up in this case was not a good custom. They cited Harris v. Carson, 7 Leigh 632, which they said was recognized in Governor, for Liggatt, v. Withers, 5 Gratt. 24; King v. St. Bartholomew, 22 Eng. C. L. R. 128; King v. Wix, Id. 60; Blewett v. Tregonning, 30 Id. 151; Leuckhart v. Cooper, 32 Id. 59; Lockwood v. Wood, 51 Eng. C. L. R. 30, 50, 67; 1 Phillipps' Evi. ch. 10, p. 660; Sedgw. Const. & Stat. Law 38, 39; 9 Bac. Abr. Statute, letter G, p. 235; Race v. Ward, 82 Eng. C. L. R. 700; Kenyon v. Nichols, 1 Rhode Isl. R. 106; Fletcher v. Seekell, Id. 267; Littlefield v. Maxwell, 31 Maine R. 134; 1 Smith's Lead. Cas. 593-4; Currie v. Page, 2 Leigh 617; Gardner v. Newburgh, 2 John. Ch. R. 161; 2 Kent's Com. 338; Schooner Reeside, &c., claimant, 2 Sumner's R. 567; Anderson v. Pitcher, referred to in 2 Stark. Evi. 566.

2d. That the statute having given the inspector a specific money compensation, no usage to take the draft flour could arise. And if the present statute was to be considered as authorizing it, the act is unconstitutional. Richmond and York River R. R. Co. v. Wicker, 13 Gratt. 375; Vanhorne's lessee v. Dorrence, 2 Dall. R. 304, 310, 311, 318; Taylor v. Porter, 4 Hill N. Y. R. 140; Wynehamer v. The People, 3 Kernan N. Y. R. 378; Fletcher v. Peck, 6 Cranch's R. 87, 134; Satterlee v. Matthewson, 2 Peters' R. 380, 414; Wilkinson v. Leland, Id. 627, 657; 2 Story on Const. p. 252, § 1399.

3d. That neither the usage nor the reports of the committees of the general assembly, nor the evidence of the witness could be referred to in aid of the construction of this statute, in which there was no ambiguity, and in which draft flour was not once mentioned. Currie v. Page, 2 Leigh 617; Barker v. Pool, 6 Missouri
465 *R. 260; Lett v. Horner, 5 Blackf. R. 296; Handy v. The State, 7 Missouri R. 607; Sedgwick Stat. and Const. 382, 241, 257; Garth's Case, 3 Leigh 761.

LEE, J. These cases have been argued together, and from their nature and character may properly be considered in immediate connection. I propose to consider, first, the action of trover in which the right of the inspector to appropriate to his own use, the flour drawn by him from the barrel in the process of inspection, called the "draft flour," is the subject of controversy.

This right is sought to be sustained upon two grounds:

1. The long continued usage or custom of the inspectors of flour in this state to retain the draft flour as a part of the compensation for their services.

2. The recognition of this custom in acts of assembly and the sanction thus given to it by the legislature.

If there could be in Virginia, a legal, valid usage or custom the effect of which is to operate per se, as an exception to the general rules of the common law, and to vest a right which could not be claimed under them but must be claimed expressly against them, I should yet hold that such a custom when invoked for the benefit of a public functionary by transferring to him a portion of the goods of the citizen with which he is called upon to deal in the discharge of his office by way of additional compensation or perquisite, over and above what the law expressly provides, would be bad as being unreasonable, unjust and contrary to the policy of our laws. It would be unjust and unreasonable that a public officer having a specified duty to perfom in relation to the property of others, for a prescribed fee, should by the discharge of that duty acquire a right not only to
466 the fee allowed, *but also to a part of the property itself. It thus makes him the sole judge of the compensation which he shall receive. There is not even the pretense of a contract which might be said to be made with reference to the custom. The manufacturer who designs his flour for shipment has no choice in regard to the inspection. He is required by law to have such flour inspected, and is subject to a heavy penalty if he shall export or ship it without such inspection. He pays the fee because required by law to do so, but in no respect does he stand in the relation of a contracting party to the inspector. Now it is well settled that a custom to take or have any thing from another man's land, or for a profit a prendre, is bad. Gateward's Case, 6 Rep. 60; Grimstead v. Marlow, 4 T. R. 717; Blewett v. Tregonning, 30 Eng. C. L. R. 151; Wilson v. Willis, 7 East's R. 121; Race v. Ward, 82 Eng. C. L. R. 700; Waters v. Lilley, 4 Pick. R. 145; Perley v. Langley, 7 New Hamp. R. 233; Kenyon v. Nichols, 1 Rh. Isl. R. 106. In the case last cited, the claim was of a custom for all the citizens to take sea weed thrown up upon the shore, but it was considered to be a claim to have an interest or profit a prendre in the land of another, and as in the other cases, a custom to sustain such a claim was held bad. And no difference in principle is perceived between such a custom, and one to appropriate part of the personal chattels of another, against his will and without his consent, and without any consideration whatever. It is not an easement, or even a profit that is claimed, but a portion of the principal subject itself; and it seems where the claim is destructive of the subject matter it is held bad even if the party setting up the custom does not claim to carry away and appropriate it to his own use. Bland v. Lipscombe, 82 Eng. C. L. R. 712, n. It is but a petitio principii to say that the inspector may appropriate the draft flour
467 to his own use because he *may destroy it or throw it away. If it be conceded that to "inspect" means more than to make mere ocular examination, and that the inspector is authorized to bake a portion of the flour into bread, or subject it to

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a chemical test, still that would not authorize him to take away any more than is necessary for that purpose, nor even that for his own use and benefit. Taking away the draft flour is no part of the inspection, for that may be made as well whether the inspector appropriates it to himself, or restores it to the owner.

The practice of millers to take toll for grinding gives no countenance to this custom. The cases are in no respect parallel. The shipper of flour has no option; he must have his flour inspected and pay the fees without any thing in the nature of a contract between himself and the inspector. The owner of grain may or may not have it ground at his pleasure, and if he do it is matter of contract between himself and the miller that the toll is yielded. They may agree that the compensation for grinding shall be in money or other thing, instead. Nor is there any real force in the suggestion however plausible it may seem, that the inspector may keep the draft flour for the purpose of vindicating his judgment, if he should be sued for a false brand. It is impossible to believe that such a motive could have been the origin of this custom. No case, I apprehend, has ever occurred in which such an instrument of evidence has been resorted to, nor is it at all likely that ever the flour drawn from a barrel by an inspector was retained for any such purpose. In point of fact, the practice has been universal for the inspectors to mix the flour thus drawn in a common bulk and to sell or otherwise dispose of it. And moreover the gist of any action against an inspection for a false brand, would be the honesty, and not the absolute correctness of the judgment which he had pronounced.

468 *This custom, as it seems to me, is also bad, because in conflict with the general policy of the law, and this in several respects. It is certainly a marked feature in our system of offices that the compensation of public functionaries shall be fixed and certain. It is a great and pervading principle of our Code and is essential to the purity and impartiality of the government. The idea of a "perquisite of office" in the sense of a fee or allowance for services beyond the ordinary salary or settled wages, has no place in our legislation but seems to be repudiated by the most necessary implication. Once to admit it is to open a wide door for imposition and corruption. Dr. Webster tells us that the common acceptation of the word in America is a fee to an officer for a specific service in lieu of an annual salary, but he gives also the other sense in which it is elsewhere used. The salaries fixed in our Code for some officers, the specified fees for services allowed to others and the penalties imposed in some instances for demanding fees for services not performed or for demanding greater fees for services than those allowed by law, all show the intention of the legislature that the compensation to the officer should be restricted to the fees expressly provided. In the inspection laws throughout, the fees are specifically named, and the idea of any further compensation would seem to be plainly excluded. For many years indeed prior to 1792, after the sum named were added the words "and no more" which served, not merely to limit the pecuniary fee to be paid down, but to exclude the idea of any other compensation, and thus discountenance the custom of taking the draft flour; and although in that year these words were dropped, it was doubtless because they were deemed surplusage the idea having been sufficiently expressed, as the words "to be paid down by the owner" found in previous acts had been dropped in 1787.

And when the present Code fixes
469 *the inspector's fee at one cent the barrel, it can hardly mean to give as much more in the form of flour as the inspector may think it necessary to take for the purpose of inspection. Now although a custom when otherwise good may override and displace the common law rule, yet a statute introducing a new principle, with a negative either express or necessarily implied, must be strictly pursued and no custom can be set up against it. Dwarris on Stat. 475, 477; Lord Lovelace's Case, Wm. Jon. 270; Jones v. Smith, 2 Bulstr. R. 36; King v. Bishop of London, Show. R. 413, 420; 9 Bac. Ab. "Statute," G, p. 237. Sedgwick on Stat. and Constit. Law 38, 39. And such is I think the character of these inspection laws; for a negative to any other compensation than the fee expressly given arises from most necessary implication. And although a custom or usage may be invoked to interpret a statute or a contract that needs interpretation, where something is to be done not sufficiently explained, yet where there is no doubt or ambiguity, it cannot be resorted to to contradict what is plain or to control, vary or add to or diminish what is expressed in formal and deliberate terms. 1 Greenleaf Ev. § 292, § 293. and cases cited in nn. Blackett v. Royal Exch. Ass. Co., 2 Cromp. & Jer. 244; The Schooner Reeside, 2 Sumn. R. 567, opinion of Story, J.

This custom, also as it seems to me necessarily contravenes the policy of the provision forbidding an inspector to trade in any commodity of which he is inspector. For when it is considered that this inspector withdrew for his own benefit very nearly sixty thousand pounds of flour on the inspections for one house within a period of seventeen months, and that for the year ending the 30th of June 1858 the number of barrels inspected was six hundred and fifteen thousand two hundred and twenty-nine, and that for two quarters only ending December 31, 1858, the number was
470 *four hundred and one thousand seven hundred and thirty-eight, it must be perceived that the inspector becomes of necessity a large dealer in the commodity of flour. It is true the section authorizes the inspector to sell any commodity which he may have received in payment of his fees: but by this doubtless is meant any article

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for which he agrees that the fee allowed him by law may be commuted. I cannot think that the act contemplated any thing in the nature of a perquisite to be received in kind by the inspector over and above the fee prescribed. I think it a sound principle of construction that a law imposing burdens, like any act granting privileges in derogation of common right, should be interpreted favorably to the public, and if there be even reasonable doubt as to the extent to which it goes, such doubt should be resolved in their favor. If a definite and described charge be made, there can be no room to presume that some other and further burden in respect of the same subject was intended to be imposed.

But I think this custom is also bad because it lacks the necessary age to render it valid as such. Indeed I do not see how any particular custom in derogation of the common law and which prevents the application of the common law rule to the locality in which the custom prevails by showing that the common law as to this subject never had any existence in that locality can be held good in Virginia. In Harris v. Carson, 7 Leigh 632, Judge Cabell in his opinion, in which all the other judges concurred excepting Brooke who was absent, says "a custom to be valid must be as old as the common law; it must be immemorial. And if the particular custom be proved to be immemorial, it necessarily excludes the general custom or common law; for two opposite and inconsistent customs cannot have immemorially existed in the same place and as to the same thing." In that case the question was as to the
471 *right of the offgoing tenant by a lease under seal, for a fixed and determinate period, to take the waygoing crop. And although in Wigglesworth v. Dallison, Doug. R. 201, it was decided that a custom would entitle such tenant to the waygoing crop even where the lease was by writing under seal and to end at a fixed time, yet it was held that in Virginia the tenant could assert no such claim as no such custom could be good because not immemorial. And the judge said: "It is clear that it could not have existed at any time even as a recent custom until after the settlement of the country and after the common law had attached to every part of it. And nobody will contend that a recent usage or practice however general will change the common law."

This opinion concurred in by all four judges of this court who were present, would seem to be conclusive upon the question in this case. Nor do I feel at all prepared to advance a different one. That a custom to displace the common law must be immemorial, and that the time of memory runs back to the reign of Richard Cœur de Lion, are maxims of such ancient, universal and familiar acceptation in the English law, that it is now quite too late to controvert their correctness. And although this period was that fixed for the limitation of the writ of right by the statute of Westminster First, which was afterwards reduced to sixty years by the statute of 32 Hen. VIII. ch. 2, I am aware of no change made in the mode of estimating the period during which to be good a custom must be said to have continued. It is true that it has been made the subject of regret and complaint that the time of legal memory was not shortened by the courts of law upon the same reason which led to the reduction of the period of limitation, yet that it remained unchanged is every where conceded. See Best on Presumptions 187; Cruise's Dig. title XXXI. ch.
472 *1; 2 Greenleaf Ev. § 538; Coolidge v. Larned, 8 Pick. 504. I am aware that cases are to be found in which regular usage short of the prescribed period has been held to be sufficient evidence of the custom alleged, and where uncontradicted or unexplained, deemed sufficient to authorize a jury to find the existence of an immemorial custom. But they do not contradict the general rule as they will be found to depend upon the artificial doctrine of presumptions, which has been introduced, in part, or at least taken advantage of, to evade the rule of legal memory and remedy the inconvenience attributed to the omission of the courts to shorten the period by analogy to the reduction of that of the limitation of the writ of right. But this doctrine cannot be applied to a subject like this. It may not be confined to incorporeal hereditaments but may extend to real estate also; but this falls within neither description: and the presumption of a grant is not a rule of law but is to be the basis of a finding as to a fact by a jury. Moreover, it can only be made where the thing lies in grant and where there is a party by whom the grant could be made as well as one to receive it. Such a right as this could not be the subject of a grant, nor is there any one who could be supposed to have made it, nor any one who could be supposed to have accepted it. The millers of the present day cannot be bound by the concessions of those of former years because in no legal sense can the latter occupy the relation of ancestors or predecessors to them, nor can the inspector of this day claim to have derived any such right by succession. His rights grow out of the statute and not of any relation in which he can be supposed to stand to those who may have happened to precede him in the office.

In reference to those cases in which a jury has been advised to presume a usage to have been immemorial from proof of its continuance for a shorter period
473 than *that of legal memory, it must be observed that this was where the usage was uncontradicted and unexplained and its origin not shown to have been within the prescribed period. This however may always be done and the presumption that the custom was immemorial thus repelled. Nor is it necessary that its origin or a time when it did not exist must be shown by the memory of some living witness: for the "memory of man" which is

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spoken of is not to be understood as merely living memory, but memory by the means of records or other written memorials. And therefore where there is any proof of the original or commencement of any thing, it cannot be claimed by prescription unless it were before the commencement of the reign of Richard I. Coke Litt. 113; Ibid. 115 a; 3 Stark. Ev. 1204; Bull. Nisi Pr. 248. The origin of the usage in this case, though not in the memory of living men, is shown by the dates of the acts establishing inspections beyond the earliest of which of course the usage could not have existed.

I have not thought it necessary to enter into the enquiry as to the origin of the custom of merchants, or into those respecting the origin of the jurisdiction of the Court of chancery or of the King's bench in other than criminal cases, or of the Courts of exchequer and common pleas; nor shall I stop to consider the custom to bar entails by surrender in the Lords' court without a recovery; all of which subjects have been so earnestly discussed by the counsel. Time and space would fail me were I to undertake to enter upon the task. I must content myself with saying that I think these enquiries would not shed much light upon the subject of discussion here, depending, as I think it does, upon a few intelligible legal principles. Neither can I stop to examine the various cases cited from the reports of our sister states and some of the courts of the United States to establish a doctrine different from that of our
474 *own court. It is sufficient for my purpose that this court has by the unanimous opinion of all the four judges sitting, disaffirmed the existence of any customary law in Virginia in a case in which the alleged custom would have been and in fact had been held good in England, and that upon general principles I think that conclusion sound and correct. Counsel, it is true, have sought to distinguish the custom alleged in this case from that claimed in Harris v. Carson, as being a general custom prevailing throughout the state, whilst that in the latter case was a mere local custom prevailing in a limited section of the state. It would be difficult to predicate of a custom prevailing at the few points at which there have been inspections of flour that it was general and prevailed throughout the state: but whether general or local, I think the objections to it are equally fatal. The cases cited will I think for the most part be found to rest upon the doctrine of presumptions to which I have already adverted, or to fall within that class in which the custom has been held to be effectual not per se as such, but because it was supposed to enter into and form part of the contract between the parties, the same being assumed to have been made with reference to it. This class of cases I do not undertake to limit or call in question. I think we have nothing to do with them here. As I have endeavored to show, there is no semblance of a contract between the shipper and the inspector, nor, as I think, is there any between the legislature or the public and a party appointed to exercise a public office. He takes the office on the terms and conditions prescribed by the statute, and when it allows a fixed and definite fee for the service which he is to perform, I think it very far-fetched and illogical to say that he acquires also by virtue of his appointment, a right as by contract, to a portion of the property of the citizen in respect of which his
475 *office is to be exercised because his predecessors in the office may have been in the habit of taking a like portion without objection or protest on the part of those with whose property they had been called upon to deal. The only contract which as it seems to me can possibly be inferred from an appointment to a public office created by statute, with specified fees for the services rendered, and its acceptance, is an agreement on his part to perform the duties of the office, and on the part of the public that he shall be entitled to the fees prescribed by the act when the services shall have been rendered.

In every view which I have been able to take of this case, I have been brought to the conclusion that there is and can be, no such customary law as that contended for, which per se can serve to vest the right claimed by the inspector. Nor can I think that it is any infringement of the right of the people to deny the existence of such customary law unless recognized by the legislature, as contended by the counsel. On the contrary at this day and in this age, in a government like ours, there can be little need of a resort to such a source as custom for legal sanction. And as the constitution vests the whole law-making power in the legislature it is difficult to see how comparatively a few individuals can make a law by custom which shall be binding upon the public at large. It would savor more of encroachment upon the rights of the people to say that they should be bound by a law which had never been assented to by them through their proper representatives. And if the legislature were to declare by express enactment that custom might make law, it might well be questioned whether such a provision would not be void for the want of power in the legislature to delegate to a few men authority to make a law by getting up a custom.

But it is contended that if the cus-
476 tom alleged cannot *operate proprio vigore to vest the right claimed in the inspector, yet that it has been sufficiently recognized by statute and thus has received the legislative sanction. Certainly if it has been recognized either expressly or by necessary implication it would thereby receive vitality, and the right claimed could well be asserted as conferred by the statute. Now I have examined all the acts of the general assembly concerning the inspection of flour commencing with the act of February 1745 and coming down to the chapter upon that subject in the present Code, and I have been unable to find any provision in

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which the right of the inspector to appropriate the draft flour to his own use is in any way recognized. The draft flour is no where mentioned in any of the various acts that have been passed from time to time, nor have I been able to find a single provision for which the right of the inspector to take it can be derived by necessary or even fair implication. It has been argued, it is true, upon the construction of the act in the present Code upon this subject, that as it had been the usage of the inspectors to take the draft flour under the previous acts, that usage should be regarded as the contemporaneous construction of those acts; and that as the legislature had substantially re-enacted those laws without negativing the usage, it had adopted that construction with the acts themselves. I do not at all impugn the maxim "cotemporanea expositio optima et fortissima est in lege," but I think it has no application here. The usage was no construction of the acts, but was something in direct contravention of their provisions. It was in terms negatived up to the act of 1792 by the addition of the words "and no more" after the fees prescribed; and although those words were dropped in that act, yet the negative was as strongly implied by its terms. That act was entitled "an act reducing into one the several acts for regulating the
477 inspection *of flour and bread," and was special and precise in its provisions, and it is most reasonable to infer that the words were dropped because it was thought that naming a specific fee for the service was a sufficient exclusion of the idea of any thing more being demanded, and that the words were therefore unnecessary. If it had been intended to sanction the usage some allusion would doubtless have been made to it. There might be some little plausibility in the argument if it appeared that the act of 1792 had passed after the reports of the committees to the house ascertaining the fact of such usage, which have been referred to (supposing these reports could be received in aid of the construction of the acts as to which I express no opinion); but the reports which have been cited in the argument appear to have commenced in 1831 and none has been shown prior to 1792. Nor is there a single provision in the act of 1819 or that in the present Code, which can, as it seems to me, with the least plausibility, be referred to the knowledge on the part of the legislature of the existence of this usage. The reduction of the fee at Richmond from two cents to one cent has been relied on, but that should more naturally be referred to the great increase in the quantity of flour inspected at Richmond than to the usage of the inspector to take the draft flour. The legislature no doubt thought from the large number of barrels usually inspected at that point, the statute fee would afford an ample salary to the inspector, without any reference to the draft flour. No reduction was made in the fee at any other place, although the usage appears to have prevailed at all the places at which there were inspections, and although the existence of the usage was as well known as far back as 1831, at least, as it was in 1849, yet during all that period no change had been made that
478 *can be traced directly or indirectly, to the existence of this custom.

Upon a review therefore of all the inspection laws, and finding no mention made any where of the draft flour nor any provision which either by necessary implication or even fair intendment can be held to recognize the usage to take it, I think the fair and reasonable inference is that the legislature did not intend either to affirm or disaffirm the right of the inspector to appropriate it to his own use, but did intend to leave the question exactly where it then stood until the right should be denied and the subject contested before the courts. Whilst however we may look in vain to the acts for the explanation of this usage, I think it not difficult to understand its true origin. At first and for a long time the inspections of flour were in small parcels, and the flour drawn was too inconsiderable to attract the attention of the owner or the inspector. In course of time however, it became worth the attention of the inspector whilst the quantity taken from any one owner was not sufficient to induce him to make any objection. It gradually continued to increase until as it appears in one year alone, the quantity of the draft flour received by the inspector and appropriated to his own use must have amounted to upwards of fifteen hundred barrels; and when the large manufacturers of the article began to realize the large quantities of flour which they were thus made to contribute to the store of the inspector, their attention was drawn more closely to the subject, and hence their protests against the right to take it under this litigation.

Being thus of opinion that there is nothing in the statute which confers or recognizes the right of the inspector to take the draft flour, I deem it entirely unnecessary to examine the question discussed by
479 the *counsel whether it would be within the constitutional competency of the legislature to take from the citizen a portion of his property for the benefit of the inspector without making the former any pecuniary compensation, and forbear to express any opinion upon it.

The complaint of the exclusion of the testimony of the witness Stovall admits I think of several answers. In the first place the issue was one of fact before the jury and it certainly could not be material for their purposes that they should be informed as to the state of knowledge of the legislature or of members in respect of the existence of the custom of the inspectors to take the draft flour, at the time the inspection law was passed. The object, it is claimed, was to aid in the construction of the act, and if admissible at all, it was not as evidence to go to the jury, but as matter for the enlightenment of the court. Again: as we have seen, there was no mention of

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the draft flour in the act, and nothing in its provisions which could be traced to such knowledge as its fruit, the evidence was simply irrelevant for any purpose. But, thirdly, I go further and maintain that the evidence was illegal in itself and inadmissible even for the consideration of the court. Without attempting to define the limits within which a court in construing a statute may properly look to extrinsic matters for the purpose of ascertaining the intention of the legislature, I cannot hesitate to say that to call witnesses to the stand for the purpose of proving that facts were known to the legislature or members thereof which may be supposed to indicate their intention in passing the law, must be inadmissible. As has been remarked, if the utmost latitude of proof was allowed, if reports and journals and parol evidence of witnesses and even of the members themselves, were admitted, it would be utterly impossible in the great majority of cases to prove
480 what the intent *of the legislative body actually was; and all attempts by any kind of evidence to get at a meaning different from that embodied in the enactment would from the nature of things prove utterly vain and illusory. Sedgwick on Stat. and Constit. Law, p. 332. See also Ibid. p. 240, et seq.; Bank of Pennsylvania v. Commonwealth, 17 Penn. State R. 144; Southwark Bank v. Commonwealth, 26 Penn. State R. 446; Supervisors of Niagara v. The People, 7 Hill N. Y. R. 504; Sedgwick Stat. & Const. Law 243. Where witnesses are called to prove knowledge on the part of members of particular facts, they can perhaps only speak from the recollections of conversations with them, and thus in the grave matter of expounding a statute, a species of evidence is resorted to which upon an issue of fact is regarded as not entitled to much consideration because so liable to be misunderstood or perverted. The evils that might result from such a mode of interpreting a statute may be curiously illustrated thus: in several cases in different circuits involving the construction of the same act different members might be called as witnesses whose recollections might differ materially as to the facts supposed to be known to the legislative body, and if the construction is made to depend upon their testimony, it would be different in different cases, and yet each case might be right upon its record and contradictory judgments upon the same statute would have to be affirmed. I think the tendency of the modern decisions is to the rule that the meaning and intent of the lawmaker is to be sought for in the statute itself. See Bank of Pennsylvania v. Commonwealth, above cited, in which it was held that evidence of public embarrassment, the proclamation and message of the governor, the journals of the house of representatives, and the reports of committees should be wholly disregarded. In Southwark Bank v. Commonwealth, it was declared that the journals are not evidence of
481 the *meaning of a statute, because this is to be ascertained from the language of the act itself and the facts connected with the subject on which it is to operate. And per Lord Denman, C. J., "in construing an act of parliament we cannot go into what was said in either house of parliament before the act was passed." Regina v. Whittaker, &c., 61 Eng. C. L. R. 635. See also Schooner Paulina's Cargo v. United States, 7 Cranch's R. 52, 60; The King v. Poor Law Commissioners, 6 Adolph. & Ell. 1, 7; King v. Burrell, 12 Adolph. & Ell. 468. I am not aware that it has ever been settled in this state whether extrinsic facts existing prior to the passage of a law, not being themselves rules of law or acts of legislation, can be taken into consideration in any way for the purpose of ascertaining the intention of the legislature, but I am clear that the mode of proof offered in this case was wholly inadmissible.

The only remaining question in this case is that raised by the exception to the action of the court in arresting the counsel and prohibiting him from arguing before the jury against the instruction of the court. It is a duty which the court owes to its own self-respect as well as to the speedy administration of justice not to allow counsel to discuss before the jury the same matter which had been already decided by it. If the decision was right the party could sustain no injury by not being allowed to controvert it before the jury. If it was erroneous, his remedy was by bill of exceptions and an application to an appellate court to correct the error. The wrong and injustice of any other rule will be apparent on a moment's consideration. If the court has erred, the party aggrieved may have the error corrected how often soever it may be repeated. If the court was right, but the party has succeeded in getting a verdict in defiance of the court's instruction, the party ag-
482 grieved has no remedy save *by an appeal to the same court to set aside the verdict and grant a new trial on payment of costs; and the power of the court to administer this remedy is exhausted after the second trial, so that if upon the third the party shall succeed in obtaining another similar verdict notwithstanding the instruction of the court, the party injured is totally without remedy.

Whatever therefore may be the true interpretation of the maxim that "the jury are the judges both of law and fact" as applied to criminal trials, I take it that in civil cases, it is for the court to expound the law and for the jury to pass upon the facts; and where the court has instructed the jury as to the law, it is no more competent for the jury to encroach upon the province of the court by finding a verdict in defiance of its instruction than it is for the latter to trench upon the province of the former by undertaking to direct them as to the facts, and that no counsel should be permitted to argue against the instruction of the court for the purpose of inducing the jury to find a verdict in defiance of it. Smith v. Mor-

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rison, 3 A. K. Marsh. R. 81. See Garth's Case, 3 Leigh 778, in which this is admitted by the counsel, Mr. B. W. Leigh to be correct.

I pass over the motion for a new trial as it involves no other question than those I have already considered, and proceed to the mandamus case which I shall endeavor to examine as briefly as may be.

The questions presented are whether the inspector of flour is authorized to exercise his office in any other manner than by boring through the head of the barrel; and if not whether he is restricted to an auger not exceeding half an inch in diameter.

The first act providing for the inspection of flour intended for exportation was an act passed in February 1745 which required the inspector to "view and examine" the flour in bulk, and if found clean, pure and
483 *unmixed, to see the same packed in casks and barrels and stamped as therein directed, for which he was allowed a fee of six pence for every barrel of two hundred and twenty pounds or less, and for every cask of greater weight, eight pence. By the act of October 1748, the fee was reduced to three pence for such barrels and six pence for casks of greater weight. By the act of November 1762, the same fees were provided as in the last named act. By the act of October 1765, the mode of inspecting by boring the cask was first provided and the same fees were continued: but nothing was said in the act about the size of the auger. By the act of October 1776 the fee was reduced to one penny half penny per barrel of two hundred and twenty pounds, and in proportion for casks of greater weight, but nothing is said in the act about the mode of inspection. This act expired by its own limitation and was revised and amended by the act of May 1780 which fixed the fee for the inspection of flour at five shillings per barrel of the then standard weight and in proportion for casks of greater weight. The next act on the subject was the act of May 1782 by which the quantity of flour which each barrel intended for exportation was required to contain was fixed at one hundred and ninety-six pounds. In November 1787, another act was passed entitled "an act to regulate the inspection of flour and bread," which after reciting that the laws theretofore made for the inspection of flour had been found defective and further regulations had become necessary, proceeded to designate the different places at which inspections should be had and to prescribe various regulations concerning them. The mode of inspection was to be by boring through the head of the barrel with an instrument not exceeding ha'f an inch in diameter and the fee was fixed at two pence the barrel. This act was followed by that of December 1792 entitled "an act for reducing into one
484 the several *acts for regulating the inspection of flour and bread." This act prescribed general regulations upon the whole subject, and like the previous act directed the inspection to be made by boring through the head of the cask with an instrument not exceeding half an inch in diameter and fixed the fee at several places of which Richmond was one, at two cents. After the date of this act, I do not find that any thing is said in any act about the mode of inspection or the fee until the revisal of 1819 which prescribes the same mode of inspection and the same fee (at Richmond) as the act of 1792: nor after the revisal of 1819 do I find any change made until the revisal of 1849. Of the Code then adopted the eighty-eighth chapter purports to be concerning the inspection of flour and certain other commodities in the number of which are fish, salt, butter, lard, lime, &c.; and the twentieth section provides that the inspector shall attend when requested and inspect any commodity of which he is inspector, by boring through the head in case of a barrel, with an auger not exceeding half an inch in diameter or in some other satisfactory manner as to barrels and all other parcels. Now I think upon a review of all these laws, that it was not the intention of the legislature to change the mode of inspecting flour. Since 1765 the mode of inspection had been by boring with an auger (excepting, perhaps, during the period between 1776 and 1787) nor do I see any sufficient indication of a purpose to change that mode at the revisal of 1849. By the eighth section all barrels containing flour, meal and bread offered for inspection are required to be well nailed with four nails in each chine hoop and three nails in each bilge hoop, and by the thirty-ninth section authority is given to the inspector to unpack any barrel but only in case he shall suspect false marking or the purchaser shall request
it. These provisions would seem to
485 exclude the idea of unpacking *for the ordinary purpose of inspection and although the provision as to nailing was extended to bread which could scarcely be inspected by boring through the barrel, it was probably done through inadvertence. The revisors for the sake of brevity, have sought to embrace a great many different commodities in one chapter and have therefore necessarily used language of a somewhat general character, but I think it should be construed reddendo singula singulis, and in the absence of any manifestation of any purpose to change the long established and familiar mode of inspecting flour, I should construe the section to mean that as to flour and corn meal the inspection should be by boring through the head of the barrel; and as to other commodities, the inspection of which could not be conveniently or satisfactorily made in that way, in some other satisfactory manner. If this had been intended to apply to flour also, there would have been no need to say anything of boring at all, and what was said of it, should for the sake of brevity, so much desired, have been omitted. Looking therefore to all the previous legislation (clearly a legitimate mode of arriving at the true construction of any act), I am of opinion that

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it was intended that such commodities as had been previously inspected by boring through the head of the barrel should continue to be inspected in the same way, and that it was not intended in respect to the very important subject of flour to leave the mode of inspection in the discretion of the inspector: that in respect to flour boring was considered a satisfactory mode of inspection, but in respect to other commodities to which that mode of inspection was unsuited, the inspector was to adopt some other that would furnish a satisfactory test.

As to the size of the auger which the inspector of flour is permitted to use, I think there can be no real question. It is true that the inspector avers in his return

486 *to the writ that he cannot made a satisfactory inspection by boring with an auger of no greater diameter than half an inch, and that it had always been the custom of the inspectors to bore with an auger of greater diameter, such as he had been in the habit of using. But the averment that the inspection could not be made in a satisfactory manner with a half inch auger was one which, I think, it was not competent for the inspector to make. The law had ascertained that a satisfactory inspection could be made with such an instrument and it was not for him to gainsay it. And it is in vain to appeal to custom to justify so plain a deviation from the requirement of the statute.

Much of what has been said upon the other branch of this case, will apply on this point to this, and I shall not therefore repeat it. I will content myself with saying that in my judgment this statute needs and will admit of no resort to a usage or custom for its interpretation. To adopt it would be not to construe the law but to set up something in direct contravention of its provisions. The restriction upon the size of the auger was most probably intended to limit the loss that might unavoidably occur in the process of inspection through injury to the surrounding mass by the admission of air and weakening the head of the barrel, and parties are as much entitled to have it respected as any other requirement of the act; and if the inspector will persist in disregarding it, any party aggrieved is clearly entitled to the mandamus to enforce it.

Thus as it seems to me there is no error in either judgment, and I am of opinion that both should be affirmed.

The other judges concurred in the opinion of Lee, J.

Judgments affirmed.

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487 *Wortham & Co. v. Smith & Sampson.

January Term, 1860. Richmond.

(Absent ALLEN, P., and LEE, J.*)

1. **Statute of Limitations—Store Accounts—To What Statute Applies.**†—The act, Code, ch. 149, § 5, p. 591, limiting actions on store accounts to two years, does not embrace wholesale dealings of importing and wholesale merchants, but applies exclusively to the store accounts of retail dealers with their customers.‡

2. **Store Accounts—Evidence as to Nature of Account.**—There being no evidence before the jury to show whether the account filed was of dealings by wholesale or by retail, other than what appears from the face of the account, proved to be correct, if the items of the account indicate that the sales were by wholesale and not by retail, they should be so regarded.

3. **Appellate Practice—Plea of Statute of Limitations—Failure to Specify Act Relied on.**—A plea of the act of limitations should state on what act the defendant relies. Though if it appears that the plaintiff could not probably be mistaken as to the act relied on, the appellate court will not reverse the judgment for the failure of the plea to specify the act.

This was an action of assumpsit in the Circuit court of Powhatan county, brought to August rules 1855, by Edwin Wortham & Co., merchants and partners, against Josiah Smith and Francis J. Sampson, late merchants and partners trading under the name and style of Smith & Sampson, to recover the sum of twelve hundred and eighty dollars and twelve cents, for goods, wares and merchandise sold and delivered by the plaintiffs to the defendants. The defendants appeared and pleaded "non-assumpsit," and

488 "the statute *of limitations;" to which the plaintiffs replied generally.

On the trial the plaintiffs introduced the account filed with the declaration, the first item of which bore date April 9, 1852, and the last item December 1, 1852. The whole account consisted of charges for articles sold by the plaintiffs to the defendants, and the articles were sold in whole parcels at a time. The correctness of the account was proved, and the written admission of its correctness by the defendants, under date of April 21, 1853, was also introduced, and proved to have been assigned in the name of the firm by Sampson. And this being all the evidence in the cause, the court, on the motion of the defendants, gave to the jury the following instructions: to which the plaintiffs excepted.

If the jury shall believe, from the evidence in the cause, that the acknowledgment in writing now offered in evidence by the plaintiffs, was made more than two years before the institution of this suit, then the plaintiffs have no right to maintain this action, by reason of the said acknowledgment, but that the same is barred by the act of limitations as to store accounts.

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*JUDGES ALLEN and LEE were sitting in a Special court of appeals.

†See principal case cited in Radford v. Fowlkes, 85 Va. 852, 8 S. E. Rep. 817; Roots v. Salt Co., 27 W. Va. 491. See also, Tomlin v. Kelly, 1 Wash. 190.

‡Code, ch. 149, § 5, p. 591. "Every action to recover money, which is founded upon an award or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: * * * * * and if it be on any other contract, within five years, unless it be an action for any articles charged in any store account; in which case, the action may be brought within two years."

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And the court further instructs the jury, that no action can be maintained for articles charged in a store account, after the expiration of two years after said account is due and payable.

The jury rendered a verdict for the defendants upon the issue joined on the plea of the statute of limitations, and the court entered up a judgment on the verdict: and thereupon the plaintiffs applied to this court for a supersedeas; which was awarded.

Steger, for the appellants.
C. Robinson, for the appellees.

DANIEL, J. The controversy in
489 this case hinges *mainly on the proper construction of the provision of the 5th section of the 19th chapter of the Code of 1849, requiring an action for any articles charged in any store account to be brought within two years next after the right to bring the same shall have first accrued; and in order to ascertain such construction, it is necessary to look somewhat into the history of our legislation and judicial decisions upon the subject.

The first act, the provisions of which it seems to me necessary to notice particularly, is the act of 1748, entitled "an act prescribing the method of proving book debts." 6 Hen. Stat. at Large, p. 53. The preamble recites: Whereas the trade of merchandise in this colony is chiefly carried on by retail, and the goods and merchandises are often delivered to the buyer by the retailer himself, and it frequently happens that nobody is privy thereto but the buyer and seller, so that in many cases there may be a defect of legal evidence to charge such buyer, and by that means a fair trader may be hindered from recovering a just debt; and the act then proceeds to declare that in any action of debt or upon the case where the plaintiff shall declare upon an emisset or indebitatus assumpsit for goods, wares or merchandises by him sold and delivered to any other person or persons, and upon the trial of such action such plaintiff shall declare upon his oath, that the matter in dispute is a store account, and that he hath no means to prove the delivery of the articles therein contained, or any of them, but by his store book; in that case, such book may be given in evidence at the trial, if he shall make out by his oath that such book doth contain a true account of all the dealings, or the last settlement of accounts between them, and that all the articles therein contained were bona fide delivered, and that he hath given all just credits due to the defendant in such account; and such book
and oath shall be admitted and
490 *received as good evidence for any of the articles for goods delivered within two years before the same action brought, but not for any article of a longer standing, unless the defendant shall have removed out of the county where he resided at the time of his contracting the debt, and then within three years before action brought.

It is not necessary to advert to the act of 1732, 4 Hen. Stat. at Large, p. 329, which is repealed by the 5th section of the act aforesaid of 1748, further than to observe that it is substantially, as well in its preamble as in all its provisions relating to the matter in hand, identical with the act of 1748, with the exception that the period within which the goods are to be delivered is eighteen months instead of two years.

The act next to be noticed is that of 1779, which is entitled "an act for discouraging extensive credits, and repealing the act prescribing the method of proving book debts." After reciting that the method of proving book debts, and the long and extensive credits formerly given by merchants and traders, had been found by experience injurious to the people of this commonwealth, this statute repeals the act of 1748, and then proceeds to declare that all actions founded upon accounts for goods, wares and merchandise sold and delivered, or for any articles charged in any store account, shall be sued within six months next after the cause of such action, or the delivery of such goods, wares and merchandise, and not after; it requires the date of the articles charged in any such account severally to be particularly specified; affixes a penalty to the post-dating of any article in such account; and makes it the duty of every court and jury before whom any such action shall be tried, ex officio to take notice of the act, although the defendant may fail to plead it.

By the act of 1789 (13 vol. Hen. St.
491 p. 5) the act *of 1779 is altered to the extent of requiring, that the period of limitation for suits on store accounts shall be one year instead of six months, and that a defendant intending to rely upon such limitation shall plead it.

In the case of Tomlin & als. v. Kelly, 1 Wash. 190, decided in 1793, the jury found a special verdict in the following words: "We find for the plaintiffs one hundred pounds nine shillings six and a half pence damages, if the court shall be of opinion that an action can be maintained for goods, wares and merchandises imported for sale by the plaintiffs who kept no retail store, but who sold the same at public auction on a wharf, and delivered them to the defendant twelve months before this suit was brought—otherwise for the defendant." The District court gave judgment for the defendant upon the verdict, and the plaintiffs obtained a supersedeas from this court.

In the course of the argument before this court it was urged that the mischief which it was the aim of the act of 1779 to remedy, existed only in the retail business, which almost entirely formed the internal commerce of this country before the war, and of course must have been alluded to by the legislature; and that additional proof that the retail trade alone was contemplated, was to be derived from the clause of the law requiring each item in the account to be truly dated. In answer to this, it was said that the second clause of the act created a bar against all actions

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founded upon accounts for goods sold and delivered, or for any articles charged in any store account; and why (it was asked), if the law only meant store accounts, was the former part of that clause inserted, as the latter would have answered the purpose? It was also further said, that if it were politic to prevent extensive credits in the confined sales of a retail store, the reason applied a fortiori to extensive
492 wholesale *negotiations; if it were wise to prevent such credits when the dealings were transacted in a house by private bargain, it was equally so when the sale was upon a wharf, at public auction. The judgment of the District court was reversed by this court without dissent; and as the opinion of the court is very brief, I give it in the language of the president (Pendleton):

"In discussing the case of Beall v. Edmondson (he says), it was agreed, by the unanimous opinion of a full court, that the act of 1779 applied only to the store accounts of retail dealers; and we should feel ourselves bound by that opinion, unless it were overruled by as full a court, even if our sentiments at this time, respecting the principle then established, were different from what they then were. But the present court retain the same opinion upon the subject; and must therefore pronounce the law to be in favor of the plaintiff, upon the special conclusion of the verdict."

On referring to the case of Beall v. Edmondson (3 Call 514), mentioned in the foregoing opinion, it will be seen that it was the case of a suit for goods, wares and merchandise, in which the jury found a special verdict for the plaintiff, subject to the opinion of the court, whether an express assumpsit of the defendant took the debt out of the act of 1779. The true question submitted to the court in that case, it will be seen, was whether the statute of 1779 had any application to the case of an express promise by the defendant to pay the amount of a store account; and in their written opinion they confined themselves to that question, and held that the statute applied only when it was necessary for the plaintiff to produce and rely on his account, and did not embrace the case of an express promise to pay, upon which a suit might be maintained without the account. The court in their written opinion say nothing
493 as to the act of 1779 applying *only to the store accounts of retail dealers; but we have the statement of the president (as has been seen), that in the discussion of the case, such was agreed as the unanimous opinion of the court. This interpretation of the act of 1779, as agreed in Beall v. Edmondson, and adjudged in Tomlin v. Kelly, was doubtless well known to our legislature, when they came to revise the laws in 1819; and we find that the provision in question is then re-enacted in the words of the act of 1779, with the exception that the period of limitation is made (as had been done in 1789) one year in the place of six months. See 1 Rev. Code 1819, ch. 128,

In the case of Moore v. Mauro, 4 Rand. 488, decided by this court in 1826, the declaration was in assumpsit for goods, wares and merchandise sold and delivered; and there was a special plea that the action was founded on an account for goods, &c., and that the supposed cause of action did not accrue within one year. To which there was a special replication, that at the time of the sale of the goods, "the plaintiff and the defendant were merchants, and that the goods were sold and delivered by the plaintiff as such merchant, to the defendant as such merchant." The only question before the court (necessary to be noticed here) was as to the effect of the special replication. The replication was founded on the saving, in the 4th section of the act of 1819, in favor of "such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants;" and it was objected in the argument that this saving did not apply to the actions mentioned in the 7th section of said act. In noticing this objection, the president (Brooke), delivering the opinion of the court, said, "It would be strange indeed if this construction was to prevail; if an action of indebitatus assumpsit between merchant and merchant is not to be barred by the saving in
494 the *act after five years, but is to be barred before, that is after one year. This objection was not well considered, or it would not have been made. In Tomlin v. Kelly, 1 Wash. 190, it was decided by this court that the act of 1779 applied only to the store accounts of retail dealers."

It is perhaps as convenient to state here as any where else, that I cite the case of Moore v. Mauro simply for the purpose of showing that this court still regarded the act of 1779, and consequently the 7th section of the act of 1819, as applying only to the store accounts of retail dealers. There is no ground whatever for supposing that this case can be brought within the saving of the 5th section of the 149th chapter of the present Code relating to accounts concerning the trade of merchandise between merchant and merchant, as that saving in its very terms applies only to cases "where the action of accounts would lie;" and this is obviously not a case of that character: For it is now well established by the English as well as the American decisions, that the saving in the act, 21 James 1, ch. 16, applies only to cases where the accounts are between merchant and merchant, relate actually to merchandise and not merely to mercantile contracts connected with it, and are current and mutual; in which last designation is not included cases where the demand is altogether on one side, though payments on account have been made. Inglis v. Haigh, 8 Mees. & Welsb. 781, and notes; Spring & als. v. Gray's ex'ors, 6 Peters' R. 151; Toland v. Sprague, 12 Peters' R. 300; Coster & als. v. Murrays, 5 John. Ch. R. 522; Murray v. Coster, 20 John. R. 576; 1 Rob. New Pr. 592-3-4-5; Rep. Revisors, note 472.

The case of Moore v. Mauro is, however,

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as I have already said, useful for the purpose of showing that this court in 1826 gave to the saving in the act of 1819 in relation to store accounts, the same construc-
495 tion which, *in 1790 and 1793, in the cases of Beall v. Edmondson and Tomlin v. Kelly, it had given to the like saving in the act of 1779; a construction which we have every reason for supposing has been received and acted upon by the courts and the members of the profession in the state generally as the true one. See 2 Tuck. Comm. 153; Tate's Digest, notes, 649.

Such was the state of the law on the subject (with the exception that in 1838 the time was changed from one year to two years) when the legislature came to act on the report of the revisors in 1849. In the 5th section of ch. 149, as reported by them, all actions upon contracts not in writing were placed on the same footing and made subject to a limitation of three years, except actions of account by one partner against another for a settlement of the partnership accounts, or concerning the trade of merchandise between merchant and merchant, their factors or servants, and actions on the case between such parties for not accounting; in either of which cases the parties were allowed five years after a cessation of their dealings, in which to bring their actions. Under this section, as recommended by the revisors, there was no distinction between store accounts and any other accounts (other than those expressly saved). The legislature, however, whilst adopting the other provisions of the section in the very words of the revisors, refused to alter the existing laws in respect to the limitation on open accounts generally, and the limitation on store accounts, and required that actions on the former should be brought within five years, and on the latter, within two years.

The question as to the propriety of adhering to the peculiar policy (known only to the laws of this state and the state of Kentucky) which had prevailed since 1779, of placing the accounts of retail dealers, with their customers, on a special footing,
496 or of abolishing *the restriction, and placing them on the same level with other accounts generally, could not have been more distinctly presented to the mind of the legislature. If, therefore, in rejecting the recommendation of the revisors in this regard, and in inserting the provision in respect to such accounts, the legislature had adopted said provision precisely as it had stood in all the preceding acts on the subject, I cannot conceive how any difficulty or doubt could have arisen in respect to their intention. In such a state of things, no room, it seems to me, would have been left for the argument that they did not mean to confine the limitation to the store accounts of retail dealers exclusively; there would have been an inference of the most conclusive character that they were seeking to accomplish the same ends that the provision had been hitherto construed by the courts as designed to effectuate. In their omitting the words "for goods, wares and merchandise sold and delivered," and retaining simply the words "action for any articles charged in any store account," as the provision now stands, I can perceive no evidence whatever of a purpose on the part of the legislature to alter the effect which was attributed to the law in Tomlin v. Kelly. I cannot see how the provision, as it now stands, is less apt to express a purpose to restrict the limitation to the store accounts of retail dealers than it was when it also contained the words now omitted. The design and policy of the law as it formerly stood, were, and, as it now stands, are, as I conceive, through the instrumentality of short credits and frequent settlements, likely to flow from its provisions, to offer some check to the loose, mischievous, and oftentimes ruinous running up of long accounts at the stores by inconsiderate and careless men and the members of their families. The transactions of the wholesale merchants with their customers do not seem to me to be within the mis-
497 chief which *such a law can be reasonably regarded as designed to cure. The stricter method of conducting such a business, the magnitude of the transaction, and the character of the customers (most generally merchants also, attentive to and fully conscious of, the state of their accounts), would of themselves seem to afford a protection against those evils which the legislature might well contemplate as the probable result of credits given by the retail merchants to their customers, if not in some degree restrained by a provision such as the one they have enacted.

In proceeding to apply these views to the instructions given to the jury by the Circuit court, it is scarcely necessary to say, that the propriety of both instructions must depend on the same question; inasmuch as the written acknowledgment by the defendants of the account of the plaintiffs, as well as all the items of the account, are of a date more than two years antecedent to the bringing of the action; and the 7th section of chapter 149 of the Code gives to a plaintiff relying on such a written promise the same number of years thereafter, within which to bring his action, that is prescribed in the 5th section for bringing the action on the original contract.

In propounding to the jury the other proposition contained in the instructions, it is obvious that the judge must have proceeded either upon the idea that the account of the plaintiffs, whether an account of wholesale or retail dealings between the parties, was barred by the limitation of two years, or, upon the assumption that the account was of the character last mentioned. Upon the first mentioned view of the instructions, the construction which I have given to the statute shows that they were erroneous; in the other alternative, the error in giving the instructions is, I think, equally apparent. In the declaration the plaintiffs are styled as merchants and partners tra-

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498 ing under *the name, style and firm of Edwin Wortham & Co., and the defendants as late merchants and partners trading under the name, firm and style of Smith & Sampson. It was proved by a witness, that he as salesman for the plaintiffs, sold and delivered to the defendants, upon their orders, the articles mentioned in the account (filed), and that the account was correct; that from time to time, when the goods called for by each order were delivered, he rendered to the defendants a bill of particulars of the goods so delivered, and that he subsequently rendered to the defendants a full account of all the particulars, corresponding with the account. There was no evidence as to whether the defendants were merchants, or as to whether the plaintiffs were wholesale or retail merchants, or in respect to the character of the dealings as being by wholesale or by retail, further than such as appears from the face of the account proved to be correct, as just above stated. The account, however, does on its face show that every dealing or sale was mainly if not exclusively by the hogshead, barrel, box, bag, sack, piece, gross, dozen, &c. Such sales answer to the popular definition of wholesale dealings, and our legislature, in ascertaining in their tax laws who should be regarded as wholesale merchants, have, on one occasion if not on others, designated as such those whose sales were of the character just indicated. Sess. Acts 1839-40, ch. 2, § 7.

Because of the error of the Circuit court in respect to the instructions, the judgment ought to be reversed, the verdict set aside, and the cause remanded for further proceedings in accordance with the principles herein declared. The mode of pleading the act of limitations—simply "the act of limitations"—was irregular; but no objection was made by the plaintiffs to the receiving and entering the plea in that form; and it is difficult to suppose that they could

499 have entertained *any doubt as to the particular limitation of the statute relied on, inasmuch as the declaration was filed at rules in August 1855; and the first item of the account bears date April 9th, 1852. I would not, therefore, have been willing to reverse the judgment because of such irregularity. As however the case has to go back on account of the error in the instructions, I think it would be proper to direct the Circuit court to strike out the plea, if the plaintiffs shall so insist, and give leave to the defendants to plead anew.

MONCURE and ROBERTSON, Js., concurred in the opinion of Daniel, J.

The following is the judgment of the court:

It seems to the court, that according to the true construction of the provision of the 5th section of the 149th chapter of the Code of 1849, requiring actions for any articles charged in any store account to be brought within two years after said actions shall have first accrued, said provision does not embrace the wholesale dealings of importing and wholesale merchants, but applies exclusively to the store accounts of retail dealers with their customers; and it appearing to the court, from the certificate of the judge of the said Circuit court, that there was no evidence to show whether the account filed was of dealings by wholesale or by retail, other than what appears from the face of said account, proved to be correct, and that the evidence furnished by said account tends to show that the several sales and dealings between the parties were by wholesale and not by retail, it seems to the court that the instructions given by the Circuit court were erroneous.

It seems further to the court, that the plea of the act of limitations by the defendants is defective in not stating on what provision of the statute the defendants

500 *intended to rely; as however it is not probable that the plaintiffs could have been deceived or misled as to the purpose and meaning of the defendants, it appearing that the declaration was filed at August rules 1855, and that the first item of the account is dated on the 9th April 1852, the court would not reverse the judgment because of the defect aforesaid; yet as the judgment must be reversed, because of the error in the instructions, and remanded for a new trial, it seems to the court that the said Circuit court, before proceeding to said trial, should, if the plaintiffs shall so insist, require the said defendants, if they intend to rely on the act of limitations, to amend their pleading, and show distinctly on what provision or provisions of the law they design to rely.

Therefore, it is considered that the said judgment be reversed.

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501 *Boyd's Adm'r v. City Savings Bank.

January Term, 1860, Richmond.

(Absent ALLEN, P., and LEE, J.*)

1. **Demurrer to the Evidence—Evidence Documentary—When Joinder Compelled.†**—If on the trial of a cause, the evidence is documentary, and presents a question of law which is not plainly against the defendant, he is entitled to demur to the evidence, and the court should compel the plaintiff to join in the demurrer.

*They were sitting in a Special court of appeals.

†**Demurrer to the Evidence—Joinder in—When Compelled.**—In Peabody Ins. Co. v. Wilson, 29 W. Va. 535, 2 S. E. Rep. 892, it is said: "Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing. The reason for obliging the party offering evidence in writing to join in demurrer applies to this sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate. But if the party who demurs will admit the existence of the fact the evidence of which is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact which the circumstances offered in evidence conduce to prove, there will be no more variance in this parol evidence than in a

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2. **Same—Plaintiff Entitled to Recover—Refusal of Court to Compel Joinder—Effect.**—If the evidence set forth in the demurrer shows that the plaintiff was entitled to recover, the refusal of the court to compel him to join in the demurrer, is not ground for reversing a judgment in his favor.

3. **Negotiable Notes—Death of Endorser before Maturity—Notice—Case at Bar.**‡—An endorser of a negotiable note dies intestate before it falls due; and when it falls due it is regularly protested for non-payment; and no person having then qualified as administrator on the estate of the endorser, the notary on the same day deposits in the post-office at Lynchburg, where the note had been made payable and discounted, the notice of protest, directed to "the legal representative" of the endorser, "Lynchburg;" the endorser having lived in that place, and his family still living in the same house. The notice is sufficient.

This was an action of debt brought by "The City Savings Bank" at Lynchburg, in the Hustings court of that city, against Robert G. H. Kean, administrator of James M. Boyd, on two notes negotiable and payable at the office of discount and deposit of the Bank of Virginia at Lynchburg, drawn by Paul Jones, and endorsed by said Boyd; one of them for two thousand dollars, dated May 22d, 1855; the other for one thousand two hundred and fifty dollars, dated July 17th, 1855, and each of them payable sixty days after date, to said Boyd, or order, and protested for non-payment.

On the trial of the issue joined on the plea of nil debet, the plaintiff, to sus-
502 tain the action, introduced as *evidence the said notes, with the endorsements thereon, and the notarial certificates of protest; and there rested his case. In the certificate of protest of the note for two thousand dollars, the notary certified that on the same day and year on which the said note became due and was protested, to wit, the 24th day of July 1855, he deposited in the post-office in Lynchburg, notice, signed by him, advising the demand, non-payment and protest of the said note, directed to "the legal representative of James M. Boyd deceased, Lynchburg."

In the certificate of protest of the note for one thousand two hundred and fifty dollars, he certified that on the same day and year on which that note became due and was protested, to wit, the 18th day of September 1855, he "personally informed R. G. H. Kean, administrator of James M. Boyd deceased, of the demand, non-payment and protest of the said note."

The defendant then demurred to the evidence, and moved the court to compel the plaintiff to join in the demurrer; which the court refused to do: and the defendant excepted.

The defendant then proved, that at the time of the maturity of said notes, the said Boyd had departed this life; that the said Boyd, during his lifetime, and at the time of his death, and his family after his death, and at the date of the said protests, and the notices therein referred to, resided in the city of Lynchburg; and it was admitted that there was no administration upon the estate of said Boyd, from the time of his death on the 17th day of July 1855, till the day of August 1855, at which time the defendant duly qualified as administrator with the will annexed of the said Boyd's estate.

And this being all the evidence, the defendant moved the court to instruct the jury, that the notice of the protest of the said note for two thousand dollars, as
503 *stated in the notarial certificate thereof aforesaid, is not sufficient to bind the estate of the said Boyd, by virtue of his endorsement of said note, and that no notice of the protest thereof was given sufficient to bind the defendant.

But the court overruled the motion, and instructed the jury that the said notice was sufficient to bind the estate of the said Boyd on account of his endorsement of the said note: and the defendant again excepted.

The jury found a verdict for the plaintiff for the amount of the two notes, with costs of protest and interest, on which verdict and judgment was rendered by the Hustings court, which was affirmed by the Circuit court on a writ of supersedeas. And the defendant obtained from this court a supersedeas to the judgment of the Circuit court.

August and Randolph, for the appellant.
Slaughter, for the appellee.

MONCURE, J. I think the Hustings court ought to have compelled the plaintiff to join in the defendant's demurrer to the plaintiff's evidence; which was documentary, and presented a question of law, at least not plainly against the demurrant. 1 Rob. Pr. (old ed.) 353; Green, &c. v. Buckner's adm'r, 6 Leigh 82. But the judgment ought not to be reversed on that ground, if the evidence set forth in the demurrer shows that the plaintiff was entitled to recover. Brockenbrough v. Ward's adm'r, 4 Rand. 352. Nor if all the evidence in the cause, which is set out in the second bill of exceptions, shows that he was entitled to recover. If upon the whole evidence the plaintiff is entitled to

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matter in writing, and the reasons for compelling the party who offers the evidence to join in the demurrer will then apply. It follows, as a necessary conclusion, that, if the demurrant will confess the matter of fact to be true, then he is admitted to his demurrer; and, wherever a party may properly demur to the evidence, the other party must join in demurrer. Baker's Case, 2 Croke 752; Wright v. Pindar, Aleyn. 18 Style 22; *Boyd's Adm'r v. City Sav. Bank, 15 Gratt. 501:* Trout v. Virginia & T. R. Co., 23 Gratt. 619; Green v. Buckner's Adm'r, 6 Leigh 82; Rohr v. Davis, 9 Leigh 30; Whittington v. Christian, 2 Rand. (Va.) 357; Hansbrough v. Thom, 3 Leigh 147; Stephens v. White, 2 Wash. (Va.) 203; Heard v. Chesapeake & O Ry. Co., 26 W. Va. 455." See also, Clark v. R. & D. R. R. Co., 78 Va. 713, and cases cited; B. & O. Ry. Co. v. Morehead, 5 W. Va. 299, citing the principal case; also, monographic *note* on "Demurrer to the Evidence."

‡See monographic *note* on "Bills, Notes and Checks."

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recover, even though he might not be upon so much of it as is set out in the demurrer, it would be vain to reverse the judgment and remand the cause for a new trial which would result in precisely the same
504 judgment. *I will therefore proceed to consider the case upon its merits.

The main if not the only question arising in the case is presented by the second bill of exceptions; and is as to the sufficiency of the notice stated in the protest of the note for two thousand dollars.

When the said note became due and was protested, Boyd the endorser was dead, and had no personal representative. He resided in Lynchburg at the time of his death, and his family continued to reside there until after the protest of the note. Notice of the dishonor of the note was, on the day of the protest, deposited by the notary in the post-office in Lynchburg, directed to "The legal representative of James M. Boyd deceased, Lynchburg;" and this is all the notice which was given.

The counsel for the defendant in error contends that no notice was necessary; or if necessary, that sufficient notice was given.

He contends that no notice was necessary, because when the note became due and was protested, there was no person in existence to receive notice, the endorser being dead and having no personal representative.

I have seen no case which expressly decides that notice is necessary under such circumstances. And there are many circumstances under which it is unnecessary to give any notice, as may be seen by referring to Story on Prom. Notes, § 356, and other elementary works. There are cases like the present, in which the notice proved to have been given in them was held to be sufficient; which strongly if not necessarily implies that some notice is necessary in such cases. But without expressing any opinion upon the question, and conceding for the purposes of this case at least that notice was necessary, I will proceed to enquire whether the notice given was sufficient.

505 *The only objection taken to the sufficiency of the notice, is that it ought to have been left at the late domicil of the endorser where his family still resided, instead of being deposited in the post-office.

While, on the one hand, it has been long and well settled that if the parties (to give and receive notice) reside in different places, the notice may be sent by mail; so, on the other, it seems to be well settled, at least as a general rule, that if they reside in the same place, the notice must be personal; that is, must be given to the individual, or left at his domicil or place of business. See 1 American Lead. Cas., 4th edition, 396 and the notes; and 2 Rob. Pr. (new ed.) 191.

But of late the courts have strongly inclined to restrict the general rule referred to, and have established many exceptions to it, as may be seen by referring to the case of the Bank of Columbia v. Lawrence, 1 Peters' R. 578, and other cases cited in 1 American Lead. Cas. 402-3, and the notes. The learned authors of that work conclude their commentary on the cases with the following observation: "It is obvious that the rule requiring personal notice, where the parties reside in the same place, has lost its reasonable force, and exists only by authority. Instead of undermining it with exceptions that conflict with it in principle, and render the subject embarrassing in practice, it would be much better to declare that the rule itself has become obsolete, and is abolished."

It cannot properly be said that the rule has become obsolete, having been recognized and acted on in many recent as well as older cases, and having in no case been denied or disregarded. It is therefore too firmly established to be abolished by the courts. "Were it an original question (as is well said by Shaw, C. J., in Eagle Bank v. Hathaway, 5 Metc. R. 212, 216), it is far from certain that notice by the post-office would not frequently reach an endorser
506 as soon and as certainly *as notice at his domicil." But though the rule is settled by a long course of judicial decisions, "it is thus settled by positive law, only so far as the cases are within it." Id. If this case be within it, we must follow it; but if not, and we are untrammeled by any decisions applying to such a case, we must then determine, as an original question, whether the notice given was sufficient.

I do not think this case comes within the general rule. It cannot be said that both parties resided in the same place. The endorser was dead, and had no personal representative at the time of the protest. If there had then been a personal representative, he would have been one of the parties, and entitled to notice, which might have been given to him precisely in the same way as if he had himself been the endorser. But there being none, there was no person in existence entitled to notice; and though it might well be expected there would soon be one, yet who he would be, and when he would qualify, and where he would reside, were probably unknown to the holder.

Nor do I think we are at all trammeled by any decisions applying to such a case. It has never been decided that in such a case notice may not be given through the post-office. It is indeed said in Story on Prom. Notes, § 310, that in such a case "notice may or should be left at the domicil of the deceased" endorser. But the cases cited as authority for that remark, only decide that notice may, not should be given in that way. The learned author seems to infer that the notice should, because it may be given in that way. But I do not think the inference is well founded. We know that under the same circumstances notice may be sufficiently given in several different ways. As the remark of Judge Story has an important relation to this

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case, and as the authorities bearing upon it are not numerous, it may be proper to review them.

507 *In Stewart v. Eden, 2 Caines' R. 121, the endorser at the date of the note resided in the city of New York, but shortly thereafter retired to his country seat, four miles from the city, where he died nearly two months before the note became due. He had no personal representative at the time of the protest, and notice addressed to him was left at his house in the city, which was shut up at the time. It was held that the notice was well served and properly addressed. Livingston, J., in delivering the opinion of the court, used the following observations, which have a strong bearing on the case before us: "We must take care that while proper diligence be imposed on the holder of negotiable paper, we do not exact from him every possible exertion that might have been made to affect an endorser with knowledge of its being dishonored. If he has done all that a diligent and prudent man could naturally do under like circumstances; if the law has prescribed no certain way of sending a notice in the given case;" "and especially, if from what has been done, it may reasonably be presumed that notice has reached the parties concerned, we should be satisfied and not ask for more." "Nor was it fatal to direct the notice to the endorser himself; for as it was not known whether he had made a will, nor who his executors were, until long after, it was full as probable that it would reach the parties interested by this address as by any other; some one of the deceased's family would either open it, or see it safely delivered to an executor."

In the Merchants Bank v. Birch, 17 John. R. 25, when the note became due the endorser was dead without a personal representative, but the fact of his death was unknown, he having died at sea. Notice addressed to him was left at his last residence, which was in the city of New York; another was left with his reputed agent in the city, and another was sent by mail to the residence of his family in the

508 country. It was insisted *that notice should have been given to the executors of the endorser when they qualified, though that was not until some months after the protest. It was held that Stewart v. Eden, supra, governed the case, and that the notice given was sufficient. "If an endorser be dead at the maturity of a note (says Spencer, Ch. J., in delivering the opinion of the court), and there be executors or administrators at that time known to the holder, notice must be given to them, for they represent the testator or intestate, and are as fully entitled to notice as he would be if alive. But it is a novel principle, unsupported either by precedent or authority, that notice is to be given to the representatives of the endorser, and who became such long after the note has fallen due. The rights of the holder of a note or bill, are to be determined by his acts, when the note or bill becomes due; and if he then gives such notice, as under the existing state of facts the law requires of him, his rights are fixed, and he cannot be required to superadd any other notice at a future period."

In Willis v. Green, 5 Hill's N. Y. R. 232, when the note became due, one of two joint endorsers was dead without a legal representative; and notice addressed to him was sent by mail to Little Falls, instead of Salisbury, where he resided at the time of his death. The court admitted that the notice would have been sufficient if it had been sent to the proper place, that is, to Salisbury; but it was unnecessary to decide the question.

In Oriental Bank v. Blake, 22 Pick. R. 206, it was held, in conformity with what was said in Merchants Bank v. Birch, supra, that where the administrator of an endorser of a note had been appointed before its maturity, and had given due notice of his appointment, he was entitled to the same notice of the non-payment of the note as is required by law to be given to an endorser.

In Planters Bank v. White, 2

509 Humph. R. 112, a notice *addressed to the endorser and sent by mail to the place of his last residence, was held to be sufficient, though he was dead and had a legal representative; the fact of his death being unknown to the notary, and the residence of the representative being at the mansion house of the deceased.

In Pillow v. Hardeman, adm'r, 3 Id. 538, the endorser was dead at the time of the protest, and the fact of his death known to the notary, but not the name of his personal representative if there then was one. A notice addressed to the "legal representative" of the endorser, as in this case, and sent by mail to the last residence of the endorser, which was at a different place from that of the protest, was held sufficient, though it did not appear that the administrator ever received it.

These are all the cases I have seen which seem to have a bearing on the subject, and the first four are all which are cited by Story in support of his statement. They certainly do not show that the notice in this case is insufficient.

I regard the question in this case then as an open one; and so regarding it, I ask, Was not the notice given sufficient? In other words, Was it not reasonable, under all the circumstances? For that is the question, whenever it comes up as an original one, unaffected by settled rules of law. When the note was protested, the endorser was dead without a personal representative. And the notary had at once to solve the question, How should notice be given to bind the estate of the endorser? It was necessary to give it, or at least to set it in motion, immediately. It could not be deferred until the qualification of a personal representative. Two modes of giving it naturally suggested themselves. One by sending it through the post-office, and the

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other by leaving it at the last residence of the endorser, where his family
510 *still resided in the same town; and the notary elected the former. Was it not a reasonable choice? Was it so unreasonable as to defeat the right of the holder against the estate of the endorser? No unnecessary restraint should be imposed on the circulation of negotiable paper. No difficult condition should be required to be performed to fix the liability of parties. What was the notary to do under the circumstances of this case? He could not deliver the notice to the personal representative himself, who was the person entitled to receive it, but who was not then known and had not qualified. All he could do was, to put it in a train of being received by the personal representative in a reasonable time after his qualification. He might have left it at the last residence of the endorser, as the cases decide; but that would only have been a means of conveying it to the personal representative after his qualification. The notice is not to the family, but to the personal representative, who stands in the shoes of the endorser. Then, as a means of conveying it to the personal representative, is not the post-office at least as good a place of deposit as the last residence of the deceased? In Stewart v. Eden, the family of the endorser had removed from his last residence, which was shut up, and the notice was stuffed in a key hole; and yet it was held sufficient. A notice given personally, or at the domicil or place of business, may be merely verbal. Would not a written notice, properly addressed and dropped in the post-office, be at least as apt to be received, and as soon received, by the personal representative after his qualification, as any notice, much less a verbal one, left at the last residence of the endorser, even supposing some person should be there to receive it? A notice dropped in the post-office would probably be taken out by the family at once, and delivered to the representative on his qualification, or be-
511 fore, if he were *known. Or, if not taken out before his qualification, would probably be called for and received by him immediately thereafter. It is said the family would have no right to take the notice out of the office, being directed to the legal representative; that drop letters (as they are called) are not advertised; and that after three months they are sent to the dead letter office; so that the personal representative might never receive the notice. This is possible, though it is certainly very improbable. We know that, in practice, letters addressed to a deceased person, or his representative, are taken out of the post-office by members and friends of the family. But if the postmaster should be so strict as to hold the notice for the representative, it would only make the receipt of it by the proper person more certain. That person would be apt to call for it in time to prevent its being sent to the dead letter office. It is not necessary that the notice should be actually received, but only that due diligence should be used to give it.

The reason for requiring notice, in the case of a living endorser, to be left at his domicil or place of business rather than at the post-office, does not apply to the case of a deceased endorser who is without a representative. In the former case, the law presumes that the endorser is always at his domicil or place of business, or has some person there to attend to his business; and a notice left there is considered to be at home, and as having in effect been personally served. In the latter case, no such presumption can be made. A notice left at the domicil of a deceased endorser for his representative when one qualifies, is not at home, but is merely in transitu; and so is a notice left at the post-office for such representative.

If notice given through the post-office would be just as effectual as notice left at the last residence of the endorser, there is one reason at least which would make the former preferable, and which was
512 mentioned *in the argument of the counsel for the defendant in error; and that is, the family of the deceased at the time of the protest, might be in a state of deep affliction (occasioned by his recent death), when it would be painful both to them and the notary, for him to have to visit them on a matter of business.

I am of opinion that the notice given of the protest of the note for two thousand dollars was sufficient.

An objection is taken in the petition to the sufficiency of the notice of protest of the note for one thousand two hundred and fifty dollars; but it was not relied on in the argument, and is clearly without foundation.

And the same may be said of another objection taken in the petition, and not relied on in the argument; being to a supposed variance between the declaration and the proof. There is in fact no such variance, the cause of action being truly set out in the declaration, though it wrongly concludes, that "by reason of the premises, cause of action accrued to the plaintiffs to have and demand of said James M. Boyd, in his lifetime, said sum of money and interest, as above demanded," instead of, his administrator since his death. But this is a mere legal conclusion, which may be rejected as surplusage. And if it were a variance, "it did not prejudice the plaintiff in error, and would have been corrected by an amendment at the trial, if the attention of the court had been called to it." Code, p. 672, § 7.

Upon the whole, I think the defendant in error is entitled to recover, and that there is no error in the judgment for which it ought to be reversed. I am therefore for affirming it.

DANIEL and ROBERTSON, Js., concurred in the opinion of Moncure, J.

Judgment affirmed.

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513 *Evans v. Pearce & als.

January Term, 1860, Richmond.

[78 Am. Dec. 635.]

(Absent ALLEN, P., and LEE, J.*)

1. **Parent and Child—Allowance to Father's Estate for Support of Child—Case at Bar.**†—A father has property of his infant children in his possession, and during his life does not apply to the court to have any of the profits of that property applied to their support, nor does he make any charge against them during his life. His estate will not be allowed any thing for their support without the clearest proof that justice requires it.

2. **Same—Guardian De Facto—Case at Bar.**‡—In such a case the father will be treated as a guardian; and his accounts will be settled on the principles applicable to guardians' accounts.

This was a bill in the Circuit court of the city of Richmond, filed by the administrator and some of the children of William Evans deceased, against his widow and other children, two of whom were infants, for a settlement and distribution of his estate. The widow thinking that the administrator did not attend to the interests of the estate, took upon herself its defence. The only matters of controversy relate to the profits of certain property belonging to two of the children of William Evans, derived from their grandmother, which was in his possession and managed by him.

Evans had been married three times; and at his death he left three children by the first marriage, two by the second, and one by the third; and another child by the second marriage had died after her mother and in his lifetime. The mother of the second wife left by her will certain real estate and slaves to her daughter for life, and after her death to her children. This property went into the possession of Evans in the lifetime of his wife, and after her death he continued 514 *to hold it and rented out the houses, and seems generally to have hired out the slaves.

The accounts having been referred to a commissioner, he made his report, settling the account on the principle applicable to guardians' accounts, and ascertaining the amount due from Evans for the rent of the houses to be one thousand one hundred and seventy-seven dollars and forty-three cents, and for the hires of the slaves, six thousand two hundred and eighty-two dollars and sixty cents; a part of this last sum being for hires and interest thereon, the actual amount for which the slaves were hired not being proved but estimated by the witness.

The defendant Mrs. Evans excepted to the report of the commissioner:

1st. That whilst William Evans was treated by the commissioner as guardian of his sons, and charged with the annual profits of their property, he was allowed nothing for their maintenance and education.

2d. That Evans was charged with interest on the profits of the estate of the children whilst they were living with him.

3d. That he was charged with interest upon conjectural hires.

It appears from the evidence that Evans was the owner of real estate, valued at his death at about fourteen thousand dollars; and he owned twelve or thirteen slaves. He was indebted to other persons beside his children for about the sum of seven thousand dollars; and was a plasterer, and carried on his business until his death in 1854: though it appears that for the last ten years of his life, his circumstances had not improved but had been impaired. The oldest of the sons to whom the property in controversy belonged, had worked at the business of his father as a plasterer for four or five years.

On the hearing of the cause, the 515 court overruled *the exceptions, and gave a decree against the estate of Evans for two-thirds of the amount reported: the other third belonging to him as the heir and distributee of the child who had died. From this decree Mrs. Evans obtained an appeal to this court.

August & Randolph, for the appellant.
Steger, for the appellees.

ROBERTSON, J. The father, in this case, rendered himself responsible as the guardian de facto of two of his infant children, by retaining in his possession the lands and slaves to which they became entitled on the death of their mother, and receiving the rents and hires. His accounts as such guardian have been settled in a suit brought after his death by his administrator. Exceptions have been taken to this settlement by his widow, who has taken upon herself the defence of the estate, because, as she alleges, the administrator has failed to protect it as he ought to have done from the claims asserted against it.

The objection to the compounding of interest, and to the charge of interest upon

*They were sitting in a Special court of appeals.

†**Parent and Child—Duty of Parent to Support Child.**—It is a well settled principle of law, governing the relation of parent and child, that a father, if of ability, is bound to maintain his infant children even though they may have property of their own. Griffith v. Bird, 22 Gratt. 80; Windon v. Stewart, 43 W. Va. 719, 28 S. E. Rep. 779, both citing the principal case. But see 6 Va. Law Reg. 585, 596, where this proposition of the principal case is said to be a dictum.

See the principal case distinguished in Hauser v. King, 76 Va. 737.

Termination of Guardianship—Allowance for Infant's Support.—In no case will an allowance be made a parent for the maintenance of his child, after the guardianship has terminated, without the clearest proof that justice requires it. Stigler v. Stigler, 77 Va. 171, citing the principal case. See also, Griffith v. Bird, 22 Gratt. 73, and *foot-note*.

As to both the propositions set forth above, see monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

‡**Guardians De Facto.**—See principal case cited in Martin v. Fielder, 82 Va. 460, 4 S. E. Rep. 605.

See generally, monographic *note* on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

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conjectural rents and hires, cannot be sustained. The charges of interest are in conformity with the rule which has been established for the settlement of the accounts of guardians; and one who makes himself guardian de facto is certainly not entitled to be treated with more favor than if he had been legally appointed.

The only question in the case, about which there can be any doubt, is whether the estate should be allowed credit for the support and education of the children out of the income of their property.

A father, if of ability, is bound to maintain his infant children, even though they may have property of their own.

The court, however, will look with
516 liberality to the *circumstances of each particular case, and to the respective estates of father and children, and will authorize the income arising from the estates of infants to be applied to their support whenever, under all the circumstances, it appears to be proper. But when the application to allow the income so to be appropriated is not made, as it ought to be, in advance, and is delayed, as it has been in this case, until after the guardianship has terminated, the court will not permit it without the clearest proof that justice requires it.

Such proof is not furnished in this case. One of the infants was kept at work as an apprentice at the trade of his father for several years; during which period his services must, at the least, have been worth his support. It is not alleged that the father was at any extraordinary expense for the support or education of either of these children: and there is nothing in the case from which it can be inferred that he did not consider himself of sufficient ability to support and educate them in the same way that he did his other children, or that he designed to put them on a different footing in this respect. It is very possible that he was not fully aware of the extent of his responsibility as their guardian. He must have known, however, that he was liable to them to some extent, yet there is not the slightest indication of any intention to offset this liability, or to make a charge against them in any form for their support or education. The fact that no such charge was intended, would not, it is true, be conclusive against its allowance, if it appears to be proper; but it is a strong circumstance to show that it is not proper—that he not only considered himself to be, but really was of ability to maintain his children out of his own means, and that he did so maintain them.

If any other person has acted as their
guardian, it would hardly be contended
517 that the income of their *property in the hands of such guardian could now be subjected to reimburse to his estate the expenses incurred by him in maintaining them; and I cannot see how the fact that he was himself both father and guardian could give him any right to use their income that he would not have possessed if the guardianship had been in other hands.

The objection to the charge of interest against the guardian, while his wards lived with and were supported by him, rests substantially on the same ground with the claim to charge for their support out of the income of their estate; for the interest is part of their income.

I am of opinion to affirm the decree.

DANIEL and MONCURE, Js., concurred in the opinion of Robertson, J.

Decree affirmed.

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518 *Claytor v. Anthony.*

Creasy v. Same.

April Term, 1860, Richmond.

(Absent DANIEL, J.†)

1. **Judgments—Injunction by Person Not Party—Liability.**—If a person, not a party to a judgment, enjoins it, and the injunction is dissolved, he is liable to pay the ten *per cent.* damages prescribed by the statute.‡

2. **Injunction Bond—Effect of Dissolution of Injunction.**—Though the condition of the injunction bond provides for the payment of such damages as may be awarded by the court, and the court simply dissolves the injunction and dismisses the bill; yet the order of dissolution necessarily imports that the damages are to be paid, unless they be expressly remitted by the terms of the order.

3. **Judgments—Injunction of—Dissolution—Damages.** Where upon a bill of review an injunction is granted to a judgment which is afterwards dissolved, the damages are to be computed, not upon the amount of the judgment at the time it was first granted on the original bill, but on the amount of the judgment at the time it was granted on the bill of review.

4. **Injunction Bond—Suit upon—Case at Bar.**—If the judgment, principal, interest, costs and damages on the injunction, amount to more than the penalty of the injunction bond, yet the plaintiff in the judgment having sued out execution on the judgment and made the money, principal, interest and costs, may recover the damages by suit upon the bond.

5. **Statutory Bonds—Construction.**§—Statutory bonds taken by officers in the country, will be construed liberally.

These were two actions of debt in the Circuit court of Bedford county, each founded on an injunction bond, and relating to the same judgment.

Some time prior to the year 1821 Pleasant Creasy, having recovered a judgment against William Trigg, sued out an execu-

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*For monographic note on Injunctions, see end of case.

†He had been counsel in the case out of which this case arose.

‡See JUDGE LEE'S opinion, and 1 Rev. Code of 1819, p. 200, § 61; Code, ch. 179, § 13, p. 679.

§See monographic *note* on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

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tion thereon, which was levied by
519 *the sheriff upon a slave named Patrick. Mark Anthony thereupon sued the sheriff John Claytor to recover damages for selling the said slave, he claiming the slave as his property; and he recovered a judgment in that action. Pleasant Creasy then enjoined the judgment, and executed an injunction bond with James M. Claytor as his surety. The condition of this bond provided, that Creasy should pay and satisfy the judgment, costs "and all such other costs, damages and charges as shall be awarded by said Superior court of chancery." The first action was on this bond.

The injunction which was awarded to Creasy in 1828, was dissolved by the Chancery court in May 1839; and this decree was affirmed by the Court of appeals in 1846. In July 1846 Creasy filed a bill of review, asking that the injunction might be reinstated or another injunction awarded. And the court made an order awarding an injunction to the judgment according to the prayer of the bill, upon condition of his giving bond and security: and Pleasant Creasy, jr., became the surety in this bond. In March 1854 this injunction was dissolved and the bill dismissed: And then Anthony instituted two actions of debt in the Circuit court of Bedford county; one on the first injunction bond against Pleasant Creasy and James M. Claytor, and the other on the second bond against the two Creasys.

Pleasant Creasy having died, the two cases were tried together at the May term 1856 of the Circuit court of Bedford county, upon the issue made upon the plea of conditions performed. The only difference in the records of the two cases is, that Claytor tendered a plea which was rejected by the court, in which he alleged that since the injunction was dissolved an execution had been issued on the judgment, amounting to more than the penalty of his bond,
520 and that he *had paid the same before the commencement of this suit.

On the trial the defendants demurred to the evidence, which consisted of the judgments of the Circuit court and Court of appeals, and records of the injunction suit and bill of review, and the execution which had been sued out on the judgment, and the admission by the plaintiff that it had been paid. And the jury found in the first case a verdict for "six hundred and seventy-five dollars and four cents damages, being the damages at four per cent. per annum on the amount of the judgment, interest and costs mentioned in the condition of the injunction bond recited in the declaration, from the 23d day of December 1828, when the said injunction was perfected, until the 31st day of May 1839, when it was dissolved." And they found a verdict in the second case for "sixteen hundred and eighty-seven dollars and forty-four cents, the same being the residue of the amount of ten per centum per annum damages on the amount of the debt enjoined, appearing to be due on the day when the injunction took effect, from the time last mentioned until the dissolution of the injunction, after deducting from said amount of damages six per centum per annum interest during the same time, on the principal sum in the forthcoming bond enjoined, until paid;" in both cases subject to the opinion of the court on the demurrer to evidence. At the same term of the court the demurrers to evidence were overruled, and judgments were entered up on the verdicts. And thereupon the defendants applied to this court for writs of supersedeas to the judgments; which were awarded.

Slaughter, for the appellants.

The Attorney General and Patton, for the appellee.

LEE, J. The position taken by the
521 counsel for the *plaintiffs in error, that damages are allowed by law on the dissolution of an injunction only in cases in which the injunction is obtained at the instance of a party to the judgment enjoined, cannot, I think, be maintained. It is true, injunctions to judgments are usually obtained at the suit of parties to them, and rarely is an injunction to a judgment allowed at the instance of a third person: but the terms of the act of 1819 under which the bonds in these cases were taken are sufficiently broad to cover such an injunction. Those terms are that "where any injunction shall be hereafter obtained to stay the proceedings on any judgment * * * and such injunction shall be dissolved, wholly or in part, damages at the rate of ten per centum per annum * * * shall be paid to the party on whose behalf such judgment was obtained on such sum as appears to be due including the costs:" and surely the reason for awarding damages cannot be less strong in the case in which a stranger intervenes and obtains an injunction to a judgment against another than where the judgment debtor himself arrests the execution by such a proceeding. The evil to be remedied, the delay occasioned by causeless injunctions, is the same in either case. That the act directs the damages to be included in the execution to be issued on the judgment after the dissolution of the injunction, presents no real difficulty. This provision from its very nature can apply only to the case in which the injunction is obtained by the judgment debtor, as it would be wholly inadmissible that he should be charged with damages during the pendency of an injunction obtained without his agency at the suit of another (see Garnett v. Jones, 4 Leigh 633); but it does not at all affect or disprove the liability of the party who does obtain it to pay them. This is the very liability which he assumes when he obtains the injunction.

If he be required to give and do give
522 *bond to perfect his injunction, he and his surety will be liable to a suit on the bond for the recovery of the damages although in the case in which he is the judgment debtor, they may also be included in the execution against him. But if not so included or if not made upon the execu-

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tion, the remedy upon the bond is unquestionable; for the propriety and necessity of the bond grows out of the consideration that the execution may prove ineffectual, and it is intended to afford a new security for the debt including the damages. So far from its being correct then to say that the legislature never intended that the creditor should be driven to an action at law in any case to recover these damages, I take it that that is exactly what the legislature must have intended where the execution was not sued or was ineffectual in the case in which the injunction was at the suit of the judgment debtor, and, always, where the injunction was at the instance of one not a party to the judgment, and who was required to give the injunction bond. To say that because the damages could not be embraced in the execution on the judgment after the dissolution of the injunction in the latter case there is no remedy for their recovery, is entirely illogical, as I think it would be also to hold that in the case where no bond is required, as where the injunction is at the suit of a personal representative or other person from whom it may be in the opinion of the court improper to require bond, there can be no right to the damages or no remedy for their recovery. That the right does exist in such cases, I think is not to be doubted, and I apprehend an ample remedy will be found for its enforcement. Whether in the case put by the counsel, of an injunction to a judgment by one not a party to it, and bond given by another, also a stranger to the judgment, the party obtaining the injunction would be liable to the damages or not, is a
523 question not at *all material to be determined in this case; certainly the latter would be liable on his bond, and if it should even be held that the party in whose name the injunction was obtained in such a case, was not, I do not perceive that any absurdity as supposed by the counsel, would be involved.

But it is said that the damages are to be in lieu and satisfaction of interest and that this cannot be unless they can be included in the execution. Hence it is deduced that the provision giving damages cannot apply where the injunction is obtained by one not a party to the judgment; and in this connection the case of Crawford, &c. v. McDaniel, 1 Rob. R. 448 is cited by the counsel. I fully concur in the conclusion to which the court came in that case upon the point referred to, but I do not think it touches the question in this case. There had been in that case an injunction because of some alleged defect of title, which had been dissolved. There was then another bill filed alleging a mistake in the quantity of the land discovered after the former suit; and the court thinking the complainant entitled to relief, by its decree injoined not only the principal money due but also the damages accrued during the pendency of the former injunction: and the Court of appeals held the decree in this respect right upon the ground that the damages were entire and were given in lieu of interest. The whole effect of this decision is that the four per centum damages above the six per centum interest must share the fate of the latter, and if relief is to be given against the latter, that relief shall extend to the former also, as both stand under the law in lieu of the latter. And so far from its being an authority against the right to the damages where the injunction is at the suit of one not a party to the judgment, its tendency is I think rather the other way in replacing the six per cent. interest with the ten per cent. damages; and construing
524 *the statute in the light which it affords, the fair result, I think, is, that whenever an injunction to a judgment is dissolved, the judgment creditor is entitled to the ten per cent. damages; if the injunction be at the suit of the judgment debtor, they may be inserted in the execution and made in that way, or the party may maintain his action on the bond (where one is given) and recover them together with the principal money and costs; if the injunction be at the instance of one not a party to the judgment and a bond be given, the obligors in the bond would clearly be responsible for them. And although in the latter case, payment of the principal money with six per cent. interest and the costs may have been made by the judgment debtor or any other for him, there would still remain due the difference between that amount and the amount of the judgment computing damages at ten per cent. in lieu of interest, to wit four per cent. on the amount due including the costs during the period of the injunction for which recovery upon the bond might well be had.

Conceding, however, for the sake of the argument, the right to the damages and that they might be recovered on a bond with proper condition, the counsel has sought to maintain that there can be no recovery on this bond, because as he contends, the condition has not been broken. The condition is to pay the judgment and costs and such damages as may be awarded by the court, and it is said the court has not decreed the payment of any damages. In express terms, it is true, it has not; but payment of the damages is the penalty of the failure to sustain the injunction and the order of dissolution necessarily imports that this penalty is to be paid unless it be expressly remitted by its terms. Thus "the law allows it and the court awards it;" for to sustain the action it may not be improper to say that in a legal sense in such a case, the damages (which must
525 and can only *be the ten per centum in lieu of interest) are awarded by the court. And here the remarks of a learned judge on a similar occasion, occur as appropriate: "I am of opinion we are not to stick to the letter in these statutory bonds taken by officers of the courts without the supervision of any tribunal and in the absence of the obligee. * * * * It is fair to presume that such was the design of the parties" (to be responsible to the extent

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that the law required) "however clumsily it may have been expressed by the officer who prepared the bond." Per Tucker, P., White v. Clay's ex'ors, 7 Leigh 68, 80. In that case, the condition of the bond was, not to pay what was due or should become due to the plaintiff as required by the statute but the judgment at law and all costs and damages, in case the injunction should be dissolved. Held, nevertheless, a good statutory bond and that the condition was broken by a dissolution of the injunction as to part. And the same liberality of construction was strikingly illustrated in another case in which the condition of the bond was to pay and satisfy the judgment in case the injunction should be dissolved together with the costs of the injunction if ruled so to do, saying nothing about damages, yet the party recovered the damages and the judgment was affirmed by this court. Fox, &c. v. Mountjoy, ex'or, 6 Munf. 36. In our case the condition stipulates for the payment of damages and as has been already said, the ten per centum on the amount of the judgment including the costs, is the only damages to which the party is liable.

The plea that an execution had been sued out on the judgment against the plaintiff in error (in the case of Claytor v. Anthony) and that a sum greater than the penalty of the injunction bond sued on had been paid by him in discharge thereof, before the suit, offered no bar to the action. The amount so paid, was paid upon
526 *the judgment and execution, not upon the injunction bond, and that bond remained as a security for whatever might still be due the judgment creditor after deducting the amount of the principal, the interest at six per cent. and the costs which had been paid, that is to say for the four per centum of the damages not embraced in the payment.

There is an objection made in the case of Creasy v. Anthony to the amount of the damages recovered which it is said should have been only upon the amount due at the time of the original injunction and not at the time of the injunction on the bill of review. I think the objection not well taken. A bill of review forms no part of the proceedings in the original cause. It is allowed only after the suit is completely ended or in England after the decree is signed and enrolled. It differs in this from a petition for a rehearing which may be allowed before the signing and enrolling of the decree, as it does also from a supplemental bill in the nature of a bill of review which supposes the cause to be still existing, and is received and incorporated into that cause as part of it: and the orders made upon it are taken and considered as orders in the original pending cause. Mitf. Pl. (6th Am. fr. 5th London ed.) p. 100, 105, and n. 107 et seq.; Bowyer v. Lewis, 1 Hen. & Munf. 553; Elizey v. Lane's ex'x, 2 Hen. & Munf. 589; Sheppard's ex'or v. Starke et ux., 3 Munf. 29. The bill of review of the appellant Creasy's principal prayed that the former injunction might be reinstated or, in the alternative, that another injunction might be awarded, and the court granted a new injunction accordingly upon the usual terms of giving bond with condition as the law required. This injunction then I take it must be regarded as an original, independent injunction, and in estimating the damages to be paid upon its dissolution they are to be computed upon the whole amount appearing to be
527 due at the time it was *perfected, and not the amount due at the date of the former injunction.

Thus, as it seems to me, no error is shown in either of these cases and I am of opinion that both judgments should be affirmed.

ALLEN, P., and MONCURE and ROBERTSON, Js., concurred in the opinion of Lee, J.

Judgment affirmed.

INJUNCTIONS.

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I. DEFINITION.

"An injunction is a judicial process issuing out of a court of chancery, whereby a party is required to do or to refrain from doing a particular thing. The most ordinary form of injunction is that which operates to prevent the performance of an act. The other form of injunction commands that an act shall be done." 16 Am. & Eng. Enc. Law (2d Ed.) 342.

II. WHEN INJUNCTIONS WILL LIE.

A. IN GENERAL.—"As the general jurisdiction of courts of chancery is founded in a lack of remedy in the courts of law, so especially is relief given by means of injunctions, because there is none, or no adequate remedy at law, and because compensation by way of damages will not be sufficient to restore the party to his rights, or to replace the wrong that may be done to him. It will be found upon careful investigation, that all the grounds upon which the right to an injunction rests, are traceable to this general rule of preventing irreparable wrong or mischief." Moore v. Steelman, 80 Va. 331; Bart. Ch. Pr. (2d Ed.) 455.

Where an irreparable injury is imminent, against which there is no adequate protection at law, and which cannot be compensated in damages, equity will take jurisdiction by injunction. Moore v. Steelman, 80 Va. 331.

Though the plaintiff have a remedy by action at law, if it is inadequate and repeated suits would not compensate him, the injury is irreparable and calls for a preventive remedy, which equity alone can provide. Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165.

"By the term 'irreparable injury,' it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages." Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165; Masonic Temple Ass'n v. Banks, 94 Va. 695, 27 S. E. Rep. 490; Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374; Callaway v. Webster, 98 Va. 790, 37 S. E. Rep. 276.

"The word 'irreparable' means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured." Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271.

Will Not Lie Where Statutory Remedy Exists.—"Where a positive statutory remedy exists for the redress of particular grievances, a court of equity will not interfere by injunction and assume jurisdiction of the questions involved, nor will it enjoin proceedings under such statutory remedy, since such interference would place the judicial above the legislative power of the government. But * * * to deprive a plaintiff of the aid of equity by injunction, it must also appear that the remedy at law is plain and adequate; in other words, that it is as practical and efficient to secure the ends of justice and its proper and prompt administration as is the remedy in equity." Penn v. Ingles, 82 Va. 65.

Will Not Lie Where Act Is Already Done.—An injunction is a preventative remedy and should not, except under peculiar circumstances, be granted where the act is already done. C. & O. R. Co. v. Patton, 5 W. Va. 234; Coalter v. Hunter, 4 Rand. 58.

Will Not Lie Where It Cannot Be Enforced.—An injunction ought not to be granted which cannot be enforced. Taylor v. Mutual, etc., Life Ass'n, 97 Va. 60, 33 S. E. Rep. 385.

B. AGAINST WASTE.—The jurisdiction of equity in restraining the commission of waste is of comparatively recent origin and rests upon the necessity of preventing irreparable injury. High on Injunctions (2d Ed.) § 649. As to the jurisdiction of equity in restraining waste, see also, Rakes v. Rustin, etc., Co. (Va.), 23 S. E. Rep. 498; Cutting v. Carter, 4 H. & M. 424; Harris v. Thomas, 1 H. & M. 18.

As to what constitutes waste, the commission of which entitles the party injured to relief by injunction, depends upon the circumstances of each particular case, and is often varied by the locality

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of the act complained of. Thus the cutting of timber in some sections may be considered waste, while in others it is a positive benefit. Hence, in every case, the law on this subject must be applied with reasonable regard to circumstances. Bart. Ch. Pr. (2d Ed.) 456; Findlay v. Smith, 6 Munf. 134, 8 Am. Dec. 733.

One making a fair *prima facie* showing in support of his title to land may obtain an injunction to restrain the commission of waste, if the injury would be irreparable. Rakes v. Rustin, etc., Co. (Va.), 22 S. E. Rep. 498.

Removal of Fixtures by Execution Creditor.—A court of equity will take jurisdiction by injunction to preserve the inheritance; and, where a mill is about to be dismantled by execution creditors of the owner, who have levied on the fixtures attached thereto, equity will interfere to prevent it. Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789.

Removal of Improvements by Tenant.—It is sufficient to sustain a bill for an injunction to stay waste and prevent the removal of improvements, that the bill alleges that the complainant is the owner and entitled to the possession of the premises with the improvements and that the defendants are in possession and threaten to destroy the improvements and that they are insolvent and unable to respond in pecuniary damages. Frank & Co. v. Brunnemann, 8 W. Va. 462.

A court of equity will, in a proper case, grant an injunction to restrain the tenant from doing a certain act, whether it amounts to waste or not, provided it be directly contrary to the tenant's own covenant, or even in contravention of an agreement which may be inferred from the course of dealing between the parties. Frank & Co. v. Brunnemann, 8 W. Va. 462.

Removal of Personal Property—Protection of Vendor's Lien.—To preserve the security of a vendor's lien, a court of equity may properly enjoin the purchaser and his agent from committing waste on the land and from selling or removing the personal property. Clarke v. Curtis, 11 Leigh 559.

Waste of Store Goods.—A judgment debtor ordered a levy on goods in a store kept by the debtor, who claimed that he held the goods under his father's will, as trustee for his wife and children. The sheriff demanded an indemnifying bond, which was denied by the creditor, who filed his bill alleging that the claim of the debtor to be acting as trustee was fraudulent, that the store goods were the debtor's individual property and liable to the lien of his judgment, and praying for an injunction and the appointment of a receiver to prevent waste thereof by the debtor. *Held*, that the bill presents no case for equitable jurisdiction. Green v. Spaulding, 76 Va. 411.

Title in Litigation—Injunction Pendente Lite.—In 1844, a person took possession of land under a patent and held exclusive possession thereof, paying the taxes for more than the statutory period, the county record showing no other claim to the land. In 1882, after the land had been purchased and paid for at a judicial sale from such person, the defendant entered forcibly under claim of title under an older patent. *Held*, that the purchaser was entitled to a perpetual injunction restraining waste. Basore v. Henkel, 82 Va. 474.

Cutting Timber by Grantee Where Title Retained by Grantor.—An injunction will lie at the instance of a grantor of land, who has retained the title as a security for the purchase money, to restrain the grantee from cutting timber on the land in a manner calculated to impair the value of the security. Such injunction may be granted as an incident to a suit to subject the land to the payment of the purchase money, and it is not necessary that the bill should allege the insolvency of the defendant. Core v. Bell, 20 W. Va. 169.

An injunction to stay waste ought not to be granted to a vendor against a vendee to whom he has sold a tract of land in fee simple, retaining the title as a security for the purchase money; unless he brings his suit to subject the land to the payment of the purchase money, and charges the defendant with cutting and selling timber in a manner calculated to render the land an incompetent security, in which case such injunction to stay waste pending the suit may be awarded. Scott v. Wharton, 2 H. & M. 25.

Parties Plaintiff.—A party claiming title to land, to which he has the legal title to one-third and an equitable title to the other two-thirds, may go into equity to restrain waste upon the land and to set aside a conveyance from the board of public works of Virginia to a purchaser of the land, the same having been previously legally granted by a valid grant. Garrison v. Hall, 75 Va. 150.

Same—Contingent Remainderman May Enjoin Waste.—A contingent remainderman may maintain an injunction to restrain waste by the life-tenant. University v. Tucker, 31 W. Va. 621, 8 S. E. Rep. 410.

C. AGAINST TRESPASS.—The distinction between waste and trespass consists in the former being the abuse or the destructive use of property by one who, while not possessed of the absolute title thereto, has yet a right to its legitimate use; trespass being an injury to property by one who has no right whatever to its use. High on Injunctions (2d Ed.) § 650; Bart. Ch. Pr. (2d Ed.) 459.

"The jurisdiction of a court of equity to interfere by injunction, in the case of nuisance, trespass, and the like, to restrain irreparable mischief, to suppress oppressive litigation, or to prevent a multiplicity of suits, is too well established to admit of doubt." Switzer v. McCulloch, 76 Va. 777.

To avoid multiplicity of suits, injunction may lie, because that shows inadequacy of legal remedy. Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271.

Equity has jurisdiction by injunction, to prevent acts of irreparable injury to land, even though there is a controversy as to title between the parties, and, having jurisdiction on that ground, will go on to give full relief, though in so doing it is necessary to decide between two adverse titles. Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271; Callaway v. Webster, 98 Va. 790, 37 S. E. Rep. 276.

A court of equity has no jurisdiction to restrain one joint devisee of land from entering thereon, at the suit of a tenant claiming under the other devisees. Baldwin v. Darst, 3 Gratt. 132.

Conditions of Relief.—To warrant the interference of a court of equity to restrain a trespass on land, two conditions must co-exist: First, the plaintiff's title must be undisputed, or established by legal adjudication; and, secondly, the injury complained of must be irreparable in its nature, unless there exists some other grounds of equity. It is not sufficient in such case that the bill alleges irreparable injury; the facts constituting such injury must be set forth. Schoonover v. Bright, 24 W. Va. 698; Cresap v. Kemble, 26 W. Va. 603; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. Rep. 724; Burns v. Mearns, 44

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W. Va. 744, 30 S. E. Rep. 112; Lazzell v. Garlow, 44 W. Va. 466, 30 S. E. Rep. 171; Becker v. McGraw (W. Va.), 37 S. E. Rep. 532.

An injunction will not lie to restrain a mere trespass to real property, where the bill does not, on its face, clearly aver good title in the plaintiff; nor even then, as a general rule, where the injury complained of is not destructive of the substance of the inheritance, or is not irreparable, but is susceptible of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. McMillan v. Ferrell, 7 W. Va. 223; Western, etc., Mfg. Co. v. Va., etc., Coal Co., 10 W. Va. 250; Cox v. Douglass, 20 W. Va. 175; Schoonover v. Bright, 24 W. Va. 698; Cresap v. Kemble, 26 W. Va. 603; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. Rep. 724.

A bill to enjoin a trespass on land must aver good title, an irreparable injury, or, in lieu of the latter, the insolvency of the trespasser; and a general charge of irreparable injury will not do, but it must be specified wherein the injury is irreparable. Fluharty v. Mills (W. Va.), 38 S. E. Rep. 521.

Where a party comes into a court of equity alleging a good legal title, and asking for an injunction to restrain a trespass, he must charge that irreparable damage will result if the injunction is denied, setting forth the facts constituting such injury, or that the defendant is insolvent. Unless the bill contains one of these allegations, it is fatally defective. Collins v. Sutton, 94 Va. 127, 26 S. E. Rep. 415; Cresap v. Kemble, 26 W. Va. 603.

It is well settled that an applicant in possession of land with a clear title, or a *prima facie* title, is entitled to an injunction against a trespasser, threatening irreparable injury, or often-repeated trespass. But even in a case of a fair *prima facie* title, if it turns out from the evidence that the right of the applicant is in doubt, and the title and boundaries of the land are really in issue, such a controversy cannot be settled in equity, though the property, in an urgent case, may be protected by injunction, until the question of right can be settled by a trial at law. Manchester Cotton Mills v. Town of Manchester, 25 Gratt. 825; Callaway v. Webster, 98 Va. 790, 37 S. E. Rep. 276. See Rakes v. Rustin, etc., Co. (Va.), 22 S. E. Rep. 498.

Same—Inadequacy of Remedy at Law.—Although a court of equity will not as a general rule interpose to prevent a mere trespass, yet if the act done or threatened would be destructive of the substance of the estate, or if repeated acts or wrongs are done or threatened, or if the injury is or would be irreparable, wherever, indeed, the remedy at law is or would be inadequate, a court of equity will enjoin a perpetration of the wrong, and prevent the injury. The insolvency or nonresidence of the trespasser is entitled to much weight in determining whether a court of equity will restrain the trespass. Miller v. Wills, 95 Va. 337, 28 S. E. Rep. 337; Callaway v. Webster, 98 Va. 790, 37 S. E. Rep. 276.

As a general rule, an injunction should not be granted to restrain a mere trespass to real property, when the injury complained of is not destructive of the substance of the inheritance—of that which gives it chief value—or is not irreparable, but is susceptible of complete pecuniary compensation, and for which the party may obtain adequate satisfaction in the law courts; and in no such case should it be granted in the absence of an allegation of the insolvency of the defendant. Lazzell v. Garlow, 44 W. Va. 466, 30 S. E. Rep. 171.

It is not necessary, in order to obtain an injunction to restrain the commission of trespass or waste, that the plaintiff should aver or prove that he could not obtain adequate compensation in damages in an action at law; but it is sufficient to invoke the jurisdiction of a court of equity, that the substantial value of the estate in the character in which it is enjoyed is imperiled. Rakes v. Rustin, etc., Co. (Va.), 22 S. E. Rep. 498.

A court of equity will enjoin a mere trespass to real property where good title in the plaintiff is alleged, and it is also alleged in the bill that the trespasser is insolvent, because in such case the party could have no adequate remedy at law. Hanly v. Watterson, 39 W. Va. 214, 19 S. E. Rep. 536; Cox v. Douglass, 20 W. Va. 175.

Equity has jurisdiction by injunction to prevent acts of irreparable injury to land, even though there is a controversy as to title between the parties, and, having jurisdiction on that ground, will go on to give full relief, though in so doing it is necessary to decide between two adverse titles. Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271, 36 L. R. A. 566.

Illegal Entry on Land by Corporation.—The remedy for illegal entry on lands by a corporation is by injunction; and the plaintiff is not required to show a case of destructive trespass or irreparable damage. The slightest excess of power is sufficient. Hodges v. S. & R. R. Co., 88 Va. 653, 14 S. E. Rep. 380.

Acts of Ownership by Rival Claimant.—A court of equity will not enjoin a solvent defendant from committing acts, not amounting to waste, which are no more than acts of ownership by a rival claimant. Callaway v. Webster, 98 Va. 790, 37 S. E. Rep. 276.

Cutting Timber.—A property owner may obtain an injunction to restrain a resident of another state from trespassing on his land, breaking down fences, driving in cattle and sheep, destroying hay, and cutting and deadening timber. Miller v. Wills, 95 Va. 337, 28 S. E. Rep. 337.

Where the defendant obtains a license from a land company to cut timber from its land, and is aware at the time of the superior rights of the plaintiff lumber company, and such license is revoked, he will be enjoined from further cutting and removing timber. Bruce v. John L. Roper Lumber Co., 87 Va. 381, 13 S. E. Rep. 153.

A party having an option to purchase the timber growing upon a tract of land, which is not limited as to time by his agreement, may by his own acts and by acquiescence in the acts of another in cutting and removing such timber, and by assisting in the removal of the same, pointing out the timber to the men engaged in cutting it, and raising no objection to the disposal of such timber by the party asserting an adverse claim thereto, estop himself from asserting any claim under his option. Hanly v. Watterson, 39 W. Va. 214, 19 S. E. Rep. 536.

Equity will not enjoin the cutting of timber and removing it from land merely because the plaintiff has brought an ejectment suit against the defendant to try the title to the land. Cox v. Douglass, 20 W. Va. 175. See Fluharty v. Mills (W. Va.), 38 S. E. Rep. 521.

A complainant obtained an injunction to prevent the defendant from cutting timber upon premises claimed by both parties, but the only proof of the complainant's title adduced upon the hearing was

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an award, which the court found to be invalid on account of misconduct of the arbitrator. All the allegations of the complainant's title were denied by the answer and unsustained by proof. *Held*, that the injunction should be dissolved and the bill dismissed. Tate v. Vance, 27 Gratt. 571.

A bill to enjoin the cutting of timber is fatally defective where it does not aver good title in the plaintiff, and does not allege the insolvency of the defendant, or otherwise show that irreparable injury would result therefrom. Western, etc., Co. v. Va., etc., Co., 10 W. Va. 250.

Injuries to Mines—Removal of Iron Ore.—Though certain persons are entitled to a tract of land as heirs and may maintain trespass against a third party, yet equity has jurisdiction to enjoin such third party from taking iron ore therefrom. Anderson v. Harvey, 10 Gratt. 386. In this case the court said: "I think it is clear that, at the time of the alleged trespass on the ore bank by the appellant, the appellees must be regarded as in possession of it, with a clear and incontestible title. They might have instituted their action of trespass against the appellant; but were they bound to do so before, or instead of applying to a court of equity to restrain the appellant from committing further trespasses on the property in dispute? Were they bound to litigate and discuss in a court of law, rights, which had not only been adjudicated as far back as 1807, but which had been solemnly recognized in the conveyances to which the appellant must necessarily refer as the sources of any title which he could assert? I think not. The practice of courts of equity of interfering in such cases by way of injunction, is one comparatively of recent origin; but the jurisdiction is now fully recognized and well established by cases both in England and America. * * * The land upon which the trespass is alleged to be committed is proved to be of little or no value, except for the iron ore found on it, which is proved to be of an excellent quality. The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it. The fact proved by the appellant, that the value of the ore per load could be readily estimated, does not deprive a court of equity of its right to interfere in the case by way of injunction. The same might be shown in most cases of the kind. The products of most mines have a value already fixed or easy of ascertainment by proof; yet it was in prevention of like trespasses to this very species of property, mines of ore, coal, etc., that the jurisdiction in question had its origin, and still continues to be most frequently exercised." Quoted with approval in McMillan v. Ferrell, 7 W. Va. 223.

Same—Extraction of Oil or Gas.—The unlawful extraction of oil or gas from land, they being part of the land, is an act of irreparable injury, and equity will enjoin it. Moore v. Jennings (W. Va.), 34 S. E. Rep. 793; Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271, 36 L. R. A. 566; Williamson v. Jones, 43 W. Va. 562, 27 S. E. Rep. 411, 38 L. R. A. 694.

Account of Profits.—In a pure bill by the assignees of the lessees of salt works to enjoin part owners of them from disturbing their possession, the only issue is the right to an injunction, and an account of profits cannot be decreed in that case. Stuart, etc., Co. v. White, 25 Gratt. 300.

D. AGAINST NUISANCE.—"It would be impossible to give all the instances in which courts of equity have interfered, or refused to interfere, in cases of nuisances. It is enough to say that when the right is clear, and the nuisance is established, a court of equity will always interfere, if the nuisance results from an unlawful act, is continuous in its nature, or, if only temporary, if it is not adequately compensable in damages. Injunctions have been granted to prevent the erection of slaughter-houses in the vicinity of dwellings, even where the neighborhood had been in a measure given up to trades of a noxious character. To prevent the continuance of the business of slaughtering cattle in the vicinity of dwellings, even when the slaughter-house was established before any dwellings were erected in the vicinity. To restrain the erection of glue-works; of works for the preparation of blood as an ingredient for Prussian blue; of melting-houses and fat-boiling establishments, bone-boiling establishments; establishments for the preparation of tripe; for the manufacture of gas. To prevent use of cattle-yards; the burning of brick near dwellings; planing-mills emitting dense volumes of smoke; potteries; the use of mineral coal as fuel; the burning of lime-kilns; the maintenance of livery stables near dwellings, impairing their comfort by noxious stenches, noise, and drawing flies to the vicinity; a turpentine distillery; the carrying on of noisy trades near a dwelling at unreasonable hours, so as to impair its comfortable enjoyment, or so as by agitating and various sounds and motions to produce actual injury to property; the performance of brass bands in the vicinity of dwellings, collecting crowds and impairing the comfortable enjoyment of property; a regatta near a dwelling, collecting a crowd; running railroad cars near a church on the Sabbath, and letting off steam, blowing the whistle, and ringing the bell so as to disturb divine worship there, and injure the value of the property for church purposes; the pollution of water so as to impair its use for domestic purposes, or manufacturing purposes, or so as to cause the emission of noxious smells, or so as to destroy it for domestic use, or so as to injure the navigability of the stream, or so as to impair the value of wharf property.' Wood, Nuis. § 809, and cases cited." Snyder v. Cabell, 29 W. Va. 48, 1 S. E. Rep. 241.

A court of equity ought not to interpose to restrain a nuisance, except where there is no adequate remedy at law or where irreparable injury might be done. Wingfield v. Crenshaw, 4 H. & M. 474.

A court of equity will enjoin a nuisance, trespass, and the like, in order to restrain irreparable mischief, suppress oppressive litigation, or prevent a multiplicity of suits. Switzer v. McCulloch, 76 Va. 777.

A court of equity has authority to enjoin the continuance of a nuisance which is likely to produce irreparable injury. Masonic Temple Ass'n v. Banks, 94 Va. 695, 27 S. E. Rep. 490.

The public nature of the work which creates a nuisance does not prevent a court of equity from enjoining the contractor from doing it in such a manner as to create a nuisance, especially where it appears that it might be safely done in another manner at a small additional expense to the contractor. Masonic Temple Ass'n v. Banks, 94 Va. 695, 27 S. E. Rep. 490.

Where the bill, answer and affidavits show a *prima facie* case of nuisance in favor of the plaintiff, the circuit court commits no error in continuing the injunction until the hearing on the merits. McEldowney v. Lowther (W. Va. 1901), 38 S. E. Rep. 644.

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Where the thing complained of is not a nuisance *per se*, and the injury apprehended is contingent, equity will not interfere. Chambers v. Cramer (W. Va.), 38 S. E. Rep. 691.

Public Nuisances.—A court of equity will not interfere to prevent a public nuisance, unless the party asking its aid can show that some private injury is actually sustained or justly apprehended by him. Beveridge v. Lacey, 3 Rand. 63.

Same—Obstruction of Highways.—An individual cannot enjoin a public nuisance, such as the obstruction of a road, unless it works special and peculiar injury to him, and that injury must not be trivial, or such as may be compensated in damages, but must be of a serious character, affecting the substance and value of the plaintiff's estate. Keystone Bridge Co. v. Summers, 13 W. Va. 476; Talbott v. King, 32 W. Va. 6, 9 S. E. Rep. 48; Shepherd v. Groff, 34 W. Va. 123, 11 S. E. Rep. 997.

Sale of Intoxicating Liquors.—Under W. Va. Code, ch. 32, § 18, a court of equity cannot restrain by injunction a party charged with selling intoxicating liquors contrary to law, or abate the house, building, or place where such intoxicating liquors are alleged to be sold contrary to law, until the owner or keeper of such house or place has been convicted of such unlawful selling at the place named in the bill. Hartley v. Henretta, 35 W. Va. 222, 13 S. E. Rep. 875.

Removal of Building by Municipal Corporation.—A court of equity has jurisdiction to restrain a municipal corporation from destroying a building as a nuisance, where by so doing, it encroaches upon private rights and works irreparable injury. Bristol, etc., Lumber Co. v. City of Bristol, 97 Va. 304, 33 S. E. Rep. 588, 5 Va. Law Reg. 242.

In order to secure and promote the public health, safety and convenience, municipal corporations are endowed with power to prevent and abate nuisances. This power, and its summary exercise, may be constitutionally conferred on municipal corporations, and they may be authorized to act against that which comes within the legal definition of a nuisance, but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such. And where a building is a nuisance merely because of the uses to which it is devoted, the building itself cannot be pulled down to stop the nuisance, but only the wrongful use can be stopped. The occupation of a building by disorderly and lewd persons, its filthy and unsightly condition, and the consequent injury to adjacent property, do not justify its destruction as a nuisance. Bristol, etc., Co. v. Bristol, 97 Va. 304, 33 S. E. Rep. 588, 5 Va. Law Reg. 242.

Peril to Health—Possibility of Warding Off Danger.—One who creates a nuisance on the premises of another, which injures his property and is pernicious to health, will not be allowed to continue it for an indefinite period, because the latter may possibly ward off the evil effects and dangerous results at his own costs and expense, especially where it would endanger human life were the continuance of the nuisance allowed. Masonic Temple Ass'n v. Banks, 94 Va. 695, 27 S. E. Rep. 490.

Blacksmith Shop—Increased Risk of Fire.—To warrant the perpetuation of an injunction restraining, as a threatened nuisance, the erection of a building proposed to be used as a blacksmith shop, the fact that it will become a nuisance if so used must clearly appear. A blacksmith shop is not a nuisance *per se*. That the erection of a blacksmith shop will increase the rates of insurance on neighboring property is no ground for an injunction to restrain such erection. Chambers v. Cramer (W. Va.), 38 S. E. Rep. 691.

Powder Factory.—Where a company engaged in the manufacture of powder and other explosives, without misrepresentation or concealment on its part, is induced to locate its works at great expense on lands adjacent to the property, and for the prospective benefit of a land development and improvement company, such company cannot, on discovering that the proximity of such powder works has diminished instead of enhanced the value of its adjoining territory, enjoin the continuance of such works as a nuisance. Huntington, etc., Co. v. Phœnix, etc., Co., 40 W. Va. 711, 21 S. E. Rep. 1037.

Furniture Factory—Noise.—A court of equity will not grant an injunction to restrain the operation of a factory whose noise is alleged to be a nuisance to the plaintiff living near by, where the evidence is conflicting, and it appears that the locality is noisy from other causes as well, and that an action at law for damages on account of the alleged nuisance is pending and to be tried by a jury. Powell v. Bentley, etc., Furniture Co., 34 W. Va. 804, 12 S. E. Rep. 1085.

Skating Rink.—A court of equity will not enjoin the maintenance of a skating rink within a short distance of a dwelling house, where the noise from the skating and attending it is of such a character as to materially interfere with the comfort and enjoyment of the inmates of such dwelling. Snyder v. Cabell, 29 W. Va. 48, 1 S. E. Rep. 241.

Slaughter House.—A slaughter house in a city or town is not a nuisance *per se*, but only *prima facie* such. Therefore, upon a bill for an injunction, the burden of proof is upon those engaged in the business to show that it is not a nuisance. Pruner v. Pendleton, 75 Va. 516.

Obstruction of Access to Building.—A testator devised to his son S. a store and lot, together with the east half of a privy located on an adjoining lot, which he devises to his son W. The store on the lot devised to W. extended back about 55 feet, while that devised to S. extended back 70 feet, leaving a vacant space on which a privy was located. There was a door in the side of S.'s house entering to this vacant space. W. sold his lot to B., subject to the rights of the owner of the adjoining lot in the one-half of the privy. Upon the death of S., B., as his tenant, closed the door giving access to the privy, and extended his own storehouse back to the rear line of the lot, building a privy on the roof. *Held*, that the children of S., without proceeding at law to establish their rights, might go at once into equity to compel the removal of the obstruction. Berkeley v. Smith, 27 Gratt. 892.

Annoyance of Neighbors—Malice.—While the doing of certain acts by a person in the use of his premises as a dwelling house might not in themselves amount to a private nuisance, yet when the same acts are done wantonly and maliciously, for the mere purpose of annoying his neighbor and to destroy the peace and quiet of his home, and they have such effect, they may amount to a nuisance which a court of equity will restrain. Medford v. Levy, 31 W. Va. 649, 8 S. E. Rep. 302.

Domestic Broils.—Where two families are occupying rooms in the same house, using in common the halls and stairways, a court of equity will not restrain the one from committing a nuisance against the other, unless the proof of the existence of such

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nuisance is clear and strong. A court of equity will, as far as it can, discourage a resort to its aid for the purpose of interfering in mere domestic broils. He who comes into a court of equity must come in with clean hands; therefore when there appears to be an unfortunate quarrel between two women, which involves the families of each, and both are in fault, a court of equity will not interfere to protect one against the other, and enjoin as a nuisance what one does against the other. Medford v. Levy, 31 W. Va. 649, 8 S. E. Rep. 302.

Nuisances to Water—Obstruction of Stream.—A contractor obstructed a stream for the purpose of doing certain work under a contract with a city, which would require from four days to two months to do, and which might safely be done in another way at a small additional expense to the contractor. The overflow thereby caused filled the cellars of the plaintiff's building with stagnant water, productive of disease to the tenants in the building. *Held*, that the plaintiff was entitled to an injunction against the further obstruction of the stream, although he might have warded off the evil effects of the nuisance at his own expense. Masonic Temple Ass'n v. Banks, 94 Va. 695, 27 S. E. Rep. 490.

The owner of a dam in a stream of water cannot enjoin a prior owner of a dam above his from damming back the water for the purpose of raising a pond sufficient to supply his mill with water for operating his machinery, although such use at times keeps back the water to the extent of depriving the lower owner of water. Mumpower v. City of Bristol, 90 Va. 151, 17 S. E. Rep. 853.

Same—Same—Milldam Obstructing Navigation.—Where a corporation claims a right to abate a milldam as a nuisance, because it obstructs the navigation of a stream, and such abatement would produce great loss to the mill owner, and great inconvenience to the public, a court of equity has jurisdiction to prevent such abatement and preserve to the mill owner his establishment, until the question as to whether the mill owner has a right to keep up his dam is decided. Crenshaw v. Slate River Co., 6 Rand. 245.

Same—Same—Rebuilding Milldam—Stagnant Water.—A mill was erected in 1815, by leave of court, according to the statute concerning mills. The stagnation of the water in the mill pond proved injurious to the health of the neighborhood, and one of the neighbors injured thereby brought an action against the mill owners and recovered damages at law. About the time of this recovery, the milldam was washed away, and the pond drained; and the mill owners, after the recovery, proceeded to rebuild the milldam, proposing certain expedients to prevent the stagnation of the water from being again injurious to the health of the neighborhood. *Held*, that a court of chancery, upon a bill by the person who recovered the judgment at law against the mill owners, should enjoin them from rebuilding the dam, unless it should appear that the expedients proposed by the mill owners, would be effectual to prevent the mischief in the future. Miller v. Trueheart, 4 Leigh 569.

Same—Same—Milldam—Injury by Backing Water on Another's Land.—The defendant was the owner of a grist mill, and the plaintiff applied to the court for leave to build a mill on the same river, above the defendant's mill: and the defendant applied for leave to raise his dam. While their applications were depending, the defendant raised his dam two feet, to the prejudice of the plaintiff, who filed his bill for an injunction, in which he stated that the water was thrown back upon his plantation, which affected the health of his family, and covered his mill-seat fourteen inches, which was done to prevent him from building the mill, and prayed for the abatement of the nuisance and for an injunction to prevent the defendant, in the meantime, from the use of the water. *Held*, that the plaintiff was not entitled to an injunction. Wingfield v. Crenshaw, 4 H. & M. 474.

A riparian proprietor will be enjoined from constructing a dike which will destroy the dike of the opposite proprietor and cause an overflow of his lands, where the opposite proprietor claims a legal right to maintain his dike under one who built the dike when he owned the land on both sides of the stream; and the court will cause the abatement of so much of the defendant's dike as will injure the dike or land of the defendant. Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247.

Nuisance to Water—Diversion of Stream.—"By the general law applicable to running streams, every person through or past whose land a natural watercourse runs, has a right to the reasonable use of the water, and no proprietor, above or below, has a right to divert or obstruct it. This right is not an easement, but is inseparably annexed to the soil, and passes with it. It is, moreover, a principle of the common law that every riparian proprietor on either side of a stream not navigable *prima facie* owns to the middle or thread of the stream (*usque ad filum aquae*), and has an equal right to the use of the water without diminution or alteration. * * * Accordingly, the diversion of a natural stream is a private nuisance, and, therefore, from an early period, courts of equity have granted relief by way of injunction, in such cases, at the suit of the injured party. The jurisdiction is founded upon the notion of restraining irreparable mischief, or of preventing vexatious litigation, or a multiplicity of suits. And where the complainant's legal right is clear, and the case is one 'of strong and imperious necessity'; or, in other words, where the right is clear, and its violation palpable, and the complainant has not slept upon his rights, equity will ordinarily interfere, although the right has not been established at law; and in such a case a preliminary mandatory injunction, as it is called, will be granted, which is so framed that it restrains the defendant from permitting his previous act to operate, and, therefore, virtually compels him to undo it—that is, to restore the water to its natural channel." Carpenter v. Gold, 88 Va. 551, 14 S. E. Rep. 329.

No person has a right to divert a watercourse on his own land so as to turn it from the land of his neighbor lower down the stream; and if he claims such right from long enjoyment of it, he must prove that he has had adverse possession more than twenty years. Where a party injured by such act restores the stream to its original channel, equity has no jurisdiction to grant redress, as it is a proper case for damages at law. The only ground of equitable jurisdiction is to prevent the threatened injury. Coalter v. Hunter, 4 Rand. 58.

A bill alleged that complainant was the owner of a tract of land formerly a part of, and now adjoining, the defendant's land: that one of the boundary lines of the two tracts ran for some distance with a stream which had supplied both tracts with water ever since the complainant purchased his land; that the defendants, shortly before the bill was filed, diverted the water of the stream by means of

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a ditch, and deprived the complainant of access to it, and thereby greatly and irreparably injured him; and prayed that the defendants be enjoined from further diversion of the stream. *Held*, that the bill stated a proper case for equitable relief. Carpenter v. Gold, 88 Va. 551, 14 S. E. Rep. 329.

Two mills owned by different parties were propelled by water taken from the same dam, and the owner of the mill which had the preference in the use of the water transferred it to a purchaser, who altered the construction, requiring more water. *Held*, that the application for an injunction by the owner of the other mill was a proper method to ascertain the rights of the parties to the use of the water power. Hanna v. Clarke, 31 Gratt. 36.

Nuisance to Water—Pollution of Stream.—The natural pollution of water in its flow through populous regions of country cannot, ordinarily, be restrained. But any use of a stream that materially fouls and adulterates the water, or the deposit or discharge therein of any filth or noxious substance that so far affects the water as to impair its value for the ordinary purposes of life; or anything which renders the water less wholesome than when in its ordinary state, or which renders it offensive to taste or smell, or which is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance which a court of equity will enjoin, or for which a lower riparian owner injured thereby is entitled to redress. Trevett v. Prison Ass'n, 98 Va. 332, 36 S. E. Rep. 373, 6 Va. Law Reg. 148.

Parties.—Two or more persons owning separate and distinct tenements, whether they occupy the premises by themselves or tenants, may, together with the tenants, where the tenements are lessened in value, or made materially uncomfortable as homes, by a nuisance which is a common injury to all the tenements and their residents, join in a suit to restrain such nuisance. Snyder v. Cabell, 29 W. Va. 48, 1 S. E. Rep. 241.

E. TO PROTECT EASEMENTS.—"Where easements or servitudes are annexed by grant, or covenant, or otherwise, to private estates, the due enjoyment of them will be protected against encroachments by injunction. * * * Damages in repeated suits would not compensate in such a case. The injury is irreparable, and calls for a preventive remedy such as a court of equity only can furnish. That court constantly interposes by injunction where the injury is of that character. By the term irreparable injury it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages." Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374; Sanderlin v. Baxter, 76 Va. 299. On the subject of Easements generally, see monographic *note* on "Easements" appended to Hardy v. McCullough, 23 Gratt. 251.

Where the easement has long been enjoyed and delay would be disastrous, the right will not be required to be first established at law. Sanderlin v. Baxter, 76 Va. 299. See Berkeley v. Smith, 27 Gratt. 892.

Easement in Private Way.—Where a party has acquired an open and unobstructed right of way over land by publicly using the same, without objection, for more than twenty years, he can enjoin its obstruction. Rogerson v. Shepherd, 33 W. Va. 307, 10 S. E. Rep. 632.

A mandatory injunction will lie to cause an obstructed or closed private way to be cleared and opened for the use of the owner. Boyd v. Woolwine, 40 W. Va. 282, 21 S. E. Rep. 1020.

Easement in Streets and Alleys.—Where lands are laid off into lots, streets and alleys, and a map plat thereof is made, all lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of such lots; and where the landowner refuses to the lot owners the use of such streets and alleys, equity will compel him to open them for their benefit. Cook v. Totten (W. Va. 1901), 38 S. E. Rep. 491.

Where a vendor of land in a town assures the vendee, though not in writing, that the piece of ground adjoining thereto is always to be kept open as an alley, and the vendee is induced by such assurance to make the purchase, or to give a higher price for the property, a court of equity will perpetually enjoin the vendor from shutting up such alley. Trueheart v. Price, 2 Munf. 468.

In a suit by the owner of a livery stable opening on a street to enjoin a railroad company from constructing its road along such street under authority granted by the city, the bill alleged that, if the defendant were allowed to construct its road as proposed, it would not only deprive the complainant of his easement in the street, but would render his building almost useless as a livery stable on account of the combustible matter necessarily stored therein, which would easily be ignited by sparks from some passing engine; that the running of trains would frighten the horses kept in the stable, and would prevent his driving teams out of the door opening on the street; and that his stable would be thereby rendered entirely worthless, since no one would come there to hire horses. *Held*, that the granting of the preliminary injunction was warranted by the bill, as it showed not merely a damage to the complainant's property, but an injury wholly destroying its value. Ohio River R. Co. v. Ward, 35 W. Va. 481, 14 S. E. Rep. 142. See also, R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. Rep. 1093.

Easement in Turnpike Road.—In 1830, a turnpike company constructed a road through the lands of a property owner, taking rock from quarries on his adjacent lands to use in constructing the same: and no proceedings of condemnation appear to have been instituted against his lands, though the lands of twenty-five others were condemned for the purposes of said road. In 1850, a letter was received by the property owner from the president of the company, recognizing the right of his tenant, when on business, to pass the toll gates of the company free: and, until the death of the property owner in 1877, he and his family and servants passed through the toll gates free. By his will, the property owner devised the land, through which said road ran, to his son, with all the privileges and appurtenances thereto belonging; and the son exercised the same privileges with reference to the road for eleven years after his father's death, when for the first time the company demanded toll of him. *Held*, that, as the son had the right to travel on the road free of toll, the collection thereof would be restrained by injunction. Lucas v. Smithfield, C. & H. F. Turnpike Co., 36 W. Va. 427, 15 S. E. Rep. 182.

Easement in Passage Way between Offices.—An injunction will lie to restrain one of the tenants in common of a building used for law offices from

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changing the interior walls so as to narrow the passage way therein from six to three feet, where such alteration would materially damage the property. Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374.

Drainage Easement.—The owner of two tracts of land, "Woodlawn and Fairfield," separated only by a public road, drained the former by ditches through the latter to the river. In 1811, he granted "Woodlawn" to A (under whom the plaintiff claims). In 1820, he devised "Fairfield" to D (under whom the defendant claims). The deed and will were silent about draining. In 1878, the defendant undertook to stop up the ditches, and the plaintiff obtained an injunction. When "Woodlawn" was granted, the ditches were open and visible, and, except for a brief time, had been used continuously to drain it. It could be drained in no other way, except by heavy expenditure. *Held*, that the ditches were necessary to the proper enjoyment of the premises. Sanderlin v. Baxter, 76 Va. 299.

Easement to Pipe Water.—Where the right to pipe water from a spring to a certain tank is granted by the landowners to a railroad company by a recorded deed, and the land is subsequently granted to one knowing that the pipes are laid across the land and that the topography requires them to be laid as they were, the grantee takes subject to the easement, and will be enjoined from interfering, though the tank be located differently from the place named in the deed, where the change does not affect the pipe's position. Diffendal v. Va. Midland R. Co., 86 Va. 459, 10 S. E. Rep. 536.

F. TO PROTECT FRANCHISES.—Unless the grant of the franchise under which the plaintiff claims is exclusive in its terms, equity will not enjoin the operations of persons claiming the right to exercise a similar franchise under legislative authority. High on Injunctions (2d Ed.) 571; Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh 42.

Where a railway company is incorporated to run its road through the same valley with a canal company previously incorporated, but whose charter is not exclusive in terms, an injunction will not lie to restrain the railway company from constructing a bridge across the canal, where the termini of the railway are such as to require it to cross the canal. Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh 42.

Where a public ferry has been disused for more than three years, though the franchise of the ferry owner has not been declared forfeited on *quo warranto* or other like proceeding, the ferry owner is not entitled to the aid of a court of equity, to prevent others from invading the franchise, which he has abandoned by such nonuser, under the statute, 2 Rev. Code, ch. 237, §§ 23, 24. Trent v. Bridge Co., 11 Leigh 521.

G. TO CONTROL CORPORATE ACTION.—Courts of equity have jurisdiction to restrain the proceedings of municipal corporations which encroach upon private rights, and are productive of irreparable injury. Bristol, etc., Co. v. Bristol, 97 Va. 304, 33 S. E. Rep. 588. On the subject of Municipal Corporations generally, see monographic *note* on "Municipal Corporations" appended to Danville v. Pace, 25 Gratt. 1.

Courts of equity cannot interfere by injunction with the exercise in good faith by municipal corporations of discretionary powers conferred upon them by law. The apprehension of a lot owner that a corporation may not perform a lawful work in a proper manner is no ground for an injunction. Harrisonburg v. Roller, 97 Va. 582, 34 S. E. Rep. 523.

In Respect to Indebtedness.—Any taxpaying resident and voter of a city may sue in behalf of himself and all other taxpayers to enjoin the creation of any indebtedness by the city in excess of the constitutional limit. Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. Rep. 279; List v. Wheeling, 7 W. Va. 501. See Brannon v. County Court, 33 W. Va. 789, 11 S. E. Rep. 34; County Court v. Boreman, 34 W. Va. 362, 12 S. E. Rep. 490.

A court of equity has jurisdiction, at the instance of the taxpayers of a municipal corporation, suing for the benefit of themselves and all others similarly situated, to enjoin the corporation and its officers from levying and collecting an unauthorized tax, or creating an unauthorized debt. It is immaterial whether the debt was wholly unauthorized, or authorized only upon conditions which have not been complied with, or that the securities for it would be void in the hands of an innocent holder. Lynchburg, etc., Ry. Co. v. Dameron, 95 Va. 545, 28 S. E. Rep. 951.

To authorize an injunction against a county levy on the ground that it is intended to pay indebtedness incurred in violation of the W. Va. Const., art. 10, § 8, it must affirmatively appear that such indebtedness is in violation of the constitution. He who asserts it must show it. It will not be presumed to be so. Armstrong v. Taylor County Court, 41 W. Va. 602, 24 S. E. Rep. 993.

An injunction will not be allowed to restrain the execution of an order of a county court making numerous allowances to different county creditors merely because some of the allowances are not proper charges on the county. The remedy in such case is to enjoin the payment of the illegal allowances only. Armstrong v. Taylor County Court, 41 W. Va. 602, 24 S. E. Rep. 993.

Same—Issuance of Bonds.—Where a city makes subscriptions to a railroad company and is about to issue bonds in excess of the constitutional limit, a court of equity may perpetually enjoin the making of such subscriptions and the issuing of the bonds. List v. City of Wheeling, 7 W. Va. 501.

Although the statute provides a mode for contesting an election by a county to subscribe to the stock of an internal improvement company, a court of equity may, on a bill filed by fifteen or more of the taxpayers, enjoin the issuing of the bonds of the county in payment of the subscription, if irregular. Redd v. Supervisors of Henry Co., 31 Gratt. 695.

An injunction will lie to restrain the issuance and sale of bonds in payment of public subscriptions to works of internal improvement in advance of the proper time for delivery upon the subscription. Neale v. County Court, 43 W. Va. 90, 27 S. E. Rep. 370, 7 Am. & Eng. R. Cas., N. S., 252.

The terms and conditions as to the issuance of bonds under a public subscription to works of internal improvement contained in the proposition of subscription approved by the popular vote cannot be changed or departed from, and the issuance of bonds contrary to such terms and conditions may be enjoined by taxpayers. Neale v. County Court, 43 W. Va. 90, 27 S. E. Rep. 370, 7 Am. & Eng. R. Cas., N. S., 252.

Same—Guaranteeing Bonds.—An injunction will lie in favor of the taxpayers of a city to restrain the city from guaranteeing bonds, though the guaranty would be void in the hands of innocent purchasers.

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Lynchburg, etc., Ry. Co. v. Dameron, 95 Va. 545, 28 S. E. Rep. 951.

"The fact that securities, when issued by a municipal corporation, may be void in the hands of innocent holders, is no sufficient reason why the taxpayers of the corporation should not have the right to call upon a court of equity to prevent them from being issued, and thus avoid the threatened wrong and provide a remedy which will at once reach the whole mischief, secure the rights of all, both for the present and the future, and thus avoid a multiplicity of suits." Lynchburg, etc., Ry. Co. v. Dameron, 95 Va. 545, 28 S. E. Rep. 951.

In Respect to Sale of Property Dedicated to Public Use.—An injunction will lie to restrain a county court from selling a public square for the purpose of erecting private buildings thereon, where such square was dedicated to the public in consideration that no public building should be erected thereon. Sturmer v. Co. Court of Randolph Co., 42 W. Va. 724, 26 S. E. Rep. 532.

In Respect to Acceptance of Jail by Board of Supervisors.—An injunction will not lie in favor of the taxpayers of a county to enjoin the board of supervisors from accepting a jail and a jailer's residence merely on the ground that the contractor has acquired an influence over the board by reason of which it has allowed the original cost of the building to be greatly increased, in the absence of any charge of fraud or collusion on the part of the board of supervisors, as a complete remedy by appeal from the decision of the board is given by Va. Code 1887, §§ 836-838. Manly Mfg. Co. v. Broaddus, 94 Va. 547, 27 S. E. Rep. 438.

In Respect to Removal of Houses.—Equity will enjoin the authorities of the town from removing houses until the rights of the parties are ascertained. Where the evidence in the cause leaves the rights of the parties in doubt, equity cannot settle them, as they involve the title and boundaries of land, but will enjoin the removal of the houses until the question of right can be settled by an action at law. Manchester Cotton Mills v. Town of Manchester, 25 Gratt. 825.

In Respect to Removal of County Seat.—An injunction will lie in favor of taxpayers of a county to restrain the illegal removal of the county seat, by carrying away records, books, documents, etc., under a pretended act of the legislature. Osburn v. Staley, 5 W. Va. 85.

In Respect to Streets and Alleys.—An injunction will lie to restrain a town from opening streets and alleys through a person's lands, without condemnation according to law, and the payment of a proper compensation. M. C. S. & M. Co. v. Mason, 23 W. Va. 211; Pierpoint v. Town of Harrisville, 9 W. Va. 215; Yates v. Town of West Grafton, 33 W. Va. 507, 11 S. E. Rep. 8.

Since a tenant for life has the immediate freehold, and therefore the sole right to hold, use and enjoy, he may sue out an injunction to restrain a town from opening streets and alleys through his premises, against his consent, without first having the same lawfully taken and condemned, and compensation to such person ascertained in the manner prescribed by law. Jarvis v. Grafton, 44 W. Va. 453, 30 S. E. Rep. 178.

Equity has jurisdiction to restrain the taking or damaging of private property for public use, without just compensation, even though an action at law will lie for the recovery of damages in such cases after the property has been so taken or damaged. Mason v. Harper's Ferry Bridge Co., 17 W. Va. 408.

Same—Paving Streets.—An injunction will not lie to restrain a municipal corporation from laying a pavement along a street, and making an assessment therefor, on the ground that the abutting property is farm land, where such land has been platted, and building lots have been sold from it, and it is vacant only because of the high price at which it is held. Riddle v. Charlestown, 43 W. Va. 796, 28 S. E. Rep. 831.

Same—Sidewalk Assessment.—A court of equity will not enjoin the collection of a tax assessment on a town lot to pay for the construction of a sidewalk in front of the same, ordained by the council of an incorporated city or town, on the sole ground that such tax or assessment is illegal; some additional circumstances bringing the case under some recognized head of equity jurisdiction must also appear. Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. Rep. 553.

Same—Raising Sidewalk.—When a town is authorized by its charter to "close or extend, widen or narrow, lay out, graduate, curb and pave, and otherwise improve" its streets and sidewalks, it cannot be enjoined from raising a sidewalk, although the property of an adjacent lot owner may be injured thereby. Town of Harrisonburg v. Roller, 97 Va. 582, 34 S. E. Rep. 523.

A town will not be estopped from raising the sidewalk on a street by the fact that it was, at a former time, enjoined from raising certain streets at their intersection. Town of Harrisonburg v. Roller, 97 Va. 582, 34 S. E. Rep. 523.

H. AGAINST TAXES.—Injunction is the proper remedy to prevent a city from collecting taxes assessed against persons or property which it has no right to tax. Crim v. Town of Philippi, 38 W. Va. 122, 18 S. E. Rep. 466; Christie v. Malden, 23 W. Va. 667.

An injunction will lie to restrain the collection of taxes upon property which is exempt from taxation. Staunton v. Mary Baldwin Seminary, 99 Va. —, 39 S. E. Rep. 596.

"Whenever the authorities of a municipal corporation make an illegal or an improper assessment of taxes on a person or subject, which they have the legal right and authority to tax properly, the remedy of the party so illegally taxed is confined to a court of law; but where such authorities illegally assess and attempt to collect a tax from a person or a subject which they have no legal right to tax, or levy an improper tax for which a court of law could not afford an adequate remedy, because redress in that court could only be had by repeated actions, then a court of equity will take jurisdiction and enjoin the assessment and collection of such tax. That is, if the municipal authorities erroneously tax property which they have the legal right and power to tax, the remedy must be sought at law; but if they tax property not legally taxable, or if they exceed the limit prescribed by the statute conferring their power to tax, their action being *ultra vires* and void, equity has jurisdiction to grant relief." Christie v. Malden, 23 W. Va. 667; Tygarts, etc., Bank v. Philippi, 38 W. Va. 219, 18 S. E. Rep. 489.

"If municipal authorities tax persons or property not legally taxable, or if they exceed the limit prescribed by the statute conferring their power to tax, their action being *ultra vires* and void, equity has jurisdiction to grant relief. No other forum can afford such prompt, complete, and adequate re-

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lief. The hand of the would-be spoiler is stayed before it seizes its intended booty. Christie v. Malden, 23 W. Va. 671. Of course, it must clearly appear that the municipality is going beyond the line of its authority." Crim v. Town of Philippi, 38 W. Va. 122, 18 S. E. Rep. 466.

"The jurisdiction of a court of equity to restrain a municipal corporation and its officers from levying and collecting an unauthorized tax, or from creating an unauthorized debt, upon the application of one or more taxpayers of the corporation, who sue for the benefit of themselves and all others similarly situated, is too well settled to admit of dispute. Bull v. Read, 13 Gratt. 78; Eyre v. Jacob, 14 Gratt. 422; Redd v. Supervisors, 31 Gratt. 695; Roper v. McWhorter, 77 Va. 214; Crampton v. Zabriskie, 101 U. S. 601; 2 Dillon Mun. Corp., sec. 914, etc.; 1 Pom. Eq. Jur., sec. 260. And this jurisdiction is exercised not only in cases where the corporation has authority under certain conditions, which have not been complied with, to make subscriptions, or lend its credit to another corporation, but it is also exercised in cases where it has no authority to make such subscriptions, or lend such credit under any circumstances." Lynchburg, etc., R. Co. v. Dameron, 95 Va. 545, 28 S. E. Rep. 951.

By a long course of decisions it has been settled, that the remedy against the attempt to coerce the payment of an illegal tax is by injunction. Richmond v. Crenshaw, 76 Va. 936; S. V. R. Co. v. Supervisors of Clarke County, 78 Va. 269.

A court of equity will not restrain the collection of an assessment or tax, imposed by an incorporated town, on the sole ground that the tax is illegal. There must exist, in addition, special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the assessment or tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the plaintiff, or the like. Douglass v. Harrisville, 9 W. Va. 162; McClung v. Livesay, 7 W. Va. 329; Corrothers v. Board of Education, 16 W. Va. 527; C. & O. Ry. Co. v. Miller, 19 W. Va. 408; Bull v. Read, 13 Gratt. 78.

A court of equity has jurisdiction to enjoin the collection of an illegal tax, where such injunction will prevent a multiplicity of suits. C. & O. Ry. Co. v. Miller, 19 W. Va. 408; Williams v. County Court, 26 W. Va. 488.

County authorities are not authorized without the action of the legislature to assess railroads or other property for taxation and county levies; and if they make such assessment, injunction is the proper remedy. S. V. R. Co. v. Supervisors, 78 Va. 269; Richmond v. Crenshaw, 76 Va. 936; Va. & Tenn. R. Co. v. Washington County, 30 Gratt. 471. For the present legislation on this subject, see Va. Code 1887, ch. 36, § 833, as amended by Acts 1895, p. 274.

Equity will not enjoin municipal assessments merely on the grounds of illegality or irregularity, where the municipality in making such assessments does not exceed the constitutional or statutory limit of its authority, as the person aggrieved in such case has an adequate remedy at law. Riddle v. Town of Charlestown, 43 W. Va. 796, 28 S. E. Rep. 881.

Qualification of Officers, etc.—Where there is no averment in a bill to enjoin a collection of taxes on the ground that the person making the levy was not regularly elected or qualified to do so, that irreparable damage would be done the complainant if the collection were allowed to proceed, or even that the officer seeking the collection is insolvent, and that an action at law against him would be unavailing, it is not error to dissolve the injunction, as the remedy at law is complete and adequate. White Sulphur Springs Co. v. Holly, 4 W. Va. 597.

A bill to enjoin a town and its sergeant from collecting from the plaintiff's employer the amount of a road tax, which, it was alleged, the sergeant had threatened to collect, though not authorized by any town ordinance or general law; and to enjoin the employer from paying the tax and deducting the amount from the plaintiff's wages, is not only multifarious, but presents no case for relief against the town, because it shows that it had not by ordinance directed the collection; and no case against the employer, because the plaintiffs have, as to him, an adequate remedy at law. And for such want of equity such bill will be dismissed at the hearing. Buffalo v. Town of Pocahontas, 35 Va. 222, 7 S. E. Rep. 238.

Cloud upon Title.—As taxes assessed on real estate without any lawful authority create a cloud upon the title thereof, a court of equity will for that cause alone entertain a bill to remove the cloud by perpetually enjoining the collection of such illegal taxes. Powell v. Parkersburg, 28 W. Va. 698; Tygart's Val. Bank v. Philippi, 38 W. Va. 219, 18 S. E. Rep. 489.

Injunction Will Not Lie against Assessment of Foreign Insurance Company.—Equity has no jurisdiction to inquire into and control the internal management of a foreign corporation. Hence, an injunction will not lie against an assessment upon a member by a foreign insurance company. Taylor v. Mutual, etc., Life Ass'n, 97 Va. 60, 33 S. E. Rep. 385.

Collection of Toll by Navigation Company.—A court of equity has no jurisdiction to restrain a navigation company from collecting tolls on the streams to which its charter refers, on the ground that the company has failed to improve the streams as its charter prescribes, or to keep them in order. The only mode of proceeding against a corporation in such case is by *quo warranto* at the suit of the commonwealth. Pixley v. Roanoke Navigation Co., 75 Va. 320.

Taxation of Bank Shares.—A federal court will not enjoin the collection of taxes levied under the authority of a state upon the shares of a national bank unless it clearly appears not only that the tax is illegal, but also that there are special circumstances which bring the case within some recognized ground of equity jurisdiction and render such relief necessary to the adequate protection of the complainant's rights, and only where the right is clear, the necessity for action urgent, and the absence of any other remedy apparent, should an injunction be granted. People's National Bank of Lynchburg v. Marye, 7 Va. Law Reg. 47.

A bank cannot maintain a suit in equity on behalf of its shareholders to enjoin the collection of taxes levied on their shares where the shareholders themselves could not maintain such suit, and where the statute under which the taxes are levied imposes no duty or liability on the bank in respect to the same. People's National Bank of Lynchburg v. Marye, 7 Va. Law Reg. 47.

Act Virginia, March 6, 1890, providing for the taxation of bank shares, required the banks to pay the taxes levied thereunder against their stockholders and provided that in case a bank failed to make

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such payment within a certain time the cashier and his sureties should be liable therefor with an added penalty to be recovered at suit of the state. Act March 3, 1896, providing for the collection of delinquent taxes on bank shares, left it optional with a bank to pay such taxes levied against its stockholders, and provided that in case it did not elect to made such payment after notice suits should be instituted for the collection of the same from the stockholders individually. *Held*, that whether the later act be regarded as repealing the provision of the one under which the taxes were levied, authorizing suit against the cashier, or as merely providing a cumulative remedy, a national bank could not maintain a suit to enjoin the officers of the state from proceeding to collect such taxes, upon an allegation that the statute imposing the same was discriminative and invalid under the laws of the United States as applied to national bank shares, where it was not alleged that any action was threatened or contemplated against the bank itself, since in suits against the stockholders under the later act they had full opportunity to make any defence, and neither they nor the bank in their behalf had any ground for injunction. People's National Bank of Lynchburg v. Marye, 7 Va. Law Reg. 47.

The jurisdiction of equity on the ground of preventing a multiplicity of suits, can be invoked only where such suits will be against the same person, and a bank cannot maintain a suit on that ground to enjoin separate suits against its stockholders for the collection of taxes levied upon their shares. People's National Bank of Lynchburg v. Marye, 7 Va. Law Reg. 47.

Where a statute providing for the taxation of bank shares imposes duties and liabilities on the bank, as by requiring it to withhold dividends from its stockholders and apply the same to the payment of the taxes on their stock, and subjecting it to heavy penalties for a failure to comply with such requirements, it may maintain a suit in equity on behalf of its stockholders to test the validity of such statute and to enjoin its enforcement if found invalid. People's National Bank of Lynchburg v. Marye, 7 Va. Law Reg. 47.

Bill to Remove Application to Purchase Delinquent Tax Lands.—Where an application was filed with the county clerk for the purchase of certain lands sold to the state for delinquent taxes, a mandamus to compel the dismissal of the application for insufficiency was not an adequate and complete remedy for the owner of such lands since any delay in granting the writ might allow the conveyance of the lands, and thus render the writ ineffectual; hence a bill to enjoin the conveyance would not fail because of the existence of such remedy. Baker v. Briggs, 99 Va. —, 38 S. E. Rep. 277.

Parties.—A bill by taxpayers to enjoin the collection of illegal taxes should be filed in behalf of the plaintiffs and all others similarly situated, as such averment is essential to a complete determination of the rights affected by the suit. Doonan v. Board of Education, 9 W. Va. 246.

In a bill filed to restrain the collection of taxes for school purposes, in a certain township, the plaintiff must aver that he sues, not only on his own behalf, but also on behalf of all others similarly situated. Such averment is essential to a complete determination of all the rights affected by the suit. McClung v. Livesay, 7 W. Va. 329; Williams v. County Court, 26 W. Va. 488.

A bill to restrain a town and its sergeant from collecting from the plaintiff's employer the amount of a road tax which it is alleged the sergeant had threatened to do, though not authorized by any ordinance or general law, and to restrain the employer from paying the tax and deducting the amount from the plaintiff's wages, cannot be maintained against the town, as it shows that the town had not authorized the collection; nor against the employer, because as against him the plaintiffs have a remedy at law, though they alleged that to assert their rights would cause their discharge. Buffalo v. Town of Pocahontas, 85 Va. 222, 7 S. E. Rep. 338.

A bill to enjoin the collection in a certain district of a tax assessed by the county court on all dog owners in the county, on the ground that the assessment was illegal and the act under which it was made unconstitutional, brought by several owners of dogs in the said district, for themselves and all other dog owners in that district, against the county court, county sheriff, and district constable, was held to be properly dismissed, being maintainable, if at all, only to prevent a multiplicity of suits, for which purpose it should have been brought by one or more in behalf of all dog owners in the county, and against all district constables. Williams v. Grant Co. Court, 26 W. Va. 488, 53 Am. Rep. 94.

I. AGAINST RAILROAD COMPANIES.—It is not competent for a chancery court to award an injunction to stay the proceedings of a company in the prosecution of its works of any kind, unless it be manifest both that it is transcending the authority given by its charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. The two circumstances must concur to warrant a court in awarding such process. N. & W. R. Co. v. Smoot, 81 Va. 495; Supervisors of Culpeper v. Gorrell, 20 Gratt. 484; James River & Kanawha Co. v. Anderson, 12 Leigh 283; Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh 42.

Construction of Railroads.—An injunction will not lie in favor of a canal company to restrain a railroad company from constructing its road across the canal, and where the railroad company does not thereby transcend its authority, the injury to the canal company may be adequately compensated in damages. Tuckahoe Canal Co. v. Tuckahoe, etc., R. Co., 11 Leigh 42.

Same—Damage to Property—Compensation.—Although a bill for an injunction contains an averment that the defendant, by cutting a channel through the plaintiff's land, when he had granted the defendant the right to construct its railroad through his land, would divert the water of a creek from his mill, and would work to him irreparable damage, yet if there is no averment that the defendant is insolvent, or that its officers, agents or servants are transcending their authority, or that any damage which may be done to the property cannot be adequately compensated in damages, the injunction must be refused. C. & O. R. Co. v. Bobbett, 5 W. Va. 138.

Where a property owner is estopped by his acquiescence from claiming damages against a railroad company for excavating a tunnel on his land, an action for such damages may be restrained in equity. N. & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. Rep. 755.

An adjoining property owner cannot restrain the construction of a street railway until the damage to his property is ascertained and paid for, unless the

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injury is so great as to amount to a virtual taking of the property. Watson v. Fairmont & Suburban Ry. Co. (W. Va.), 39 S. E. Rep. 193.

The distinction between mere damage to property by an internal improvement company in the construction of its work, and the actual appropriation or taking of the same, is to be observed and insisted upon where an injunction is prayed for by the owner. Ohio River R. Co. v. Ward, 35 W. Va. 481, 14 S. E. Rep. 142.

In a suit by the owner of city property to enjoin an internal improvement company from irreparably injuring property or actually appropriating it under the power of eminent domain delegated to such company by the city, where the court directs an issue of *quantum damnificatus*, the question of title is not ordinarily involved, and the jury should assess the value of the fee where the property is taken, or the amount of damage thereto, where the property is only damaged. Ohio River R. Co. v. Ward, 35 W. Va. 481, 14 S. E. Rep. 142.

Where a railroad company neglects and refuses to pay the damages properly assessed against it for the right of way over the plaintiff's land, and proceeds to construct its road over the plaintiff's premises, or continues to operate its road over the land in question, an injunction will be allowed until payment has been made of the damages assessed. High on Injunctions (2d Ed.) 409; Freshwater v. Pittsburg, etc., R. Co., 6 W. Va. 503.

Under the West Virginia statute, an injunction will not lie at the suit of a property owner to restrain the operation of a railroad company charged with having entered upon and taken possession of the complainant's land without authority, where it is not averred that the railroad company was, at the time of filing the bill, transcending its authority or about to do so, or that it was insolvent or about to do an injury to the complainant's property which could not be compensated in damages. C. & O. R. Co. v. Patton, 5 W. Va. 234. See also, C. & O. R. Co. v. Bobbett, 5 W. Va. 138.

A railroad company claiming adverse right and title to a right of way lawfully in the possession of a rival company by virtue of condemnatory proceedings, cannot enjoin the latter company from proceeding to construct its road until just compensation is paid to the former company. But the disputed right and title must first be settled at law. Kanawha, etc., R. Co. v. Glen Jean, etc., R. Co., 45 W. Va. 119, 30 S. E. Rep. 86.

Although the plaintiffs can establish that they are entitled to compensation, that the injury they complain of is such that it cannot be adequately compensated in damages, and that it is therefore proper for a court of equity to grant the relief to which they may appear to be entitled, yet it is not proper for the court, pending the enquiry into their right to compensation, and before its assessment by law, to interfere by injunction, or otherwise, to stay the proceedings of the defendant railroad company, in laying or using the tracks on the land in respect to which the injury is alleged to be done or threatened, unless it be "manifest" that the company is transcending its authority, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. N. & W. R. Co. v. Smoot, 81 Va. 495.

Same—Railroad in Street—Rights of Abutting Property Owners.—Where a company by consent of a town council is building its road through the streets of a town, and the owner of an adjoining lot seeks an injunction till a court of equity can ascertain the damages he will sustain, giving as a reason for such injunction that the court of common law will furnish no adequate remedy, as the plaintiff would have to bring repeated suits to recover for the damages he might sustain, as he would recover in any one suit only the damages which he might have sustained prior to the institution of such suit, and on its termination would have to bring a like suit for his damages subsequently sustained, and so on for an indefinite period, this reason furnishes no ground for the interposition of a court of equity, as all damages of a permanent character may be recovered in such case in the first suit at law; and there is not only no necessity for such repeated suits at law, but after such first suit, in which the entire damages are recovered, no second suit could be brought, except to recover damages which did not necessarily result from the building and proper use by the company of its track in such street. A second suit could only be brought for the careless running of cars in such street, or for other wrongs done by the company, not including the injury necessarily resulting from the running of its cars in such street, which is the right of the company. Smith v. Point Pleasant & O. R. R. Co., 23 W. Va. 451, 20 Am. & Eng. R. Cas. 160.

Where a street-railway company is authorized to construct its line through a city, and is proceeding to lay its track, an abutting property owner cannot enjoin such act unless under the ordinary principles of equity, he has ground for relief. Watson v. Fairmont & Suburban Ry. Co. (W. Va.), 39 S. E. Rep. 193.

In a suit by the owner of a livery stable opening on a street to enjoin a railroad company from constructing its road along such street under authority granted by the city, the bill alleged that, if the defendant were allowed to construct its road as proposed, it would not only deprive the complainant of his easement in the street, but would render his building almost useless as a livery stable on account of the combustible matter necessarily stored therein, which would easily be ignited by sparks from some passing engine; that the running of trains would frighten the horses kept in the stable, and would prevent his driving teams out of the door opening on the street: and that his stable would be thereby rendered entirely worthless, since no one would come there to hire horses. *Held*, that the granting of the preliminary injunction was warranted by the bill, as it showed not merely a damage to the complainant's property, but an injury wholly destroying its value. Ohio River R. Co. v. Ward, 35 W. Va. 481, 14 S. E. Rep. 142. See also, Ohio River R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. Rep. 1093.

An injunction will not lie in favor of the owner of a lot abutting on a street, through which a railroad company is laying its track, on the ground that his damages are not ascertainable in one action at law. Smith v. Railroad Co., 23 W. Va. 451.

The owners of lots and lands adjoining a road along which a railroad is constructed, whether they own the fee in the ground occupied by the road or not, cannot enjoin the railroad company from constructing its railroad along the road in the manner required by the statute, unless the injury therefrom will entirely destroy the value of the property, and thereby be equivalent to a taking of it by the railroad company. Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. Rep. 1075; Arbenz v. Wheeling, etc., R. Co., 33 W. Va. 1, 10 S. E. Rep. 14.

Under the West Virginia statute authorizing a

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railroad company, with the assent of the municipal authorities, to construct and operate its road along the public street of a city, the abutting lot owner cannot enjoin the railroad company from building a trestle in the street as an approach to a bridge, unless his injury therefrom will be such as to completely destroy the value of his property, and thus be equivalent to an actual taking of it by the railroad company. Ohio River R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. Rep. 1093.

Same—Same—Road within 60 Feet of House.—Although Va. Code 1887, § 1072, forbidding the invasion by a railroad of any dwelling house or space within 60 feet of one, is impliedly repealed by Va. Code 1887, § 1093, which provides that, in case any lot or street or alley shall be impaired in value, such company shall, before crossing or occupying such street or alley, compensate the owner thereof, the occupation of a street by a railroad company within 60 feet of a dwelling house will be enjoined where compensation has not first been made to the owner. Hodges v. Seaboard, etc., R. Co., 88 Va. 653, 14 S. E. Rep. 380.

Same—Same—Duty to Repair Street.—Where a railroad company constructs its road along a street, under a license from the city, but also under an ordinance and the general laws of the state, requiring it to restore the streets to a passable condition and to make crossings, a failure on the part of the railroad to fulfil these obligations is a nuisance which equity will abate by a mandatory injunction. City of Moundsville v. Ohio R. Co., 37 W. Va. 92, 16 S. E. Rep. 514.

Operation and Management of Railroads.—An injunction will lie to prevent the lessee of a railroad from ceasing to operate it during the lease, when his contract compels him to maintain and operate the road during the whole term of the lease. The remedy at law to recover damages for the breach of the contract is neither complete nor adequate. Southern Ry. Co. v. Franklin, etc., R. Co., 96 Va. 693, 32 S. E. Rep. 485, 44 L. R. A. 297.

Upon enjoining the lessee of a railroad from abandoning its operation, the court should not dismiss the suit from the docket, but should retain it during the term of the lease for the purpose of making such additional orders as circumstances may require. Southern Ry. Co. v. Franklin, etc., R. Co., 96 Va. 693, 32 S. E. Rep. 485, 44 L. R. A. 297.

Although a stockholder in a corporation may enjoin it from employing the property or powers of the corporation for a purpose wholly or materially different from that which was designed by the act of incorporation, yet he has no right to enjoin it from doing what is in direct furtherance of the object of its creation, and is for the benefit of all the stockholders as such; though it may be injurious to such stockholder in another character; or the interest of some other person or the public may be injuriously affected by the work about to be executed. Baltimore & Ohio R. Co. v. City of Wheeling, 13 Gratt. 40.

Same—Appointment of Receiver.—Though a court of equity should properly, under the circumstances, appoint a receiver to take charge of and manage a railroad, it should not enjoin the directors of the company from doing any act as such, where such order is not necessary to accomplish the object of the principal order. Stevens v. Davison, 18 Gratt. 819, 98 Am. Dec. 692.

Same—Consolidation with Other Companies.—A court of equity will not grant a preliminary injunction, on the application of a minority stockholder in a railroad company to restrain the majority from consolidating the company with others, or from taking measures to that end, in anticipation of the passage of a law by a state legislature which will authorize such consolidation, where it is alleged and admitted that under existing laws it cannot legally be effected. Ryan v. Williams (Va.), 100 Fed. Rep. 172.

J. AGAINST PUBLIC OFFICERS.

Against Sheriff.—Where a defaulting, insolvent ex-sheriff, with the proceeds of taxes collected by him, has taken up a large number of county orders, and, instead of having them credited as payments on his arrearage, is selling them to third persons, an injunction will lie at the suit of his sureties to compel the application of such orders to their relief. Maxwell v. Miller, 38 W. Va. 261, 18 S. E. Rep. 449.

Where a sheriff neglects to return an execution at the request of the plaintiff, he is not liable to a fine, and a judgment for such fine may be enjoined; and though the answer denies such request, yet the testimony of one witness proving it is sufficiently corroborated by the fact that the plaintiff has rested for three years without complaint that the execution had not been returned. Goodall v. Bullock, Wythe 328.

A sheriff may file a bill of interpleader to settle the rights of property, taken in execution, to which there are conflicting claims, but an injunction will not be awarded to stay a suit against him in case of his selling the property; because the law provides him an ample remedy. Storrs v. Payne, 4 H. & M. 506.

The plaintiff at law recovered, by successive judgments, many fines against a sheriff for failing to return one execution, to a greater amount in all than the execution itself, with his extra costs added thereto. It appeared that the execution was lost and therefore could not have been returned, that the sheriff's failure to make defence at law to any of the judgments after the first was due to ignorance of the true construction of the act of assembly, and that in relation thereto there was a general delusion among the citizens of the commonwealth. *Held*, that equity would enjoin any further recovery against him on account of his failure to return such execution, although it appeared that he had received and applied to his own use a part, if not all, of the money upon the execution. Tomkies v. Downman, 6 Munf. 557.

Against Commissioner of County Court.—Equity has no jurisdiction to enjoin commissioners of a county court from certifying to the governor the result of their canvass of the vote in their county for a representative in the congress of the United States. Alderson v. Commissioners, 32 W. Va. 640, 9 S. E. Rep. 868.

Nor will an appeal from a decree in a suit in equity bring up for review an order discharging a rule to show cause why the party shall not be punished for contempt in disobeying an order of injunction made in such suit. Alderson v. Commissioners, 32 W. Va. 640, 9 S. E. Rep. 868.

Against Commissioner of School Lands.—An injunction will not lie to restrain a commissioner of school lands from selling, for the benefit of the school fund, delinquent lands purchased in by the state, at the instance of one claiming to hold a superior title to the lands. Moore v. M'Nutt, 41 W. Va. 695, 24 S. E. Rep. 682.

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Against Secretary of State.—A court of equity has no jurisdiction to enjoin the secretary of the state from delivering to the speaker of the house of delegates the sealed returns of an election for governor, properly transmitted to him, and such injunction, if granted, will be treated as a nullity. Fleming v. Guthrie, 32 W. Va. 1, 9 S. E. Rep. 23, 25 Am. St. Rep. 792, 3 L. R. A. 53.

Against Auditor of State.—Although the state of West Virginia cannot be sued, an injunction will lie against the auditor of the state to restrain him from the performance of a mere ministerial duty. C. & O. R. Co. v. Miller, 19 W. Va. 408.

Against Commissioner of Agriculture.—A court of equity has jurisdiction to enjoin illegal acts of an officer attempted *colore officii*; a suit against an officer not being necessarily a suit against the state. Hence, an injunction will lie to restrain the commissioner of agriculture from doing unlawful acts under color of his office. Blanton v. Southern, etc., Co., 77 Va. 335.

Against Overseer of Poor.—The rector of the Protestant Episcopal Church of a certain parish, insisting that the glebe land of such parish was a private donation to the church made before the Revolution and so reserved to the church within the exception of the statute of 1802 for the resumption of glebe lands, and therefore claiming the legal estate in the glebe land, filed a bill in chancery praying an injunction to inhibit the overseers of the poor of the county from selling the same under the general provisions of the statute. *Held*, that the court of chancery has no jurisdiction of such case. Overseers of Poor of Henrico v. Hart, 3 Leigh 1. See Va. Code 1887, §§ 1419, 1421, 1447. But where the church shows a good title, a court of equity has jurisdiction, and may award an injunction to prevent the sale of glebe lands. Turpin v. Locket, 6 Call 113.

Will Not Lie to Determine Title to Office.—A court of chancery has no jurisdiction to determine the title of an officer to his office, where the same has been determined by competent authority, from whose judgment there can be no appeal. Johnson v. Barham, 99 Va. —, 38 S. E. Rep. 136.

Where title to office is the point in controversy, the remedy is not by injunction, but at law, by information in the nature of *quo warranto*. Kilpatrick v. Smith, 77 Va. 347. See Dryden v. Swinburn, 15 W. Va. 234.

K. IN MATTERS PERTAINING TO CONTRACTS.—As a general rule equity has no jurisdiction to prevent by injunction the violation of a merely personal contract, unless such contract be of that class or character capable of being enforced by specific performance. The test of the exercise of such jurisdiction in equity in any case is the inadequacy of remedy in a court of law. Shepherd v. Groff, 34 W. Va. 123, 11 S. E. Rep. 997.

The plaintiff engaged the defendants to construct a macadam road on a public county road, reserving to himself the right to cancel the contract if for any reason the work done under it was not satisfactory. *Held*, that the plaintiff, having notified the defendants to discontinue the work because of noncompliance with the contract, was not entitled to an injunction against the further prosecution of the work by the defendants, there being an adequate remedy at law. Shepherd v. Groff, 34 W. Va. 123, 11 S. E. Rep. 997.

Where a person covenants to make a good title to certain lots of land, including the use and enjoyment of certain streets, he will be enjoined, at the suit of the covenantee, from obstructing such streets. Brooke v. Barton, 6 Munf. 306.

An injunction will not be awarded to suspend the execution of a contract until an issue relative to a tort may be tried. Harris v. Magee, 3 Call 502.

Where a party applies to a court of equity to prevent the issuing of the patent, or an assignment of a survey, and alleges a fraud committed by the defendant in forging an agreement between him and the complainant, the court of equity has jurisdiction to grant an injunction without the party's first resorting to a caveat. Lyne v. Jackson, 1 Rand. 114.

Where a plaintiff has brought the defendant into equity by an injunction claiming property, and the defendant has answered, and the case has been submitted to the court upon full proofs on the issue thus obtained, and the defendant has established an equitable demand against the plaintiff, there is no reason why the court should stop the dissolution of the injunction. On the contrary, it is competent and proper for the court to dispose of the whole case and adjust completely the respective rights and obligations of the parties as established by the proofs before it. Smyth v. Sutton, 24 Gratt. 191.

Usurious Contracts.—See monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698. See also, High on Injunctions (2d Ed.) 731.

L. IN MATTERS PERTAINING TO NEGOTIABLE NOTES.—In a suit by the maker against the payee and assignee of negotiable notes to enjoin them from collecting the same on the ground of an equity affecting the payee only, he being guilty of a fraud against the maker, the court, having before it all the parties concerned, ought not to discharge the maker altogether, nor to turn over the assignee to a suit at law against the assignor, but should decree against the assignor, in the first instance, that he pay the amount of the note to the assignee, and the costs at law, and liberty should be reserved to the assignee to apply to the court to dissolve the injunction as to the maker for so much of the debt as he may not be able to recover from the assignor, in which case a decree ought also to be rendered in favor of the maker against the assignor (the payee) for so much thereof as he may be compelled to pay; and the decree should further direct that the action at law by the assignee against the assignor, if any be pending, be perpetually enjoined, except as to the costs. McNiel v. Baird, 6 Munf. 316.

Where a third endorser endorsed a note on the faith of the solvency of a prior endorser, and, on a renewal of the note, the order of the endorsements was changed without the consent of the third endorser, who, for the convenience of renewing the note, had left his blank endorsement with the makers, equity will relieve him as against the endorser who should have preceded him. Slagle v. Rust, 4 Gratt. 274.

For nonpayment at maturity, a note was protested and suit brought on it. The maker made a partial payment and the payment of the balance was extended to a given day. Upon failure of payment at such time, suit was again brought. The endorser, a nonresident, was induced to accept service of process, without information of the partial payment and extension of time, and judgment was obtained. Afterwards, with knowledge of the partial payment, but in ignorance of the extension of time, the endorser executed a deed of trust to secure the balance. The property was advertised for sale

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under said deed. *Held*, that the endorser was entitled to have the sale enjoined. Dey v. Martin, 78 Va. 1.

A grantee who has been defrauded by his grantor may come into a court of equity, and, upon a charge that his grantor is insolvent, and has transferred without consideration his unpaid negotiable purchase-money notes to a third person, for the purpose of defrauding the grantee, may enjoin such third person from assigning or transferring the notes, and have the same cancelled so far as necessary to protect such grantee. Dickenson v. Bankers' Loan, etc., Co., 93 Va. 498, 25 S. E. Rep. 548.

A court of equity will interpose by injunction to relieve against a judgment on a note against the maker, where a written contract, without which the maker could not make his defence at law, has been lost. Vathir v. Zane, 6 Gratt. 246.

M. IN MATTERS PERTAINING TO EXECUTORS AND ADMINISTRATORS.—In a suit upon an administration bond for the benefit of distributees, two of whom were the administrators, judgment was rendered against the executors of the security only, for the amount of the inventory. On a bill in equity to injoin this judgment, it appearing by an *ex parte* settlement in a county court, that a considerable part of the estate had been *bona fide* disbursed by that administrator, and partly, to some of the distributees, relief was given, though no defence had been made at law. Wall v. Gressom, 4 Munf. 110.

Where a judgment has been obtained against an executor who, from the perplexed state of the assets, and other causes, was unable to plead at law, a court of equity will afford relief. Pickett v. Stewart, 1 Rand. 478. See Pendleton v. Stuart, 6 Munf. 377.

An executor, against whom judgments have been obtained at law, may be relieved in equity upon showing that assets sufficient to pay all the debts of the estate came into his hands, but that a large portion of them had been since recovered by a paramount title. Royall v. Johnson, 1 Rand. 421.

An executor brought suit on certain notes of his testate, to which the defendant pleaded credits for certain payments in accordance with a written contract between himself and the deceased for the board of the deceased and for the goods furnished him, and that his claim as residuary legatee be a set-off. *Held*, that there was no reason for equitable interference by injunction. Miller v. Miller, 25 W. Va. 496.

Where a surviving partner qualifies as administrator with the will annexed and resorts to equity to establish and enforce claims against his testator's estate and to set aside conveyances made by him, he places his whole trust and authority under the control of the court, and will be restrained by injunction from proceeding to sell the real estate before there is an adjudication of the matters in controversy between himself and the devisee and legatee. Watson v. Fletcher, 7 Gratt. 1.

A testator by his will directed that his farm should be kept for five years, or longer if his executor thought proper, and cultivated by his widow for the support of his family, at the end of which time the executor was vested with power to sell the farm, and as each child arrived at the age of twenty-one years he should have his share of the estate. The widow lived on the farm and cultivated it for five years, and the oldest child was within a few months of being twenty-one years old, and then the executor offered the land for sale. *Held*, that if it was the positive duty of the executor to sell the land in time to pay the oldest child his share of the estate, the executor acting in good faith, and being of opinion that the interests of the family required the sale, and that opinion not being disproved by the evidence it would be an uncalled for and improper exercise of power in a chancellor to interfere and substitute his discretion in the place of that of the executor. Dixon v. McCue, 14 Gratt. 540.

An injunction in favor of an administrator, on the ground of a deficiency of assets, should not be made perpetual, but only until assets shall come to his hands, reserving to the creditor liberty to show such assets by a *scire facias* at law. Haydon v. Goode, 4 H. & M. 460.

A testator bequeathed slaves to his son for life, the remainder to his son's children. The executor, being apprehensive that the son would sell the slaves to persons who would carry them out of the state, applied to a court of equity to restrain him from so doing, and to compel him to give security that the property should be forthcoming at his death for the legatees in remainder, the executor alleging that he had never assented to the legacy, and the legatee for life alleging that he had assented thereto. *Held*, that if the executor had not assented to the legacy, he had a plain remedy at law to recover the subject, and if he had assented to it to the legatee for life, that assent enured to the benefit of the legatees in remainder, and though they might ask the aid of the court to secure the subject to them in remainder, the executor could not do so. Bishop v. Bishop, 2 Leigh 484.

N. TO RESTRAIN EXERCISE OF POWER BY COMMITTEE OF INSANE PERSON.—Although the appointment of a committee for an insane person is made without notice, and is therefore void, an injunction will not lie to restrain the exercise of powers under such appointment, as there is an adequate remedy at law. Lance v. McCoy, 34 W. Va. 416, 12 S. E. Rep. 728.

O. IN MATTERS PERTAINING TO WIFE'S PROPERTY RIGHTS.—The equitable separate estate of a married woman is the creature of a court of equity, and, notwithstanding the provision of section 2999 of the Code, an injunction will always be granted when necessary to protect, aid, or enforce any equitable estate or interest which she may have. Courts of equity having once acquired jurisdiction never lose it because jurisdiction of the same matters is given to courts of law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words. Filler v. Tyler, 91 Va. 458, 22 S. E. Rep. 235.

Where a party has actual notice of an order of injunction, although it may not have been yet served, or be defectively served upon him, the order becomes operative on him from that time. Such an order is a sufficient incipient sequestration of the visible personal separate estate of a married woman, such estate then being specifically proceeded against by her creditor by bill in equity. A purchaser of such property at a sale made under a deed of trust, with knowledge of the order of injunction, acquires thereby only such right, as against the plaintiff in the suit, as the equity of the trust creditors may, on hearing the cause, be held to confer. Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. Rep. 702.

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Sums decreed to be paid as alimony should be charged upon the lands of the husband, but it is error to enjoin him from disposing of or encumbering his real estate, unless the facts of the particular case show it to be necessary or proper. Trimble v. Trimble, 97 Va. 217, 33 S. E. Rep. 531.

P. IN PARTNERSHIP MATTERS.—Where an insolvent member of a firm, without the consent or knowledge of his partner, wrongfully obtains a bank certificate in his individual name for partnership funds and transfers it to a foreign bank, equity will enjoin the application of such funds to the payment of such certificate until the partnership can be settled in a suit for that purpose. Grobe v. Roup, 44 W. Va. 197, 28 S. E. Rep. 699.

A court of equity may restrain one partner from persisting in a course jeopardizing the rights of another or depriving him of his due share in the direction of the business. Tillar v. Cook, 77 Va. 477.

Q. IN MATTERS PERTAINING TO CREDITORS.—A creditor of retail store keepers purchased their stock of goods, obtained credit for his debt and assumed certain of their debts. Wholesale merchants, with only personal demands against the storekeepers, obtained an injunction and had a receiver appointed to take charge of the goods and sell the same. There was no evidence of fraudulent intent. *Held*, that it was error for the injunction to be granted and the receiver appointed. Rorrer v. Guggenheimer, 87 Va. 533, 12 S. E. Rep. 1054.

Process in a foreign attachment was served upon a garnishee having property of the absent debtor in his hands. Afterwards, other creditors sued out attachments at law against the same party as an absconding debtor, which were served upon the same garnishee. Before the foreign attachment was ready for hearing, they obtained judgments and an order for the sale of the property in the hands of the garnishee. *Held*, that the plaintiff in the foreign attachment may amend his bill and enjoin the sale. Moore v. Holt, 10 Gratt. 284.

A judgment debtor obtained advances from his millers to pay off judgments against himself, upon which executions had issued, and the millers took an assignment of one of the judgments to themselves. These advances were obtained on the debtor's crop of wheat, to be afterwards delivered. The millers subsequently made further advances of money and produce to the debtor on the same account. After the wheat was delivered to the debtor, and before any settlement of the accounts between them, the millers sued out execution on the judgment assigned to them against the debtor. *Held*, that an injunction lies to restrain the execution of the judgment until a settlement of the account between the debtor and his millers can be had before a commissioner, and upon such account being returned, the injunction should be dissolved in whole or in part, or perpetuated, according to the result of such account. Isler v. Willis, 1 Pat. & H. 43.

A court of equity will not restrain a creditor from enforcing the payment of a debt for which he has obtained a decree, or which the debtor admits to be just and due, until the creditor has acknowledged in writing his liability in another and wholly different transaction, or furnished to the debtor written evidence of it. Solenberger v. Herr (Va.), 27 S. E. Rep. 839.

A creditor cannot obtain an injunction to restrain his debtor from disposing of his property until he has first proceeded as far as he can at law. To enjoin his creditor from disposing of real property, he must have obtained a judgment at law: to enjoin him from disposing of personal property, he must have obtained a judgment and execution. Rhodes v. Cousins, 6 Rand. 187.

Where, pending an injunction to a judgment at law, the plaintiff in equity pays a part of the judgment debt, the injunction should be perpetuated as to the sum so paid. Tapp v. Beverley, 1 Leigh 80.

It is error to grant an injunction against the collection of a whole debt, where the debtor sets up a defence to a specified part only; the injunction should be allowed only as to the part specified. Hutchinson v. Landcraft, 4 W. Va. 312.

R. TO PREVENT OR REMOVE CLOUD ON TITLE.—Equity will interfere in advance, by injunction, to prevent a cloud from being cast on title, upon the same principles on which it will remove a cloud already resting on such title. Moore v. McNutt, 41 W. Va. 695, 24 S. E. Rep. 682.

See *supra*, title, "Against Taxes"; *infra*, title, "Against Collection of Purchase Money on Failure of Title."

S. AGAINST SALES UNDER TRUSTS.—Where personal property is conveyed by a deed of trust, and a claim is set up by a third person, a court of equity ought not to enjoin a sale under the deed, but should leave the party to his remedy at law. Poage v. Bell, 3 Rand. 586.

An injunction will not lie to prevent the sale by a trustee of a tract of land conveyed by a deed of trust, where the title to the land offered for sale and the debt for which it is about to be sold are both undisputed, merely because the debtor claims that he is entitled to a conveyance from the creditor of a parcel of land adjoining. To entitle him to an injunction in such case he must further allege that the land offered for sale will not bring a fair price unless sold in connection with the parcel of land adjoining, claimed by him, and also that he is unable to pay the debt and thus prevent the sale. Shonk v. Knight, 12 W. Va. 667.

A court of equity will grant an injunction to protect the interest of the purchaser at a foreclosure sale before it has been confirmed, as against an execution sued out by the creditors of the mortgagor. Crews v. Pendleton, 1 Leigh 297, 19 Am. Dec. 750.

Where the grantor in a deed of trust conveys all his property to a trustee for the benefit of his creditors with power to sell the same immediately, he will not be permitted to enjoin such sale merely because the amount of his debts, their priorities, and the persons to whom they are due and owing have not been ascertained, the amount to be raised by such sale is uncertain, and the legal title is outstanding in trustees in prior deeds of trust. Sandusky v. Faris (W. Va.), 38 S. E. Rep. 563.

Where an injunction has been awarded to stay a sale under a trust deed until certain accounts have been settled, the court may proceed to full relief and render a personal decree for the balance due from the debtor beyond the sum realized by the sale under the trust deed. Beecher v. Lewis, 84 Va. 630, 6 S. E. Rep. 867.

Equity will enjoin the sale of a portion of the property under a deed of trust, where such sale would render the residue of the property valueless and the circumstances require that the property should be sold as an entirety. Anchor Stove Works v. Gray, 9 W. Va. 469.

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Advertisement—Advertisement of Whole Property When Only Part to Be Sold.—A court of equity will not enjoin a sale of property under a trust deed on the ground that the trustee has advertised to sell all of the property, while the law authorizes the sale of only so much as is necessary to satisfy the debt secured, the presumption being that the trustee will sell no more than is necessary. Moore v. Barksdale (Va.), 25 S. E. Rep. 529.

Same—Length of Time.—No general rule can be laid down as to the length of time property should be advertised for sale. Ordinarily a direction to "duly advertise" is sufficiently complied with by advertising in accordance with the prevailing custom adopted by prudent men in the management of their own affairs, or by following the rule of courts in relation to sales of like property in the jurisdiction in which the property is situated. Wilson v. Wall, 99 Va. —, 7 Va. Law Reg. 43, *disapproving* Morriss v. Ins. Co., 90 Va. 370, 18 S. E. Rep. 843.

Failure to Give Grantor Notice No Ground for Injunction.—A court of equity will not enjoin a sale under a trust deed for failure to give the grantor notice, unless it appears that the grantor resides in the county. Walker v. Boggess, 41 W. Va. 588, 23 S. E. Rep. 550.

Unpropitious Time of Sale No Ground for Injunction.—An injunction will not lie to prevent a sale of real estate under the provisions of a deed of trust, on the ground that money is scarce, and that, in consequence of the large cash payment required, a sale at that time will result in great if not irreparable loss to the owner of the property. Muller v. Bayly, 21 Gratt. 521; Caperton v. Landcraft, 3 W. Va. 540.

A trustee is not entitled to an injunction against a sale for cash under Va. Code 1873, ch. 113, § 6, on the ground that the sale will be greatly inequitable, inasmuch as real estate, sold for cash at a time of great financial depression, must be disposed of at an unnecessary sacrifice. Muller v. Stone, 84 Va. 834, 6 S. E. Rep. 223.

Inadequacy of Price No Ground for Injunction.—An injunction will not lie to restrain the conveyance by a trustee of lots sold by him under a trust deed, because of the inadequacy of the price bid, and because the lots were offered together in bulk, where no fraud is shown, and the sale appears to have been open and fair and made in accordance with the terms of the trust deed, and it is not alleged or proved that any one else would have bid more had the lots been offered for sale separately. Old Dominion Inv. Co. v. Moomaw (Va.), 25 S. E. Rep. 540; Lallance v. Fisher, 29 W. Va. 512, 2 S. E. Rep. 775.

Usury as Ground for Injunction.—A trust deed was executed to secure a debt usurious under Va. Code 1873, ch. 137, which, by section 9 thereof, exempts the borrower from paying any interest, and directs all payments to be deducted from the principal. An injunction was awarded to prevent a sale under the trust deed. *Held*, that by Va. Code 1887, § 4204, the mode of procedure is charged to conform to § 2822, which dispenses with a jury to try the issue of "usury or no usury." Edmunds v. Bruce, 88 Va. 1007, 14 S. E. Rep. 840. See Meem v. Dulaney, 88 Va. 674, 14 S. E. Rep. 363. See also, monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

A person borrowing money on an usurious contract procured the bond of a third person which he transferred to his creditor in part payment of the usurious debt, giving his own bond, secured by the deed of trust, to the third person for the same amount. At the instance of the usurious creditor, the obligor in the transferred bond directed a sale of the trust property. *Held*, that equity will enjoin such sale and restrain the usurious creditor from enforcing the payment of the transferred bond. Cabaness v. Matthews, 2 Gratt. 325.

An injunction to restrain a trustee from selling land under a deed of trust to secure a debt on the ground of usury should be dissolved, so that the creditor may enforce his right under the trust, where it appears that there is no usury in the debt, and no other creditors are interested in the case. Watterson v. Miller, 42 W. Va. 108, 24 S. E. Rep. 578.

Parties.—Where a bill is brought by an administrator to enjoin a sale of real estate under a deed of trust in the nature of a mortgage, on the ground that the indebtedness was paid by the intestate in his lifetime, the heirs are necessary parties, being the owners of the real estate and directly interested in the result of the controversy. Stewart v. Jackson, 8 W. Va. 29.

Dissolution of the Injunction.—Where the allegations of the bill upon which an injunction is obtained, restraining a sale of real estate under a deed of trust in the nature of a mortgage, are fully denied by the defendant's answer, and are not supported by evidence upon the hearing, the injunction should be dissolved. High on Injunctions (2d Ed.) 296; Arbuckle v. McClanahan, 6 W. Va. 101. But where it is necessary to ascertain the amount due from the debtor and for which the sale should be made, it is regarded as premature to dissolve an injunction restraining a sale under a deed of trust, although the grounds upon which it was granted are not maintained, and the injunction should be retained until such amount is ascertained. High on Injunctions (2d Ed.) 296; White v. Mechanics', etc., Ass'n, 23 Gratt. 233.

T. AGAINST COLLECTION OF PURCHASE MONEY ON FAILURE OF TITLE.—"The numerous adjudged cases on this subject will show that this court has gone very far in staying the collection of the purchase money for land upon proof of a defect of the title where no suit is pending, or even threatened. But even here a distinction has always been made between an injunction to a judgment for the purchase money and an injunction to a sale under a deed of trust. In the latter case the court interferes the more readily upon the ground of removing a cloud upon the title, in order to prevent a sacrifice of the property; whereas, in a like case, the court will not interfere with the vendor in enforcing his judgment, since the doubt about the title may eventually turn out to be frivolous and groundless." Rosenberger v. Keller, 33 Gratt. 499.

A court of equity will enjoin a sale under a deed of trust given to secure the purchase money of land, where there is a cloud upon the title which would occasion a sacrifice at such sale. Faulkner v. Davis, 18 Gratt. 651, 98 Am. Dec. 698; Miller v. Argyle, 5 Leigh 460; Gay v. Hancock, 1 Rand. 72; Bryan v. Stump, 8 Gratt. 241.

Where there is a cloud on the title, uncertainty as to the debts secured or the amounts thereof, or a dispute as to priorities, the aid of equity may be invoked by any person interested, to enjoin a sale under the trust deed until such impediments to a fair sale are removed. But unless some such impediments exist, it is not the duty of the trustee, in every case where there are liens on the trust subject, to invoke the aid of equity before making sale

in pais. Muller v. Stone, 84 Va. 834, 6 S. E. Rep. 223; Shultz v. Hansbrough, 33 Gratt. 567.

The right of a vendee of land to have an injunction to protect him from the payment of the purchase money, upon proof of an actual outstanding superior title in a third person, is now the established doctrine of our courts; yet his right to such relief must depend upon the equity of his case. Keyton v. Brawford, 5 Leigh 39.

Equity will enjoin the collection of the purchase money of land on the ground of defect of title, where the vendee has taken possession under a conveyance from the vendor, with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective. Kinports v. Rawson, 29 W. Va. 487, 2 S. E. Rep. 85; Wamsley v. Stalnaker, 24 W. Va. 214; Ralston v. Miller, 3 Rand. 44, 15 Am. Dec. 704.

Where the grantor in a deed conveys land with general warranty, and the grantee assigns to him the bonds of a third person in payment of the purchase money, and the title to a part of the land is afterwards discovered to be clearly defective, the grantee may enjoin the collection of so much of such bonds as will compensate him for the land to which the title is defective. Clarke v. Hardgrove, 7 Gratt. 399.

Where a suit is brought to restrain the collection of the purchase money of land on the ground of defect of title, and that the title is questioned by a suit pending or threatened, the bill must allege the grounds upon which such pending or threatened suit is based, which must be such as would put a reasonable man in just apprehension of the loss of his land. Kinports v. Rawson, 29 W. Va. 487, 2 S. E. Rep. 85.

Where the grantor covenants with the grantee for general warranty of title and that the land "shall not be subject to any liability from incumbrances now thereon," and there are recorded judgment liens on the land at the time of the conveyance, equity will not enjoin the collection of a judgment against the grantee for the purchase money of the land, unless the bill shows that the grantor has no other lands sufficient to satisfy such judgment liens, and that he is pecuniarily unable to pay them. Wamsley v. Stalnaker, 24 W. Va. 214.

Where, by an agreement under seal between the vendor and purchaser of a tract of land, it is covenanted, that if any part thereof should be recovered by law from the purchaser, the vendor will abate or refund in proportion, and that he will not bring suit upon the bond for the purchase money until the quantity of land which the purchaser is to get is ascertained, provided the purchaser prosecutes a suit for the purpose in a reasonable time, a court of equity will enjoin a premature suit on the bond, and if it appears that the purchaser prosecuted his suit in a reasonable time, and could not recover the land, the court will decree that the injunction be perpetuated, that the money paid be refunded, that the bond be surrendered and cancelled and that the contract be rescinded. Bullitt v. Songster, 3 Munf. 54.

A vendor in consideration of a certain price per acre to be paid him by the vendee undertook to procure a third person who was in possession of a tract of land as owner thereof to make a good deed for the same to the vendee with general warranty. The vendor purchased the land from such third party, paid the purchase money, and directed him to make the conveyance to the vendee, which was made accordingly with general warranty. The vendee executed to the vendor his notes for the price agreed upon between them, and took possession of the land, which he held without eviction or disturbance. *Held*, that equity will not enjoin the vendor from collecting the money due him by the vendee, whatever may be the defects of such third person's title to the land; and, that no eviction or disturbance of the vendee's possession having taken place, defect of title is no ground for his coming into equity against such third person. Long v. Israel, 9 Leigh 556.

A testator devised an undivided moiety of specific lands and mills to the defendant, who in turn sold his interest to the plaintiff, specifying that as soon as the plaintiff paid the purchase price, the defendant would make a good and sufficient deed of conveyance of his interest. The testator left a child born after the will was made. His widow renounced the provision made for her by the will, and her dower was assigned to her principally out of the lands devised to the other children. After the contract between the defendant and the plaintiff was made, the guardian of the infant children asked to have the widow's dower reassigned and the after-born child claimed her share of the estate as pretermitted by the will. *Held*, that the plaintiff was entitled to indemnity against these incumbrances, and to an injunction to restrain the collection of the balance of the purchase money, until the extent of his loss from such incumbrances could be ascertained. Price v. Browning, 4 Gratt. 68.

Where a purchaser of land gives bond and security for the price without getting a good title, he may bind his surety, as well as himself, by waiving such title as he might otherwise have insisted upon as a condition precedent to the payment of the money. If, therefore, he does not appeal from an order dissolving an injunction, which was granted him for the want of title, his surety has no right to another injunction for the same ground. But, in such case, the purchaser, or the surety, having a lien on the land for indemnification, is not precluded from obtaining such conveyance as he can show himself entitled to, notwithstanding the dissolution of the injunction. Ross v. Woodville, 4 Munf. 324.

The obligor in a bond for the purchase price of land gave a new bond therefor to an assignee of the original bond, after several intermediate assignments, and the original bond was canceled, renewal being made in consideration of further indulgence. Upon the institution of an action on a new bond, the obligor brought suit to enjoin the judgment, on the ground of an encumbrance on the property, the purchase of which formed the consideration of the bond, alleging that he was ignorant of the encumbrance at the time of the purchase. It appeared that the encumbrance was a mortgage made by the obligor's brother, who had formerly owned the land, and who had become surety in the new bond, which mortgage was recorded in the office of the obligor, who was clerk of the county court, and it did not appear that the assignee who took the renewal of the bond had any notice of the encumbrance. *Held*, that the obligor was not entitled to relief in equity. Washington v. Pollard, 5 Gratt. 432.

A negro man was conveyed by deeds of trust to secure debts amounting to more than his value, and the grantor sold him, and the purchaser paid to

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one of the *cestuis que trust* part of the purchase money, and executed to the other his obligation for the residue. The grantor made to the purchaser a bill of sale of the negro as a slave, and therein warranted and defended the title to him against the claims of all persons whatsoever. The *cestuis que trust* did not join in the bill of sale or warranty, but, by the arrangement, their liens on the negro were relinquished to the purchaser, and the payment made by him to one of the *cestuis que trust*, and the obligation executed by him to the other, discharged the grantor's debt to them *pro tanto*. It turned out that the negro so purchased was a free man; judgment having been obtained at law against the purchaser upon his obligation, an injunction was awarded him. *Held*, that the purchaser can have no relief against the *cestuis que trust* and that the injunction should therefore be dissolved and the bill dismissed. Findlay v. Hickman, 10 Leigh 354.

Sales of Hazard.—Where a purchaser of land accepts a conveyance without warranty of title, an injunction will not lie against unpaid purchase money, unless the vendor is guilty of fraud or concealment in regard to the title. Price v. Ayres, 10 Gratt. 575. "Such a purchase may properly be termed a sale of hazard, and it may be laid down as a general rule that in sales of hazard equity will not interpose in the absence of fraud or misrepresentation." High on Injunctions (2d Ed.) 256.

Where a sale of land is made in gross, the contract being one of hazard on both sides, the purchaser is not entitled to relief in equity in case of a deficiency in the amount. Keyton v. Brawford, 5 Leigh 39; Russell v. Keeran, 8 Leigh 9; Farrier v. Reynolds, 88 Va. 141, 13 S. E. Rep. 393. But every sale of real estate, where the quantity is referred to in the contract, is presumed to be a sale by the acre, unless the contract plainly indicates a sale in gross; and this presumption can only be overcome by clear and cogent proof. Boschen v. Jurgens, 92 Va. 756, 24 S. E. Rep. 390. For the rules as to abatement in the purchase money for land on account of deficiency in acreage where the sale is by the acre, see Bart. Ch. Pr. (2d Ed.) 481; Farrier v. Reynolds, 88 Va. 141, 13 S. E. Rep. 393; Grayson v. Buchanan, 88 Va. 251, 13 S. E. Rep. 457; Morgan v. Brest, 34 W. Va. 232, 12 S. E. Rep. 710; Board v. Wilson, 34 W. Va. 609, 12 S. E. Rep. 778.

Where the purchase is, as to the title, one of hazard, there being no fraud or concealment by the vendor in regard to the title, a judgment for the purchase money will not be enjoined, even though the vendor represented the title as good when it was fatally defective, his representation having been made in good faith. In such case the purchaser, having accepted the land without any agreement express or implied for a conveyance with warranty, is considered as having taken upon himself all risk as to the title, and is therefore debarred from relief in equity. High on Injunctions (2d Ed.) 256; Sutton v. Sutton, 7 Gratt. 234, 56 Am. Dec. 109.

Failure of Vendor to Make Deed According to Contract.—A vendee of real estate under an unwritten contract, who has not paid any part of the purchase money, nor been let into possession, and who has refused to complete the purchase because the vendor has declined to make such a deed as the contract called for, has a full, adequate and complete defence at law to an action against him to recover the purchase money, and will not be entertained in a court of equity to enjoin the prosecution of such action by the vendor. Virginia Mining Co. v. Wilkinson, 92 Va. 98, 22 S. E. Rep. 839.

Deficiency in Quantity of Land.—The jurisdiction of a court of equity to enjoin the collection of the purchase money of land, after conveyance executed, on the ground of a deficiency in quantity, the contract being a sale by the acre, is not now to be questioned. And equity will enjoin the collection of the purchase money on the ground of defect of title, after the vendee has taken possession, under conveyance from the vendor with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective. Koger v. Kane, 5 Leigh 606. See Boschen v. Jurgens, 92 Va. 756, 24 S. E. Rep. 390.

A bill praying for an injunction to restrain the sale by a trustee of a tract of land conveyed to secure the purchase money alleged "that since the purchase was made, the plaintiff had caused a survey of the land to be made, and instead of there being 1,500 acres as represented, there were only 900 acres," and this was the only allegation in the bill, on the ground of which relief was asked. *Held*, that the bill did not present sufficient equity, on its face, to justify the interference of a court of equity. Reed v. Patterson, 7 W. Va. 263.

Knowledge of Defect in Title.—Where a vendee is in possession of land under a conveyance with general warranty, and the title has not been questioned by any suit prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase money, unless he can show a defect of title respecting which the vendor was guilty of fraudulent misrepresentation or concealment, and which the vendee had at the time no means of discovering. Beale v. Seiveley, 8 Leigh 658.

A court of equity should enjoin a sale by trustees where the title to the property is disputed and full value could not probably be had for it; even if that fact was known to all the parties to the deed, when executed. Lane v. Tidball, Gilmer 130.

The mere fact that some one has asserted a claim on the land, which is generally known in the community where the land is situated, is insufficient to justify a court of equity in restraining a sale under a trust deed given to secure the purchase money on the land. Kinports v. Rawson, 29 W. Va. 487, 2 S. E. Rep. 85.

Injunctions Not Often Perpetuated.—While the jurisdiction of equity in restraint of the payment of purchase money is freely exercised, a perpetual injunction will rarely be granted, and equity will only extend its protection until the defective title is cured. And where the vendee has obtained an injunction on the ground of defective title, the vendor is entitled to a dissolution on curing the defect by a conveyance of the outstanding title, although there are general allegations in the bill of other outstanding title, such allegations being unsupported by proof. High on Injunctions (2d Ed.) 263; Lovell v. Chilton, 2 W. Va. 410.

Judicial Sales.—Where a purchaser at a judicial sale desires relief on the ground of an alleged defect in title, his remedy is by objecting to the confirmation of the sale, and not by an injunction restraining the collection of the purchase money. Threlkelds v. Campbell, 2 Gratt. 199, 44 Am. Dec. 384.

Recovery Barred by Statute of Limitations.—Where a vendee enters under a title bond and holds the land under that title till the statute of limitations bars a recovery against him by an adverse title, he

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cannot set up defect of title in his vendor, existing at the date of the sale to him, as a ground of injunction to a judgment for the purchase money. Amick v. Bowyer, 3 W. Va. 7.

Not Granted Where Deed Perfecting Title Given.—Equity will not enjoin the enforcement of a trust deed to secure the payment of the purchase money of land on account of an ineffectual deed in the claim of title, where a deed perfecting the title is given. Morgan v. Glendy, 92 Va. 86, 22 S. E. Rep. 854.

Vendor's Failure to Procure Outstanding Title.—Where the vendor contracts to procure a conveyance to the vendee of the title of the other joint owners of the premises, but fails to do so, he may be enjoined from enforcing a judgment upon the vendee's bond for the purchase price, although the vendee himself procures the remainder of the title directly from the other owners. Jaynes v. Brock, 10 Gratt. 211.

Set-Off.—In conformity with the principle that unliquidated damages cannot be urged by way of set-off in proceedings in equity, a bill will not lie to enjoin an unpaid balance of purchase money, where the real object is to obtain damages for an alleged fraud in the transaction. The object of such proceeding being simply to obtain damages, the relief should be sought in a court of law. Robertson v. Hogsheads, 3 Leigh 667; Koger v. Kane, 5 Leigh 606.

U. AGAINST ACTIONS AT LAW.—It is well settled that a court of equity will interfere by injunction either pending an action or after judgment, where there is a distinct defence against the claim asserted at law which is solely cognizable in equity. And it is equally well settled that where a court of equity has acquired jurisdiction for one purpose, it will ordinarily proceed to a final disposition of the case. Penn v. Ingles, 82 Va. 65.

Adjustment of Complicated Accounts.—Where the litigation involves the adjustment of complicated accounts, and the remedy at law is inadequate and a complete defence at law is impossible, equity may enjoin the action at law. 16 Am. & Eng. Enc. Law 367; Penn v. Ingles, 82 Va. 65; Tillar v. Cook, 77 Va. 477; Staples v. Turner, 29 Gratt. 330.

When Granted to Make Set-Off Available.—A court of equity will not ordinarily enjoin an action at law at the instance of the defendant to enable him to set-off an alleged balance due him on a partnership account, as a settlement may show a balance against him instead of in his favor. But where it is certain that the balance will be in favor of the complainant, though the amount thereof is unascertained, and the debtor partner is insolvent, and the complainant would be otherwise without remedy to get the benefit of his offsets, equity will stay the proceeding at law and afford relief. Commercial Bank v. Cabell, 96 Va. 552, 32 S. E. Rep. 53.

Actions Relating to Real Property.—Where a party obtains a patent for land with knowledge of the prior equitable title in another, and brings a writ of right for the land, a court of equity will award an injunction to stay the proceedings at law for a reasonable time, to afford the tenant an opportunity to get in the legal title to the land outstanding in a third person. Goodwin v. McCluer, 3 Gratt. 291.

Same—Action of Ejectment.—Where the complainants are in possession of real estate they cannot enjoin the defendant, who is out of possession, from prosecuting an action of ejectment against them for the recovery of the premises upon the ground that the deed under which the plaintiff claims is absolutely void, either from want of delivery and acceptance or because obtained by duress or fraud, since, in either event, the defence in the action of ejectment would be complete. Hawkinberry v. Snodgrass, 39 W. Va. 332, 19 S. E. Rep. 418.

The defendant in an action of ejectment cannot maintain a bill in equity to enjoin the plaintiff from proceeding with his suit on the ground that the tax deed under which the plaintiff claims was irregularly obtained, unless such defendant shows some privity with the title which was sold at such delinquent tax sale or that he was for some reason entitled to redeem the land. Hawkinberry v. Snodgrass, 39 W. Va. 332, 19 S. E. Rep. 417.

Same—Action of Unlawful Detainer.—Where a mortgagor was present at a trustee's sale of the property, and bid within $25 of the price for which it was sold, interposed no objection on the ground of insufficiency of notice or otherwise, until more than six months after it was made, and induced two persons who were present for the purpose of bidding on the property to refrain from bidding, the property having sold for a fair price, he cannot enjoin the purchaser from maintaining an action of unlawful detainer. Wilson v. Wall, 99 Va. —, 38 S. E. Rep. 181.

Attachment Suits.—An injunction will lie to protect creditors in a foreign attachment who are entitled to a priority of claim over creditors subsequently attaching. High on Injunctions (2d Ed.) 58; Erskine v. Staley, 12 Leigh 406; Moore v. Holt, 10 Gratt. 284.

To Prevent Multiplicity of Suits.—An injunction to prevent multiplicity of suits is allowed only when the subject-matter of the various litigations, as well as the parties, are substantially the same. And the fact that different suits have been brought, each having a distinct object, founded on distinct and separate grounds, brought by different persons, does not constitute such a multiplicity of suits as to bring the case within the rule and warrant an injunction. Zanhizer v. Hefner (W. Va.), 35 S. E. Rep. 4; High on Injunctions (2d Ed.) 50.

The fact that attachments by four distinct creditors are levied on goods of a common debtor, they having no connection, will not give a third party, claiming the goods, an injunction on the ground of preventing multiplicity of suits. Zanhizer v. Hefner (W. Va.), 35 S. E. Rep. 4.

Necessity of Confessing Judgment in Action at Law.—"We have no statutory provision commanding courts of equity to require, in any case, a confession of judgment as a condition of equitable interference with legal proceeding. The terms upon which injunctions are awarded by courts of equity, except where they are controlled by statutory enactments, are, in each case, a question for the discretion of the chancellor. It is not, however, an arbitrary discretion, but a discretion, as was said by JUDGE BOULDIN in Great Falls Manfg. Co. v. Henry's Adm'r, 25 Gratt. 575, 579, 'to be exercised on well-established principles of equity and law, so as to preserve, as far as practicable, the rights of the party restrained, and at the same time to inflict no wrong on the plaintiff in equity.'" Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100.

When a defendant in an action at law files a bill to make his defence in equity and asks for a stay of proceedings in the law court, it is a matter within the discretion of the chancellor in granting the injunction, whether he will or will not require a confession of judgment in the action at law. If such confession be required, it should be made

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"subject to be dealt with as the court shall direct." Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100; Great Falls Mfg. Co. v. Henry, 25 Gratt. 575; Parsons v. Snider, 42 W. Va. 517, 26 S. E. Rep. 285.

A defendant in an action at law who has a distinct equitable defence as well as a legal defence should not be required, as the price of coming into equity to enjoin the proceedings at law, to confess judgment at law. In such case it is not safe to require him to confess judgment and it is error to require it, and even in proper cases for such confession, it should not be required unconditionally, but the order requiring such confession should provide that the judgment is to be thereafter dealt with as the court of equity may direct. Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100; Thornton v. Thornton, 31 Gratt. 212; Staples v. Turner, 29 Gratt. 330; Great Falls Mfg. Co. v. Henry, 25 Gratt. 575; Warwick v. Norvell, 1 Rob. 308; Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798; Knott v. Seamands, 25 W. Va. 99; Miller v. Miller, 25 W. Va. 495. See High on Injunctions (2d Ed.) 46; Warwick v. Norvell, 1 Leigh 96.

It is error to require the defendant in an action at law on notes to confess judgment at law as a condition precedent to the continuance of an injunction against the action at law, where he denies all liability on the notes on account of fraud, of which the plaintiff in the action at law had notice at the time they were transferred to him. Dudley v. Miner, 93 Va. 408, 25 S. E. Rep. 100.

Where a defendant at law was required to confess judgment at law before the court would give him equitable relief, he cannot, after a decree against him, have the judgment set aside because of legal defences not made known to the court. Robinson v. Braiden, 44 W. Va. 183, 28 S. E. Rep. 798.

In such case, where an injunction has been granted, and the chancellor dissolves the injunction on account of the refusal of the complainant to confess judgment at law, and there is an appeal from the order, the appellate court will not examine the merits of the case, though, at the time the order was made, the cause stood for hearing. Warwick v. Norvell, 1 Leigh 96.

V. AGAINST JUDGMENTS.

Necessity of Taking Advantage of Remedy at Law.—A court of equity will not entertain a party seeking relief against a judgment which has been rendered against him in a court of law in consequence of his default upon grounds which might have been successfully taken in a court of law, unless some reason founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party be shown why the defence was not made in that court. Holland v. Trotter, 22 Gratt. 136; Moore v. Lipscombe, 82 Va. 546; Dey v. Martin, 78 Va. 1; Mason v. Nelson, 11 Leigh 227; Mosby v. Haskins, 4 H. & M. 427; Alford v. Moore, 15 W. Va. 597; Knapp v. Snyder, 15 W. Va. 434; Smith v. McLain, 11 W. Va. 654; Harner v. Price, 17 W. Va. 523; Braden v. Reitzenberger, 18 W. Va. 286; Grafton v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1028.

Equity will not grant relief on the ground of a defence, which might have been made at law, unless the plaintiff alleges and proves a good excuse for not having used it at law. Chapman v. Harrison, 4 Rand. 336.

Where, in a proceeding by one person against another to recover money which he claims to have paid as the surety for the latter, it was determined that both were principals, and judgment was rendered in favor of the plaintiff for a part of the sum paid, the defendant, having made no defence, cannot obtain relief in equity, although he shows that he was the surety, and the plaintiff in the action at law the principal, unless he alleges and proves sufficient reasons for his failure to defend at law. Turner v. Davis, 7 Leigh 227, 30 Am. Dec. 502. See also, Morgan v. Carson, 7 Leigh 238.

Where a party has been fully heard in a court of law in a case in which the rule is the same in equity as at law, he will not be permitted to go into a court of equity on the same controverted points. Morris v. Ross, 2 H. & M. 408.

After a verdict for the plaintiff in an action sounding in damages, and a refusal by the court of law to grant a new trial, a court of equity ought cautiously to interpose. Meredith v. Johns, 1 H. & M. 585.

Judgment was recovered by the assignee of a bond given for the purchase money of land, the contract for which was rescinded. *Held*, that the obligor is not entitled to enjoin the judgment as against the assignee, nor should the obligor be permitted to enforce payment to himself by the assignor, until he has paid the judgment to the assignee, or released the assignor from his liability as such to the assignee. Drake v. Lyons, 9 Gratt. 54.

Where a judgment in assumpsit is recovered upon an agreement, the defendant at law cannot resort to equity to set up the defence that there never was a complete contract between the parties. He might have made that defence at law under the general issue. Mackey v. Mackey, 29 Gratt. 158.

In an action of debt, the defendant pleaded a special plea in bar, and the issue joined thereon was found against him, and judgment was rendered for the plaintiff. The defendant then exhibited a bill in chancery, stating, that, though he was unable to prove the matter of his plea on the trial at law, he is now able to prove it, without suggesting fraud accident, mistake, or other circumstances which prevented him from establishing his defence at law and praying relief against the judgment. *Held*, the court of chancery had no jurisdiction to grant relief in such a case. Norris v. Hume, 2 Leigh 334.

Same—Where Relief at Law Doubtful.—A person returned as appearance bail, who denies that he ever executed the bail bond, is not precluded from obtaining relief in equity by his failing to appear and plead *non est factum* at law, after being informed that his name was subscribed to such bond for if, in fact, he did not execute the bond, he had regularly no day in court, and was, therefore, not bound to take any step for his relief. In a case where the remedy at law is considered doubtful, when the party applies to a court of equity, it will be too strict to deny him admittance into that court for relief. Spotswood v. Higgenbotham, 6 Munf. 313.

Same—Failure to Endorse Payment on Bond.—A surety applied in equity for relief against a judgment on the ground that a payment was not endorsed on the bond on which the judgment was rendered. *Held*, that this defence might have been made at law, and is no ground for relief. Harnsbarger v. Kinney, 13 Gratt. 511.

Same—Discovery of Receipt after Judgment. Equity may enjoin a judgment at law on a ground of which the party might have availed himself before the jury, where it appears that moral justice and the hardship of the case requires such relief, as

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where a receipt or other evidence is discovered after the judgment. Barrett v. Floyd, 3 Call 531.

Same—Party Guilty of Laches Not Entitled to Relief.—To entitle one to relief in equity against a judgment at law, it is not sufficient that injustice has been done him, but he must have been guilty of no laches, and have done everything required of him to render effectual his defence at law. Canada v. Barksdale, 84 Va. 742, 6 S. E. Rep. 10; Dey v. Martin, 78 Va. 1; Wallace v. Richmond, 26 Gratt. 67; Slack v. Wood, 9 Gratt. 40; Callaway v. Alexander, 8 Leigh 114, 31 Am. Dec. 640.

It must appear that the omission of the defendant to avail himself of the defence at law was unmixed with any negligence of himself or his agent. This rule is absolutely inflexible and cannot be violated, even when the judgment is manifestly wrong in law or fact, or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe, or which he owes to a third party. Richmond Enquirer Co. v. Robinson, 24 Gratt. 548; Gentry v. Allen, 32 Gratt. 254; Braden v. Reitzenberger, 18 W. Va. 286.

Where a defendant in an action at law has not used due diligence in applying to a court of equity for a discovery to assist his defence at law, he cannot, after the verdict against him, obtain the aid of a court of equity to stay the proceedings at law, or have a new trial. Green v. Massie, 21 Gratt. 356.

A party who might have pleaded *non est factum* in an action at law, and who merely wrote to counsel to defend him, is guilty of such neglect as will preclude him from relief in equity. Stanard v. Rogers, 4 H. & M. 438.

Where a decree for the sale of land has remained unexecuted for fourteen years, and an injunction is prayed on the ground that the debt, for which the sale was ordered, has been paid in full, the court should grant a temporary injunction, and refer the cause to a commissioner to ascertain what, if anything, is still due on such debt. Buster v. Holland, 27 W. Va. 510.

A party having obtained an injunction to a judgment at law upon the usual condition of a release of errors, omits to execute the release. Pending the injunction suit, he obtains a supersedeas to the judgment at law, but does not perfect the appeal by giving the security. There are repeated applications by him for a renewal of the supersedeas, which are granted, but he does not perfect the appeal. The injunction is proceeded in and decided against him; and he afterwards, more than ten years from the date of the judgment, asks that he may have a writ of error to the judgment at law, without giving security, except for costs, which is granted. His laches in perfecting his appeal being wilful, deliberate and repeated, and the application for the appeal, having been, under the circumstance, improper, the court of appeals will, upon motion by the appellee, dismiss the appeal. Ross v. Reid, 8 Gratt. 229.

Same—Failure to Appeal.—If a defendant at law be ruled into a trial in the absence of some of his witnesses, to whose materiality he has made affidavit, he may except to the opinion of the court, and proceed to obtain relief in a superior court of common law, but not in chancery. Syme v. Montague, 4 H. & M. 180.

An injunction ought not to be granted on the ground that the plaintiff at law was dead before the judgment was obtained in his name; the remedy in such case is by writ of error *coram nobis*. Williamson v. Appleberry, 1 H. & M. 206.

Judgments Obtained through Fraud.—Where a defendant, who had an adequate remedy at law, has been prevented from resorting to it by a fraudulent representation or promise of the plaintiff, he is entitled to relief in equity. Poindexter v. Waddy, 6 Munf. 418.

Where the defendant in an action on a promissory note might have successfully pleaded *non est factum* to the action, but was prevented from doing so by the representation of the plaintiff, an injunction will lie to restrain the enforcement of the judgment. Poindexter v. Waddy, 6 Munf. 418.

A bill for an injunction to a judgment obtained against the plaintiff, on a note executed by him as surety, charged that his principal had induced him to sign the note by fraudulent misrepresentations as to the purpose for which the note was given, and of the plaintiff's liability on account thereof, but did not charge or prove fraud or misrepresentation by the defendant to whom the note was executed. *Held*, that the bill stated no case for relief. Griffith v. Reynolds, 4 Gratt. 46. See Jameson v. Deshields, 3 Gratt. 4.

The mere fact that the plaintiff sues on a false claim, or one which he knows has been previously adjudged invalid by a competent court, is not such a fraud upon the rights of the defendant as to entitle him to an injunction against the prosecution of such claim. Evans v. Taylor, 28 W. Va. 184.

Where the defendant in an action, on being served with process, applies to his regular attorney to defend him, stating to him his grounds of defence, and is informed by him that he is employed as counsel for the plaintiff, but that he is satisfied with the justice of his defence and will take no judgment against him, and the defendant, relying on such assurances, makes no defence to the action and is not aware of the judgment until after it is rendered, the judgment will be enjoined. Holland v. Trotter, 22 Gratt. 136; Moore v. Lipscombe, 82 Va. 546; Dey v. Martin, 78 Va. 1. See also, Lee v. Baird, 4 H. & M. 453.

A person cannot obtain an injunction against a decree rendered in a cause to which he was a party, on the ground that no process was served on him, where the return of the officer and the recitals of the decree show that the process was served on the defendant, unless the false return of service was procured or induced by the plaintiff, or he can in some way be connected with the deception. Preston v. Kindrick, 94 Va. 760, 27 S. E. Rep. 588.

Same—Relief by Injunction in Case of By-bidding.—A plaintiff, known to have a feeling of attachment for certain slaves that were sold at auction was induced by a by-bidder to bid an exorbitant price for them. One of the defendants, suspecting that some would decline bidding in order to favor the plaintiff, instructed the auctioneer not to let the slaves be sold at a reasonable price. The auctioneer then employed the by-bidder, without any special instructions to do so. *Held*, that the judgment for the purchase money should be enjoined, and the sale set aside as to the excess of price and an issue directed to ascertain a fair price. Hinde v. Pendleton, Wythe 354.

Judgment Obtained through Accident or Mistake.—A judgment in an action at law on accounts will be enjoined on the ground of a mistake and miscalculation on the part of the jury, ascertained by after-discovered evidence, where such mistake, if

discovered in time, would have furnished good ground for a new trial at law. The relief in such case should be by reference to a commissioner to ascertain the real amount due. Rust v. Ware, 6 Gratt. 50.

In reducing to writing a contract for the sale of land and the crops thereon, the undertaking of the vendor to put the vendee in possession of the crops was omitted by mistake, and the vendor did not put the vendee in possession of the crops, which were of the value of $100, as estimated in the contract, but recovered judgment for the whole amount of the purchase money against the vendee. *Held*, that the vendee was entitled to have the judgment enjoined to the extent of $100. Booth v. Kesler, 6 Gratt. 350.

A court of equity will not relieve against a judgment on the ground that the defendant was prevented from making his defence at law by a mistake of law, although it was a mutual mistake by both parties to the suit. R. & P. R. Co. v. Shippen, 2 P. & H. 327. See also, Meem v. Rucker, 10 Gratt. 506.

The fact that process was served on the wrong person, who makes no defence, but allows judgment to be taken against him by default, and execution having issued, gives a forthcoming bond, will not authorize an injunction. Chisholm v. Anthony, 2 H. & M. 13.

After the dissolution of one injunction, another was granted to the same judgment and made perpetual, upon new matter not known to the complainant before the first was dissolved; it appearing that the contract in question, though not tainted with fraud, was founded upon a mistake in relation to the existence of an important fact, of which both parties were ignorant. Armstrong v. Hickman, 6 Munf. 287.

Same—Loss of Instrument.—The loss at the time judgment was recovered on a note of a written agreement between the maker and the payee of the note, relating to the contract in pursuance of which the note was made, and without which the maker could not establish his defence at law, will authorize an injunction against the judgment. Vathir v. Zane, 6 Gratt. 246.

Judgments Obtained through Ignorance or Surprise.—An injunction will lie to restrain proceedings on a judgment or decree obtained by surprise. Callaway v. Alexander, 8 Leigh 114, 31 Am. Dec. 640. See also, Mann v. Drewry, 5 Leigh 296.

Equity will not enjoin a judgment at law on the ground that the defendant at law failed to make his defence from ignorance of the nature of the proceeding against him, and a misapprehension of what was necessary to charge him. And a mere averment in his bill of the facts constituting his excuse for not defending himself at law is not sufficient; he must prove them. Meem v. Rucker, 10 Gratt. 506. For *note* on this case, see High on Injunctions (2d Ed.) 142.

Equity will not restrain the collection of a judgment, though the bill states that the complainant was ignorant of facts which would constitute a perfect defence to an action at law against him until after judgment had been recovered, unless it be further stated that the complainant had, before the rendition of the judgment, used due diligence to ascertain the facts necessary to his defence. Slack v. Wood, 9 Gratt. 40.

Where the defendant in an action at law on a promise founded on a gaming consideration is surprised at the trial, and there is a verdict and judgment against him, he may come into equity for relief, though he made no effort to obtain a new trial in the common-law court. White v. Washington, 5 Gratt. 645.

Where a defendant has no knowledge of the existence of an action at law against him until after judgment is obtained, an injunction may be allowed on the ground of surprise. Mosby v. Haskins, 4 H. & M. 427.

Erroneous or Irregular Judgments.—A court of equity will not relieve against a judgment on the ground of error in law only: it must appear that justice requires its interposition, and that the party was prevented from obtaining it by legal forms of pleading, or by some fraud or mistake. Kincaid v. Cuningham, 2 Munf. 1. See also, Picket v. Morris, 2 Wash. 255.

Equity cannot relieve against a judgment at law merely on the ground that it was erroneous, even though the plaintiff at law was not entitled to recover, or not entitled in that form of action, and the judgment was obtained by default. To entitle the defendant at law to relief in equity in such cases, there must be some suggestion of fraud or surprise, or some good reason assigned for the failure to make defence at law. Turpin v. Thomas, 2 H. & M. 139, 3 Am. Dec. 615; Graham v. Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. Rep. 245.

A partner withdrew from a mercantile company and was afterwards erroneously included in a suit against a new company formed by the other partners. *Held*, that he may be relieved in equity against the judgment therein obtained, upon the ground that one of the company prevented his making defence at law by assuring him that the matter would be adjusted. Lee v. Baird, 4 H. & M. 453.

A person cannot obtain an injunction against a decree rendered in a cause to which he was a party, on the ground that no process was served on him, where the return to the officer and the recitals of the decree show that the process was served on the defendant, unless the false return of service was procured or induced by the plaintiff, or he can in some way be connected with the deception. Preston v. Kindrick, 94 Va. 760, 27 S. E. Rep. 588.

A court of equity will not interfere to give relief to a purchaser under a decree of a court having jurisdiction of the subject, or to his sureties, for errors in the decree, or the proceedings under it, where the report of the commissioners has been confirmed. Worsham v. Hardaway, 5 Gratt. 60.

Where the plaintiff at law recovers more than he is in conscience entitled to, and there is no standard by which a court of equity can ascertain how far the judgment is correct, but only that it is unconscionable to some extent, the judgment will be set aside *in toto*. McRae v. Woods, 2 Wash. 80.

A court of equity will not interfere in a question purely legal and where the case is precisely the same as that decided by the court of law on the ground that the decision of the court of law was erroneous. Terrell v. Dick, 1 Call 546.

Judgments Obtained through Negligence, Mistake, or Fraud of Attorney.—An injunction will not lie against a judgment at law on account of a mistake of an attorney, it appearing that the defendant was guilty of negligence. Wallace v. Richmond, 26 Gratt. 67. See Ayres v. Morehead, 77 Va. 566.

The errors of counsel as to questions of law can furnish no ground for relief in equity; for the party who takes advice must abide by the consequences of it. Nicolson v. Hancock, 4 H. & M. 491.

An attorney brought a bill to enjoin the collection

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of a judgment on a note for $572, given by him and others to meet the balance of a protested note on which they were sureties, it appearing that notes for collection had been placed in his hands to enable him to pay off the original note, and that he had collected them and procured the execution of the $572 note, while such sufficient funds were in his hands. *Held*, that he was not entitled to relief in equity. Thompson v. M. & M. Bank, 3 W. Va. 651.

Same—Relief Granted Where Defence Prevented by Assurance of Plaintiff's Counsel.—Where the defendant at law has been prevented from making his defence by the assurance of promises of the plaintiff's counsel, the court will relieve him. Moore v. Lipscombe, 32 Va. 546; Dey v. Martin, 78 Va. 1; Holland v. Trotter, 22 Gratt. 136. See also, Lee v. Baird, 4 H. & M. 453.

Void Judgments or Orders.—A judgment pronounced by a justice, without service of process on the defendant or notice to him is void. But as such judgment may be set aside, even when rendered upon the verdict of a jury, by the circuit court, upon a writ of *certiorari*, the defendant in the judgment cannot obtain relief against it in a court of equity. Kanawha, etc., Ry. Co. v. Ryan, 31 W. Va. 364, 6 S. E. Rep. 924.

Where the order of the court appointing a trustee in the place of one who has died is not in accordance with the requirements of the statute, and therefore void, a sale made by such trustee should be perpetually enjoined. Pitzer v. Logan, 35 Va. 374, 7 S. E. Rep. 385.

Although the pleadings and proof in a suit by a vendor to subject land to the payment of the purchase price do not authorize a personal decree against the defendant for the deficiency after sale, yet, where the court has jurisdiction of the parties and the subject-matter, the rendition of such personal decree is merely an error for which relief may be had under Va. Code 1887, § 3451, and hence injunction will not lie against such decree. Preston v. Kindrick, 34 Va. 760, 27 S. E. Rep. 588.

Judgments by Default or Confession.—An injunction will not be awarded against a judgment by default upon a summons directed to the sheriff of another county than the one where the action is brought, although the summons was issued contrary to law, as the judgment, though erroneous, is not void, and the defendant has a complete remedy at law by motion under Va. Code, § 3451. Brown v. Chapman, 30 Va. 174, 17 S. E. Rep. 855.

The collection of a judgment by default on the agreement of the defendant to transfer a note will not be enjoined merely because of the failure to make such transfer. Equity regards as done that which ought to be done, and the note, by the agreement to transfer, became the property of the plaintiff, and the defendants held it simply as trustees for his benefit. Rollins v. Nat. Casket Co., 40 W. Va. 590, 21 S. E. Rep. 723.

In 1866, a creditor sued a partnership in debt. The sheriff returned on the process, executed on one by leaving a copy in his house with his sister, and on the other by leaving a copy at his house with his wife. On this return, there was an office judgment confirmed. The stay law prevented an execution on this judgment, but there was a judgment upon notice for a year's interest on this judgment in 1867, and also in 1868. In 1870, execution was issued on the judgment when the partnership enjoined it on the ground that a credit of $100 endorsed on the note should have been $600, and that the process was not properly served, and they had no notice of the suit. The creditor demurred to the bill for want of equity. *Held*, that the judgment was a judgment by default in the sense of the statute, Va. Code 1873, p. 1135, §§ 5, 6 (see Va. Code 1877, §§ 34, 51-2, as amended by Acts 1893-'4, p. 376), and the firm, having had notice of the judgment within the time limited for a motion to quash it, had a remedy at law by motion to quash the sheriff's return, and are not entitled to relief in equity. Goolsby v. St. John, 25 Gratt. 146.

If, by mistake of the sheriff a writ is served on the wrong person, but such person makes no defence at law, suffers judgment to go against him by default, execution having issued, gives a forthcoming bond, and afterwards delays the payment by appealing from a judgment on that bond, he is not entitled to relief in equity. Chisholm v. Anthony, 2 H. & M. 13.

Where a debtor confesses judgment in favor of his creditor for a smaller amount than that claimed, the confession being made by way of compromise, he cannot enjoin the enforcement of the judgment, in the absence of fraud in the adverse party, and when it is not shown that he was prevented from defending by reason of accident, mistake, or surprise as to material facts necessary for his defence. Morehead v. De Ford, 6 W. Va. 316.

An agent in charge of his principal's real estate during his absence rented out a portion of it and received the rents, but neglected to pay the taxes, in consequence whereof the property was sold at a tax sale, and the agent became the purchaser. *Held*, that the agent would be enjoined from executing a writ of possession under a judgment obtained by default against his principal for the land so purchased. Morris v. Joseph, 1 W. Va. 256, 91 Am. Dec. 386.

Satisfied Judgments.—In a case where, by virtue of an agreement between a judgment debtor and a judgment creditor, the judgment ought to be entered as satisfied, but in lieu thereof the creditor has an execution issued and levied upon the goods of the debtor, the latter cannot obtain relief by injunction in a court of equity, for the reason that he has a complete and adequate remedy at law. Howell v. Thomason, 34 W. Va. 794, 12 S. E. Rep. 1088.

An agent prosecuted a suit to judgment in favor of his principal and endorsed on the execution that it was partly for his own benefit. Before the execution was placed in the hands of the sheriff, the debtor paid the full amount of the debt to the principal and took his receipt in full discharge. *Held*, that though the debtor might have made a motion to quash the execution, and thus had a remedy at law, yet a court of equity has jurisdiction to give him relief by way of injunction to inhibit further proceedings on the execution. Crawford v. Thurmond, 3 Leigh 85.

A tender of money in payment of a judgment, will not authorize a court of equity to stop the execution, where there is neither allegation nor proof that the defendant in the execution kept the money on hand for the discharge of the judgment. Shumaker v. Nichols, 6 Gratt. 592.

Judgments Affecting Title.—Where a court of equity appoints special commissioners to make a sale of land in a pending cause for the purposes thereof, and the sale is made accordingly, such court should not entertain a bill of injunction to enjoin the collection of a judgment at law rendered upon a bond given to the commissioners for the purchase money,

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upon allegations that the commissioners have no title to the land, and that no deed has been made or filed as an escrow for the same, and that the title to the land is in another person, especially where such person is a party to the suit in which the decree of sale is made. Shields v. McClung, 6 W. Va. 79.

A sheriff levies a *fieri facias* upon property in possession of the defendant. An action of trespass is then brought against the sheriff, by the executors of the defendant's testator, on the ground that the legal title to the property is in them, and not in the defendant, as they held the property under the will of their testator, and had never given their assent to the legacy to the defendant, who was residuary legatee of their testator. The jury give vindictive damages against the sheriff. In such case, a court of equity will enjoin the judgment in trespass, if it appears that the executors of the testator had only a legal title, without any beneficial interest in the property, the debts and legacies of their testator having been all paid. It would be against conscience, that the debtor should pay his debt, and at the same time recover damages against his creditor, on the distinction, that he held only the beneficial interest, and not the legal title, to the property taken in execution. Lewis v. Wyatt, 2 Rand. 114.

A son was possessed of slaves for life with a limitation to his mother in case of his death without living issue. The mother died first, leaving him her only heir, and he afterwards died without such issue. The administrator of the mother brought detinue for the slaves against one of the heirs and distributees of the son, and also one of his administrators, but not declared as such, and recovered judgment on a case agreed by which the parties rested the decision upon certain specified points of law, to wit, whether the limitation to the mother was legal and valid, and whether the slaves, on the death of the son, became vested in her administrator. *Held*, that in a suit in equity filed in favor of the son's administrators the judgment should be perpetually enjoined, on the ground that they, as representing him, are entitled to the slaves, and, being in possession, should not be compelled to relinquish that possession and afterwards be put to the circuity of another action to recover them back. Royall v. Royall, 5 Munf. 82.

Judgments Based on Gaming Contracts.—A court of equity has jurisdiction to relieve against a judgment founded on a gaming debt, although the party failed to defend at law, and gives no good reason for such failure. Woodson v. Barrett, 2 H. & M. 80; Skipwith v. Strother, 3 Rand. 214; White v. Washington, 5 Gratt. 645.

On a bill to enjoin a judgment on the ground that the debt on which it was founded was for money won at cards, it being doubtful on the evidence, whether such was the consideration, or if it was, whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced to take the transfer of the debt under the belief, induced by the concealment or misrepresentation of the debtor, that the consideration of said debt was good and lawful, the court should continue the injunction and direct an issue to ascertain the facts. Nelson v. Armstrong, 5 Gratt. 354.

Judgments Based on Usurious Contract.—A decree perpetually enjoining a judgment rendered in favor of an assignee on a usurious note, without decreeing in his favor against the execution of his assignor, was affirmed on appeal by the assignee. Toole v. Stephen, 4 Leigh 581.

Insolvency of Judgment Creditor and Indebtedness to Judgment Debtor.—A judgment on a forthcoming bond may be enjoined at the suit of the surety, on the ground that he has an action pending against the plaintiff in the judgment for a larger amount, and that the plaintiff is insolvent. M'Clellan v. Kinnaird, 6 Gratt. 352. See *infra*, title "Against Executions."

When Judgment of Another State Enjoined.—A court of equity will not enjoin the enforcement of a judgment of another state upon grounds which might have been urged as a defence to the action at law in such state, and when the defendant in the judgment fails to show good reason for not interposing his defence in the original action. Black v. Smith, 13 W. Va. 780.

Judgment in Slander Suit Enjoined Where Plaintiff Insane.—It is a sufficient ground of equity for a perpetual injunction to a judgment in slander that, at the time of speaking the defamatory words, and when the judgment was obtained, the complainant in the bill, who was the defendant at law, was insane, or in a state of partial derangement on the subject to which the defamatory words related. Horner v. Marshall, 5 Munf. 466.

Relief by Injunction against Awards.—The parties to an action agreed to submit the matters in dispute to certain arbitrators, whose award should be made a judgment of the court. The award of the arbitrators was given against the complainant, but was not made a judgment of the court until about six years afterwards, when execution issued thereon was returned, "no property." The judgment was reported in a pending chancery suit to subject the complainant's real estate to the payment thereof, and finally a sale was directed. Whereupon, the complainant obtained an injunction to restrain such sale. *Held*, that such injunction must be dissolved on the ground that the complainant's defences had been fully passed upon by the arbitrators and were *res judicata*. Canada v. Barksdale, 84 Va. 742, 6 S. E. Rep. 10.

An award condemning a party to pay damages for refusing to ratify an illegal and fraudulent contract is not binding; and relief against a bond given in conformity with said award is properly sought in equity. Beverley v. Rennolds, Wythe 121.

Against Judgment in Ejectment.—An agent whose duty it was to pay the taxes of his principal, assessed in the name of the heirs of a party of whom the principal claimed he was the sole heir, failed to pay the taxes, and when the land was sold for the non-payment thereof, purchased the same, professedly for his principal, but took the deed to himself, and brought an action of ejectment against them, being in possession of the land under his principal, and recovered a judgment. *Held*, that a court of equity will perpetually enjoin the enforcement of such judgment, although the plaintiffs failed to show that the principal was the heir of the person in whose name the land had been taxed. Franks v. Morris, 9 W. Va. 664.

A bill in equity was brought by a husband and wife to enjoin an ouster under a writ of possession in ejectment by the grantee of a party who held merely a tax title, having purchased the land for a nominal sum, and who had, within two years of the delinquent sale, refused a tender of the taxes, interest and damages, duly made by the wife, to whom the land had been conveyed three years

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before the assessment. *Held*, that it was a proper case for an injunction as there was no remedy at law. Sperry v. Gibson, 3 W. Va. 522.

An injunction will not lie to restrain the execution of a writ of possession in ejectment against a husband, where the wife was not a party, and claims the land as her separate estate, but the parties will be left to test their titles at law. Bushong v. Rector, 32 W. Va. 311, 9 S. E. Rep. 225.

The owner in possession of real estate may obtain an injunction to restrain others from dispossessing him by means of a writ of *habere facias possessionem* issued by a chancery court, without any notice to him, in a suit to which he was not a party, where he does not claim the land under any party to the suit but by a title paramount and adverse to them. Williamson v. Russell, 18 W. Va. 612.

Effect of Injunction against Part Only of Judgment.—Where an injunction to a judgment is only perpetuated as to a part of it, or a reversal is only as to a part of a judgment, the lien of the part not affected continues from the date of the judgment. Grafton & G. R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1028.

New Trial—Judgment Allowed to Stand as Security for What May Be Found to Be Justly Due.—Upon a bill in chancery to enjoin a judgment at law, and for a retrial, there must not be a decree before such retrial annulling the judgment and granting a new trial in the law court; but the judgment is allowed to stand as security for what may be found to be justly due, and the injunction allowed to stand until after the retrial, and the decree should direct an issue or issues to be tried in the circuit court to find what the nature of the case requires, and upon the verdict the court should perpetuate or dissolve, wholly or partially, the judgment. Grafton & G. R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1028.

Set-Offs.—An injunction against a judgment at law will not be sustained to allow the defendant at law to set up payments or offsets, which he might have pleaded at law; and if a discovery was necessary to enable him to prove them, he should have filed his bill of discovery in aid of his defence at law, or he should have filed interrogatories to the plaintiff under the statute. George v. Strange, 10 Gratt. 499.

A judgment debtor applied for an injunction to the judgment, on the ground that he had offsets which he had intended to plead, but that, owing to the sickness of his family at the time when the court sat, and for some months before, he had not been able to attend the court or prepare for trial, and that his counsel, to whom he had communicated his defence, was also absent. It appeared that the offsets were neither pleaded nor filed, and, though one of the defendant's counsel was present, no motion for a continuance was made, nor was any affidavit filed upon which such application could have been based. *Held*, that there was no cause for an injunction and new trial. Griffith v. Thompson, 4 Gratt. 147.

In an action at law upon a bond, after the husband's death, by the wife against the obligor, a plea of offsets setting forth an agreement with the husband, that his dealings with certain firms, of which the obligor was a member, should be set-off against the bond, was waived by the defendant's counsel, and there was a judgment for the plaintiff. *Held*, upon a proceeding in equity by the obligor in his own right and as the administrator of the husband to enjoin the execution of the judgment, that the offset, if valid, constituted a legal defence, and no sufficient excuse having been shown for failing to make the defence at law, equity will not interfere. Perkins v. Clements, 1 P. & H. 141.

Where, in the action at law, the defendant was prevented by unavoidable accident from setting up offsets against the plaintiff's demands, which were not connected with the claim sued upon, and could be enforced by law, he is not entitled to have the judgment enjoined and his offsets set up against it, but must pursue his remedy at law. And if his offsets are only recoverable in equity, he cannot have the judgment enjoined and avail himself of his claims against it. Hudson v. Kline, 9 Gratt. 379.

Where, on a bill of injunction to stay proceedings on a judgment at law, it appears from the commissioner's report that the complainant is entitled to a credit which the defendant failed to give, the court ought not to set aside the order for account and dismiss the bill, on the ground that the complainant had neglected to carry into effect a previous order referring, by consent, the accounts between them to a different commissioner; but, the last order having been made on the defendant's motion, and the report being excepted to for want of notice to the complainant, a new account ought to be ordered. Roberts v. Jordans, 3 Munf. 488.

Where an injunction has been awarded to stay the collection of a judgment, and it appears from the answer of the defendant that there is a considerable sum in his hands, which he has agreed to apply as a credit on such judgment, and it is uncertain what is the amount which he ought, under an agreement into which he has entered, to credit on such judgment, the court ought not to dissolve the injunction till it has ascertained, by sending the cause to a commissioner if necessary, the amount of the credit which should be so given in such judgment. Heatherly v. Farmers' Bank of Phillippi, 31 W. Va. 70, 5 S. E. Rep. 754.

Where a judgment at law is enjoined and an account between the parties directed, the commissioner ought not to give the plaintiff at law credit for claims not exhibited to the jury, nor mentioned in the answer, and which are prior in date to the commencement of the action at law. Lipscomb v. Littlepage, 1 H. & M. 454.

Same—Purely Equitable Set-Offs.—A defendant is not required to plead his equitable set-offs at law, but may come into equity, after the judgment at law, to establish his set-offs and enjoin the judgment. Terry v. Wooding, 2 P. & H. 178; High on Injunctions (2d Ed.) 157. See, however, Hudson v. Kline, 9 Gratt. 379.

Same—Effect of Insolvency of Judgment Creditor.—In general, the insolvency of a creditor who is pressing the foreclosure or enforcement of a lien, and against whom offsets are claimed by the debtor, constitutes good ground for an injunction; but when this is the only ground for equitable interference, and the plaintiff fails to prove the insolvency, the injunction should be dissolved. Farland v. Wood, 35 W. Va. 458, 14 S. E. Rep. 140.

The mere insolvency of a judgment creditor will not, of itself, justify an injunction against the enforcement of a judgment at law upon the ground of a set-off, which might have been pleaded at law at the time such judgment was recovered. Sayre v. Harpold, 33 W. Va. 553, 11 S. E. Rep. 16.

Though generally injunction does not lie against a judgment to let in set-offs, yet it will lie where the judgment creditor is insolvent. Jarrett v. Goodnow, 39 W. Va. 602, 20 S. E. Rep. 575.

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W. AGAINST EXECUTIONS.—Where the remedy at law is full, summary, adequate, and complete, a court of equity will not assume jurisdiction to enjoin an execution. Hall v. Taylor, 18 W. Va. 544; Howell v. Thomason, 34 W. Va. 794, 12 S. E. Rep. 1088; Morrison v. Speer, 10 Gratt. 228; Crawford v. Thurmond, 3 Leigh 85; Jarrell v. Eddins, 2 Pat. & H. 579.

Where the debtor in an execution objects that a previous execution has been levied by the sheriff upon sufficient property to satisfy the judgment, and that he has improperly misapplied the proceeds of the sale of the property, or if he insists that payment has been made to the sheriff which has not been credited on the execution, if he has an opportunity to apply to the court of law from which the execution issued for redress, he has no right to come into equity for relief. Beckley v. Palmer, 11 Gratt. 635.

The trustee or *cestui que trust* cannot go into a court of equity to enjoin a sale of trust effects under an execution issued and levied by virtue of a subsequently acquired judgment, there being a complete and adequate remedy at law. Kuhn v. Mack, 4 W. Va. 186.

A party claiming that he has not been credited for all the money paid by him to the sheriff on an execution is not entitled to relief in equity by injunction, as he may have any injustice done to him in that respect corrected by the court from which the execution issued. Morrison v. Speer, 10 Gratt. 228.

An injunction will not lie to restrain the collection of an execution on the ground that it has been paid, as there is an adequate remedy at law by motion to quash the execution; and where the sheriff has paid the execution, without authority from the defendant, it will be quashed on motion, for, by such motion, the payment of the sheriff would be ratified. Hall v. Taylor, 18 W. Va. 544.

An injunction will lie to restrain a sheriff from making a sale of personal property, for the payment of taxes, on which he has levied, where the bill alleges that the taxes have been fully paid and discharged. And upon proof that the taxes have been paid off and discharged, the injunction will be perpetuated. Lewis v. Spencer, 7 W. Va. 689.

An injunction prohibiting a defendant and all other persons from selling slaves until a further order of the court is sufficient and conclusive, while in force, to prevent a valid sale of the slaves, on execution against the defendant, although in favor of persons not parties to the suit. West v. Belches, 5 Munf. 187.

A member of assembly, before its session, obtained an injunction to stay proceedings on an execution at law against his property. *Held*, that he could not object that his privilege as a member ought to prevent the hearing of a motion to dissolve the injunction during the session. Botts v. Tabb, 10 Leigh 616.

Where an injunction to a judgment at law is made perpetual at the instance of one of two defendants therein, who has been compelled to give a forthcoming bond, and there is no equity in favor of the other defendant, on whom the execution was not served, the court should so extend the decree as to enjoin such defendant from availing himself of the return of the execution and forthcoming bond, to prevent proceedings against him on the original judgment. Poindexter v. Waddy, 6 Munf. 418.

An injunction to restrain the execution of a writ of possession, based on an alleged error in the judgment upon which the execution issued, and also upon a judgment in the complainant's favor for possession of a tract of land of which the land in question is a part, the final decision of which is pending on appeal, should on motion be dissolved Rosenberger v. Bowen, 84 Va. 660, 5 S. E. Rep. 697; Eppes v. Thurman, 4 Rand. 384.

Purchasers at a foreclosure sale, being entitled to the then growing crops, may enjoin creditors of the mortgagor from proceeding under execution to levy upon such crops, the doctrine of emblements having no application to purchasers under a foreclosure sale. High on Injunctions (2d Ed.) 167. Crews v. Pendleton, 1 Leigh 297.

Irregularity in Issuance of Execution.—Where an execution is irregularly issued, and the remedy by motion to quash is inadequate because of the formalities and delay incident thereto, it is competent for the judge in vacation to restrain proceedings upon it by an injunction order. Shackelford v. Apperson, 6 Gratt. 451; Snavely v. Harkrader, 30 Gratt. 487.

Where Judgment Creditor is Insolvent and Indebted to Judgment Debtor.—Where a person sues to enforce a decree for costs obtained in another suit, he may recover judgment thereon, but will be enjoined from collecting the same, where he is insolvent and indebted to the defendant, and has pledged the decree as security for the costs of another suit. Shipman v. Fletcher, 95 Va. 585, 29 S. E. Rep. 325. See *supra*, title "Against Judgments."

Bankrupt May Enjoin Execution on Judgment Obtained before His Discharge.—Where a judgment debtor has obtained his discharge as a bankrupt subsequent to the judgment, he is entitled to an injunction to the suing out or levy of any execution thereon. Peatross v. McLaughlin, 6 Gratt. 64.

When Granted to Protect Surety against Execution.—A bond with surety was executed upon a settlement of an account for articles furnished by the obligee to the principal obligor. After the articles were furnished but before the execution of the bond, the principal conveyed his property in trust for his wife and children, subject to his then existing debts. The obligee recovered a judgment on the bond and levied an execution on the surety's property. There was a suit in the same court against principal, obligee and others to ascertain the principal's indebtedness at the date of the deed, and to adjust the accounts between his trust estate and the obligee, who was largely indebted to the estate for rent. *Held*, that the surety was entitled to an injunction to restrain a sale under the execution. Meade v. Grigsby, 26 Gratt. 612.

A surety received a mortgage of slaves from his principal, and afterwards they were levied on for the debt of the principal, while it was uncertain whether the surety would sustain a loss by reason of his suretyship. The surety filed a bill for an injunction to restrain the sale. *Held*, that equity had jurisdiction to grant relief, and to protect the surety by injunction. Marshall v. Colvert, 5 Leigh 146.

A creditor recovered judgment against the principal debtor and his surety, had execution levied on the property of the principal, and, on receiving part of the money, gave the principal further time for the balance and ordered the sheriff to restore the goods to him, without the assent of the surety. *Held*, that the judgment was thereby discharged at law, and the surety, not having assented to the agreement, was discharged in equity, and that

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equity would restrain any subsequent execution on the judgment by injunction. Baird v. Rice, 1 Call 18.

Where the sureties in a bond have been released by a contract for forbearance to sue between the creditor and the principal debtor, and the creditor obtains a judgment at law against the sureties, before they have notice of the contract for indulgence, a court of equity, on the application of the sureties, will perpetually enjoin the execution of the judgment. Armistead v. Ward, 2 Pat. & H. 504.

The judgment on a forthcoming bond was enjoined at the instance of a surety therein, on the ground that he had an action pending against the plaintiff in the judgment for a larger amount, and that the plaintiff was insolvent. McClellan v. Kinnaird, 6 Gratt. 352.

Upon a bill in equity by a reversioner of slaves against the husband and a tenant for life, alleging a purpose to remove one of the slaves out of the commonwealth, an injunction was awarded, and bond given by the husband with surety, conditioned to abide by and perform the final decree of the court. Upon an amended bill against the surety as well as the husband, it appeared that the surety while bound as such, and of course with full knowledge of the plaintiff's claim, caused the slaves to be removed and sold out of the commonwealth. *Held*, that for such removal and sale in contempt of the court's authority, it was competent for the court to give redress and vindicate its jurisdiction by decreeing in favor of the plaintiff against both the obligors in the bond. Johns v. Davis, 2 Rob. 729.

Incumbrancer Cannot Enjoin Execution.—Equity will not enjoin a sale of personalty on execution at the instance of one claiming to hold an incumbrance on it, but will leave him to his remedy at law. "For if an incumbrancer has the right to have the property sold and the proceeds paid to him in satisfaction of his lien, the sheriff may as well sell as anybody, and the incumbrancer will not be injured." Beach on Injunctions, 729; Bowyer v. Creigh, 3 Rand. 25; Rollins v. Hess, 27 W. Va. 570.

Equity has no jurisdiction to enjoin the sale of a slave, belonging to the estate of a decedent, though about to be made under a wrongful levy, at the instance of creditors, or of the administrator acting in their behalf, and alleging that the assets are insufficient to pay the debts; for, in such case, they claim merely as incumbrancers, and the remedy is at law, upon the indemnifying bond, if one is given, or by suit for the recovery of the property. But, if the injunction be asked by the distributees, or by the administrator in their behalf, alleging that a sale of the property would not be necessary for the payment of debts, equity would have jurisdiction; for, in that case, they claim as owners of the property, and it may have a peculiar value, not to be fully compensated in damages in any proceeding at law. Jarrell v. Eddins, 2 P. & H. 579; Bowyer v. Creigh, 3 Rand. 25.

Seizure of Property of Stranger to Writ.—An injunction will not lie against the sale of goods and chattels attached, claimed by a third party, unless they are of peculiar value to the owner, and it is clearly shown and manifestly appears that great injury would result to the owner from consequential damages from the sale, because the owner has a complete and adequate remedy at law. Zanhizer v. Hefner (W. Va.), 35 S. E. Rep. 4; Dunn v. Baxter, 30 W. Va. 672, 5 S. E. Rep. 214; Baker v. Rinehard, 11 W. Va. 238.

Where there are conflicting claims to personal property, possessing no *pretium affectionis*, the remedy is adequate at law and equity will not take cognizance of the case, though one of the parties be a trustee, claiming the property under a trust deed. Moore v. Steelman, 80 Va. 331. See Sheppards v. Turpin, 3 Gratt. 373.

A nonresident of the state caused an execution to be levied on tobacco, corn, etc., in possession of the debtor, and a third person claiming a legal right to the goods joined the debtor in a forthcoming bond for the delivery thereof at the time and place of sale. *Held*, that the claimant, if he had such legal right, had an adequate remedy at law by an action against the sheriff, and therefore was not entitled to an injunction to restrain the creditor from proceeding under his execution and upon a forthcoming bond. Miller v. Crews, 2 Leigh 576. In Wilson v. Butler, 3 Munf. 559, the court seemed to lay down a contrary rule. But in that case the plaintiff claimed as owner and the property consisted of slaves. See Bowyer v. Creigh, 3 Rand. 25; 16 Am. & Eng. Enc. Law (2d Ed.) 406.

An injunction will not lie to prevent the sale of personal property of a third person, levied on by an officer for unpaid taxes, when the property is not of peculiar value to the owner and it does not manifestly appear that great injury would result to the owner from consequential or collateral damages occasioned by such sale. In such case the owner has a complete and adequate remedy at law to which he may resort for redress. White v. Stender, 24 W. Va. 615.

The statute providing for the taking of an indemnifying bond by the officer levying on property, does not preclude a party claiming to be the owner of the property levied on, other than the judgment debtor, from his right to go into a court of equity to obtain an injunction against the same, when he has no complete and adequate remedy at law. Walker v. Hunt, 2 W. Va. 491, 98 Am. Dec. 779.

A court of equity has jurisdiction to enjoin the sale of personal property under an execution, where the plaintiffs claim the property as owners, and charge fraud in the sale of it to them by the defendant in the execution, and collusion between him and the judgment creditor, in the procurement of the judgment, and otherwise, and they are without complete remedy at law. McFarland v. Dilly, 5 W. Va. 135.

Same—Property of Peculiar Value to Owner.—Equity will enjoin the sale of property of peculiar value to the owner, which cannot be compensated in damages. 16 Am. & Eng. Enc. Law (2d Ed.) 407; Randolph v. Randolph, 6 Rand. 194; Kelly v. Scott, 5 Gratt. 479.

Same—Same—Slave Property.—The principle that equity will interfere to prevent the sale of property of peculiar value to the owner has been frequently applied to the seizure and sale of slaves not the property of the execution debtor. Some of the decisions hold that the nature of the property itself is sufficient to justify the interference of a court of equity, and that in every case in which the owner of slaves, wrongfully taken in execution for the debt of another, applies to a court of equity to inhibit the sale thereof, the court should award an injunction, and, if the case be made out, give relief, although it is neither alleged nor proved that the slaves have any peculiar value in the eyes of the owner. Sims v. Harrison, 4 Leigh 546; Kelly v. Scott, 5 Gratt. 479. In other cases it has been held that the slave must

be shown to possess some peculiar value which cannot be compensated for in damages. Allen v. Freeland, 3 Rand. 170. Thus it was held that where the slave had no peculiar value to the owner, but was held by him as mere merchandise, equity would not interfere, and the owner should be left to his legal remedy. Randolph v. Randolph, 6 Rand. 197.

An execution was levied on slaves in possession of the debtor, and the slaves were claimed by a third party, whereupon the plaintiff in execution gave the sheriff an indemnifying bond, and he sold the slaves, and subsequently brought suit on the bond, pending which suit the plaintiff in execution filed his bill, alleging that the claimant claimed under a voluntary deed, fraudulent as to both prior and subsequent creditors, praying that it might be avoided, but asking no discovery from the parties to the deed. *Held*, that the facts alleged in the bill, if true, would constitute a good defence at law to the bond, and that equity was without jurisdiction. Harvey v. Fox, 5 Leigh 444.

A *fi. fa.* against the estate of a testator was levied on slaves, specifically bequeathed, which were in the possession of the legatees as their property, either by actual delivery from the executor, or by his permission. *Held*, that a court of equity may award an injunction to prevent the sale of the slaves. Sampson v. Bryce, 5 Munf. 175. See Whitton v. Terry, 6 Leigh 189.

Where a *fieri facias* against the goods of a testator is levied on slaves, which, by his will, were specifically bequeathed, and after his death were allotted to the legatee by the executor, who thereupon held them and hired them out as guardian for such legatee, a court of equity should enjoin the sale until an account is taken of the unadministered assets; and, upon such account, should decree that the creditor be satisfied out of those assets or, if there be a deficiency, out of the residue of the estate of which the testator died possessed, regard being had to the rights of the several legatees under the will. Scott v. Halliday, 5 Munf. 103.

III. JURISDICTION.

Under the Virginia constitution (see Va. Code 1803, art. 14, p. 4), the judges of the general court and judges in chancery were to be appointed by the joint ballot of both houses, and to be commissioned by the governor, and to continue in office during good behavior. A judge of the general court could not, by law, be vested with chancery powers, unless he was also appointed a judge in chancery by joint ballot, and commissioned as such. Hence, the act of 1792, 1 Rev. Code 1803, pp. 64, 74, §§ 9, 11, directing that the district courts, or a judge thereof in vacation, should exercise the power of granting injunctions, and of dissolving and finally disposing of them, under the same rules as were prescribed for conducting similar suits in the high courts of chancery, was unconstitutional and void. Kamper v. Hawkins, 1 Va. Cas. 20.

An allegation in a bill for injunction that the legislative act, under which the wrong complained of is being committed, is unconstitutional, will not, of itself confer jurisdiction upon the court of equity to grant the relief prayed for. Thomas v. Rowe (Va.), 22 S. E. Rep. 157.

County Court.—Under Va. Code 1873, ch. 175, § 6, a judge of a county court may award an injunction, where the act or proceeding to be enjoined is apprehended, or is to be done, or is doing in his county or district. Rosenberger v. Bowen, 84 Va. 660, 5 S. E. Rep. 697.

A county court has no power to make an order enjoining the judgment of a superior court. Bite v. Fitz-Randolph, 1 Va. Cas. 269.

Circuit Court.—Where an injunction is granted by a county judge, who has no authority to grant the same, and is perpetuated by the circuit court, the order of the county judge is simply inoperative; and the circuit court has authority at the hearing to award an injunction, although not prayed for in the bill, if it is necessary for the purposes of complete justice, and hence may adopt the previous order of the county judge as its own and perpetuate the same. Sanderlin v. Baxter, 76 Va. 299.

Under Va. Code 1887, § 3436, as amended by Acts 1899–1900, p. 966, providing that jurisdiction of a bill for an injunction to restrain any act or proceeding shall be in the circuit court of the county in which such act or proceeding is to be done or is being done or apprehended, the circuit court of a county has jurisdiction of a suit to enjoin the clerk of such county from conveying certain delinquent lands to an applicant for the purchase thereof. Baker v. Briggs, 99 Va. —, 38 S. E. Rep. 277.

Chancery Court of City of Richmond.—The chancery court of the city of Richmond cannot enjoin an act to be done in the county of Prince George. N. & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 936, 14 S. E. Rep. 690.

Court of Appeals.—As to the jurisdiction of the supreme court over injunctions, see Va. Code 1887, § 3438, as amended by Acts 1895–6, p. 728. Fredenheim v. Rohr, 87 Va. 764, 13 S. E. Rep. 193; Wilder v. Kelley, 88 Va. 274, 13 S. E. Rep. 483; Mayo v. Haines, 2 Munf. 423; Randolph v. Randolph, 6 Rand. 194; Gilliam v. Allen, 1 Rand. 414; 10 Enc. Pl. & Pr. 882. See also, *infra*, title "Appeals."

Where an injunction is refused by a chancellor in open court, it is competent for a judge of the court of appeals, out of court, to award it. Toll Bridge v. Free Bridge, 1 Rand. 206.

The judges of the court of appeals, or any one of them out of court, have power to award injunctions which have been refused by the judge of any superior court of chancery, but this power is not possessed by the court itself. Mayo v. Haines, 2 Munf. 423.

The fact that an injunction has been refused by a judge of the circuit court and also by a judge of the supreme court, is no objection to the granting of the injunction by another judge of the supreme court. Jaynes v. Brock, 10 Gratt. 211.

Upon an appeal from an order overruling an injunction, the court awarding the injunction, not the supreme court, has jurisdiction of a proceeding for contempt for its violation. State v. Harness, 42 W. Va. 414, 26 S. E. Rep. 270.

Federal Jurisdiction to Enjoin Collection of State Taxes.—A federal court will not enjoin the collection of taxes levied under the authority of a state upon the shares of a national bank unless it clearly appears not only that the tax is illegal, but also that there are special circumstances which bring the case within some recognized ground of equity jurisdiction and render such relief necessary to the adequate protection of the complainant's rights, and only where the right is clear, the necessity for action urgent, and the absence of any other remedy apparent, should an injunction be granted. People's Nat. Bank of Lynchburg v. Marye, 7 Va. Law Reg. 47.

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Concurrent Jurisdiction of Equity and Law Courts.—Though courts of equity and courts of law have a concurrent jurisdiction in cases of fraud, yet if a suit be first brought in a court of law, in which the question of fraud may be tried and determined, the party injured by the fraud must make his defence there; and if he neglects to do so, the court of equity has no jurisdiction to relieve him. Haden v. Garden, 7 Leigh 157.

Consent of Parties Cannot Confer Jurisdiction.—Where the law does not give a court of equity jurisdiction of the subject-matter—*e. g.*, to enjoin the building of a railroad pursuant to a valid ordinance—consent of parties cannot invest the court with power to award damages or ascertain and decree compensation. Ohio River R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. Rep. 1093.

Upon a county court's overruling a motion for the dissolution of an injunction, the parties cannot make the injunction perpetual by consent, in order that an appeal may be taken; but to authorize an appeal, the cause must be regularly proceeded in to a final decree. Blakey v. West, 3 Munf. 75.

Objection to Jurisdiction—When to Be Made.—A bill to enjoin an execution on the ground that a previous execution on the same judgment has been levied on the property of another defendant, must be filed in the county in which the judgment was recovered. In such case, objection to the jurisdiction may be taken at the hearing. Beckley v. Palmer, 11 Gratt. 625.

Where the plaintiff in a pure bill of injunction institutes a suit in one county to restrain a sale of real estate situated in another, and the defendants answer and do not object to the jurisdiction, the plaintiff cannot afterwards raise the question of jurisdiction. Muller v. Bayly, 21 Gratt. 521.

IV. VENUE.

An injunction cannot be maintained in a county other than that in which the act or proceeding is to be done, or is doing, or apprehended. N. & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. Rep. 689.

Under the statute, Va. Code 1887, § 3436, providing that the jurisdiction of a bill for an injunction to any judgment, act, or proceeding shall be in the circuit court of the county, or the circuit or corporation court of the corporation, in which the judgment is rendered or in which the act or proceeding is to be done, or is doing or apprehended, an injunction to restrain entry on land cannot be maintained in a county other than that in which the land is situated. Norfolk, etc., R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. Rep. 689; N. & W. R. R. Co. v. Postal Tel. Cable Co., 88 Va. 936, 14 S. E. Rep. 690. See also, Beckley v. Palmer, 11 Gratt. 625.

Under W. Va. Code 1887, ch. 123, §§ 1, 2, providing that a suit in equity may be brought in the county in which any of the defendants reside, or in which the cause of action or a part thereof arose, a suit to enjoin the defendants from interfering with the plaintiff's possession of certain railroad ties may be brought in the county where a part of them are found, provided that service on the defendants is had therein, although the defendants reside in another county, and the contract by which the plaintiff became entitled to the ties was made there. Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. Rep. 37.

Although by statute, Sup. Rev. Code, ch. 109 (see Va. Code 1887, §§ 3436-37), jurisdiction is given to each of the judges of the circuit courts to award injunction without as well as within his own circuit, yet the order of the judge must be directed to the clerk of the court of that county or corporation in which the judgment shall have been rendered or the proceeding is apprehended, and the subsequent proceedings must be had in that county. Randolph v. Tucker, 10 Leigh 655.

A court of chancery has power to grant injunctions to the judgments of all courts of common law within its district, the place where the court is held, and not the residence of the parties, furnishing the rule of jurisdiction in such case. Cocke v. Pollok, 1 H. & M. 499.

Change of Venue.—The superior courts of chancery had power, upon general principles of equity, to direct the venue to be changed after issue joined in a county or other inferior court, where it appeared that strong prejudice existed against the defendant, which was unknown to him until after such issue was joined, and that a fair and impartial trial could not have been expected in the court where the suit was depending. In such case, a judgment was not necessary to authorize the chancellor to grant the injunction. Darmsdatt v. Wolfe, 4 H. & M. 246.

Same—Ancillary Injunction.—Under the statute providing that a suit shall be brought in the county in which the judgment sought to be enjoined is rendered, or in which the act or proceeding sought to be enjoined is being done or apprehended, only a pure bill of injunction is meant, not a bill seeking other relief, to which the injunction sought is merely ancillary. Muller v. Bayly, 21 Gratt. 521; Winston v. Midlothian Coal Mining Co., 20 Gratt. 686. See also, Beckley v. Palmer, 11 Gratt. 625; Pulliam v. Winston, 5 Leigh 324; Singleton v. Lewis, 6 Munf. 397; Hough v. Shreeve, 4 Munf. 490.

Where a bill seeks relief and asks for an injunction to restrain the sale of real estate in another county as ancillary to the relief sought, the court of the county or city where the defendants or some of them reside, has jurisdiction of the cause; and the order for the injunction properly proceeds from the court of that county or city. Winston v. Midlothian, etc., Co., 20 Gratt. 686.

V. PARTIES.

The common-law rule with regard to injunctions is that they will not be granted to restrain a person who is not a party to the suit, but, whether granted in a pending suit or not, the person whose action is sought to be restrained must become a party to the bill or petition upon which the application is based. Lyne v. Jackson, 1 Rand. 119; Robertson v. Tapscott, 81 Va. 533; Bond v. Pettit, 89 Va. 474, 16 S. E. Rep. 666; Baker v. Briggs, 99 Va. —, 38 S. E. Rep. 277.

No person can enjoin a judgment at law to which he is not a party; but if he is aggrieved, he should pray an injunction to the execution. Jordan v. Williams, 3 Rand. 501.

It is error to perpetuate an injunction against a party without having him before the court. Chapman v. Harrison, 4 Rand. 336.

Where a suit is brought to enjoin a trustee's sale under a trust deed, at the instance of the administrator of one of several creditors whose debts are secured thereby, on the ground that all of such debts have been paid, including that of the deceased, not only the testator and trustee but also all the other creditors or their legal representatives should be made parties. Calwell v. Prindle, 11 W. Va. 307.

Where the lessees of oil and gas land bring suit

against the lessees of an adjoining tract to enjoin them from boring a well on land claimed by both. the lessors of both leases and all persons having an interest in the product of the well are necessary parties to the suit. Steelsmith v. Fisher Oil Co. (W. Va.), 35 S. E. Rep. 15; Moore v. Jennings (W. Va.), 34 S. E. Rep. 798.

Two infant negroes were entitled to freedom on their attainment to the age of twenty-one, under a bequest in a will to which the executors did not assent. A bill in chancery was filed by their mother, a free negro, showing their prospective rights to freedom, and that the holders of them claimed and intended to sell them as absolute slaves, whereby their freedom might be jeoparded, and praying an injunction to restrain the holders from selling or disposing of them so as to impair their prospective rights, and security for their enjoyment of their freedom when it should accrue. *Held*, that a court of chancery has jurisdiction to give such relief and that the mother may maintain such suit, in her own name, for the protection of her infant children. Anderson v. Anderson, 11 Leigh 616.

Commissioner of Sale.—A commissioner about to make a judicial sale is a necessary party to a suit to enjoin the sale. Robertson v. Tapscott, 81 Va. 533.

Register.—Where the object of a suit is to prevent the issuing of a patent by the register of the land office, such register is a proper party to the bill. Lyne v. Jackson, 1 Rand. 114.

Holder of Certificate.—In a suit to enjoin the payment of a certificate, the holder of the certificate should be made a party. Grobe v. Roup, 44 W. Va. 197, 28 S. E. Rep. 699.

County Clerk.—In a bill to compel a county clerk to remove an application for the purchase of certain delinquent tax lands and to enjoin him from conveying such lands to the applicant, such county clerk is not only a proper but a necessary party. Baker v. Briggs, 99 Va. —, 38 S. E. Rep. 277.

State Auditor.—Under the act of Feb. 11, 1898, a bill to remove an application for the purpose of delinquent tax lands and to enjoin proceedings thereunder, which shows title to such lands to be in the state, is not defective in failing to make the state auditor a party. Baker v. Briggs, 99 Va. —, 38 S. E. Rep. 277.

Heirs of Grantor.—In a bill by an administrator to enjoin a sale of real estate by a trustee, on the ground that the debt has been paid by the debtor in his lifetime, the heirs of the grantor are necessary parties. Stewart v. Jackson, 8 W. Va. 29.

Joining Officers as Parties.—The officer who returned the writ of bail bond ought, as well as the plaintiff at law, to be made a party defendant to a bill of injunction filed by the person returned as bail, who denies that he ever executed the bond, for the officer is interested in the matter in controversy and should be a party in order that final and complete justice may be done. Spotswood v. Higgenbotham, 6 Munf. 313.

Misjoinder of Parties.—In a suit against oyster inspectors and others to enjoin them from assigning oyster ground to the other defendants, and to require them to assign the same to the complainant, the bill alleged, that the ground in controversy was unoccupied: that the complainant claimed the right to have the whole assigned and rented to him as the first applicant for it; and that the inspector and his deputy were about to assign it to the other defendants because they had occupied it under the old law, though they had not applied for it as the law required, but had abandoned it. *Held*, that the bill was not bad because of misjoinder of parties. Coleman v. Claytor, 93 Va. 20, 24 S. E. Rep. 463.

VI. THE BILL.

A. CERTAINTY.—The complainants in a suit to restrain a sale of lands under a deed of trust to secure an unpaid balance of the purchase money claimed credit as mortgagors against such balance for damages for the cutting of timber upon a portion of the lands, which portion, they alleged, had been conveyed by their vendor, a defendant in the suit, to other persons prior to the conveyance to them. There was no allegation in the bill that the cutting took place after their purchase, or by whom it was done, or that they did not get all the land for which they had contracted. *Held*, that the bill was demurrable for want of certainty. Cleaver v. Matthews, 83 Va. 801, 3 S. E. Rep. 439.

The charge in a bill of injunction against a railroad company that they "have entered upon the same (the land), or are about to enter upon the same," is too uncertain, when taken in connection with another charge in the bill that the company has acted without the authority of law, and in the absence of any averment or charge that it is about to act further without authority of law. C. & O. R. Co. v. Patton, 5 W. Va. 234.

B. NECESSARY ALLEGATIONS.—In a bill for an injunction where relief might have been had at law, the plaintiff must state why he did not defend at law. Yancy v. Fenwick, 4 H. & M. 423.

The mere averment, by a plaintiff in his bill asking for an injunction to a judgment at law, of the facts constituting his excuse for not defending himself at law, is not sufficient; he must prove them. Meem v. Rucker, 10 Gratt. 506.

Where a debtor, by way of compromise, confesses judgment for a sum less than the amount of his debt and seeks relief in a court of equity on the ground that he was entitled a credit of which he was aware, he should allege and prove that, though he used proper diligence he was prevented from ascertaining the fact or making defence by fraud, accident, mistake, or surprise. Morehead v. De Ford, 6 W. Va. 316.

Where, in order to sustain a bill of injunction, a jurisdictional fact is necessary to be established, such fact must not only be alleged in the bill, but should be sustained by sufficient evidence to make at least a *prima facie* case before the court proceeds to refer the cause to a commissioner, or to order an issue out of chancery. Ohio River R. Co. v. Ward, 35 W. Va. 481, 14 S. E. Rep. 142.

The mere allegation in a bill for an injunction that the act complained of is being committed under an unconstitutional statute is not of itself sufficient to confer jurisdiction on a court of equity to grant the relief sought, where the other allegations do not make out a case for such relief. Thomas v. Rowe (Va.), 23 S. E. Rep. 157.

Allegation as to Parties.—In a bill filed to restrain the collection of taxes for school purposes in a township, the plaintiff must aver that he sues, not only on his own behalf, but, also, on behalf of all others similarly situated, such averment being essential to a complete determination of all the rights affected by the suit. McClung v. Livesay, 7 W. Va. 329. See Bull v. Read, 13 Gratt. 78. See *supra*, title, "Against Taxes."

Allegation of Plaintiff's Title.—A bill to restrain the

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recording of a paper on the ground that it would cast a cloud on the title to certain land is properly dismissed, where it fails to allege the plaintiff's interest in the land. Smith v. Thomas (Va.), 37 S. E. Rep. 784.

A bill of injunction is fatally defective which does not aver good title in the plaintiff, contains no charge of insolvency against the defendants, does not show that irreparable damage will result if the injunction is denied, and prays an injunction to restrain a naked trespass upon real property. The Western, etc., Co. v. Va., etc., Co., 10 W. Va. 250; McMillan v. Ferrell, 7 W. Va. 223. See Cox v. Douglass, 20 W. Va. 175; Schoonover v. Bright, 24 W. Va. 698; Cresap v. Kemble, 26 W. Va. 603; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. Rep. 724.

Allegation of Character of Injury Apprehended.—A bill of injunction should contain a distinct averment of irreparable injury, and the facts must appear on which the allegation is predicated, in order that the court may be satisfied as to the nature of the injury. Farland v. Wood, 35 W. Va. 458, 14 S. E. Rep. 140; Fluharty v. Mills (W. Va.), 38 S. E. Rep. 521. See also; Collins v. Sutton, 94 Va. 127, 26 S. E. Rep. 415; Cresap v. Kemble, 26 W. Va. 603.

A mere allegation of irreparable injury is not sufficient to warrant an injunction. The facts must appear on which the allegations are founded. Hale v. Point Pleasant, etc., R. Co., 23 W. Va. 454.

A bill to enjoin the commission of waste by cutting timber which merely alleges that the injury will be irreparable, and does not show in what respect it will be irreparable, will be dismissed on demurrer. Watson v. Ferrell, 34 W. Va. 406, 12 S. E. Rep. 724.

In order to sustain a bill to enjoin trespass on land, facts constituting irreparable injury must be set out. Becker v. McGraw (W. Va.), 37 S. E. Rep. 532.

A bill to enjoin the foreclosure of a usurious mortgage is demurrable, where it fails to show in what respect the plaintiff would be injured by the sale. Saunders v. Balto. Building & Loan Ass'n (Va.), 37 S. E. Rep. 775.

Allegation of Fraud.—In a bill for an injunction on the ground of fraud, the facts constituting such fraud must be stated. Dickenson v. Bankers' Loan, etc., Co., 93 Va. 498, 25 S. E. Rep. 548.

The facts relied on to sustain a bill for an injunction must be stated in the bill, and must, when taken together, be sufficient to make out a case of fraud. Dickenson v. Bankers' Loan, etc., Co., 93 Va. 498, 25 S. E. Rep. 548.

Allegation of Insolvency.—Although a bill asking for an injunction contains the averment that the defendant, by cutting a channel through the plaintiff's land, the defendant having been granted the right to construct its railroad through such land, would divert the water of a creek from the plaintiff's mill, and would work to him irreparable damage, yet if there is no averment that the defendant is insolvent, or that its officers, agents, or servants are transcending their authority, or that any damage which may be done to the property cannot be adequately compensated in damages, the injunction must be refused. C. & O. R. Co. v. Bobbett, 5 W. Va. 138.

Allegation of Destruction of Original Papers.—It is a sufficient compliance with Va. Code 1887, § 3376, where a sworn bill alleges and the answer admits the destruction of the original papers in a cause in which there was a decree for the sale of certain lands, and there is filed a certified copy of the papers from the supreme court, where the cause was on appeal; and an injunction will not lie on the ground that "no affidavit of the destruction was filed." Hudson v. Yost, 88 Va. 347, 13 S. E. Rep. 436.

C. ALLEGATIONS ON INFORMATION AND BELIEF.—A bill for an injunction charged that the complainant was informed and believed that there were other parties who claimed the land described in the defendant's deed to the complainant, but there was no allegation as to who the parties were, nor was their title shown or indicated. *Held*, that this allegation was too general to warrant an injunction restraining the collection of the purchase price. Lovell v. Chilton, 2 W. Va. 410.

As a general rule, an injunction will not be allowed upon mere information and belief, and the following affidavit to a bill of injunction is insufficient under the statute: "James Montgomery on his solemn oath says that each and every allegation contained in the foregoing bill are true so far as they are known to him personally, and so far as he has heard, he believes them to be true," Montgomery not being a plaintiff in the bill. C. & O. R. Co. v. Huse, 5 W. Va. 579.

D. DISCOVERY.—As a general rule, where a plaintiff is entitled to relief by injunction he is also entitled to a discovery of the facts upon which his right to relief is based. 10 Enc. Pl. & Pr. 937; N. & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. Rep. 689.

The bill should not call upon the defendant to disclose the nature and character of his own title to the subject-matter of the controversy, where such inquiries do not pertain to the title of the plaintiff and are not necessary to maintain the plaintiff's title. N. & W. R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. Rep. 689.

An injunction to restrain a telegraph company from going on the plaintiff's land for the purpose of condemning a right of way, until a discovery be had of the company's incorporation, and the proceedings authorizing the condemnation proceedings, should not be granted, as one is not entitled to a discovery of the facts by which another's case is to be established, but only of those necessary for his own. Norfolk, etc., R. Co. v. Postal Tel. Cable Co., 88 Va. 932, 14 S. E. Rep. 689.

E. VERIFICATION OF THE BILL.—The following affidavit to a bill of injunction was held to be insufficient under the West Virginia statute: "James Montgomery on his solemn oath says, that each and every allegation contained in the foregoing bill, are true so far as they are known to him personally, and so far as he has heard, he believes them to be true." C. & O. R. Co. v. Huse, 5 W. Va. 579.

It is no objection to a bill of injunction that it is sworn to by a person not one of the plaintiffs, if the affidavit is good in other respects. C. & O. R. Co. v. Huse, 5 W. Va. 579.

An injunction ought not to be awarded, which is verified only by the affidavit of an agent of the plaintiff, "that the facts and allegations contained in the bill, so far as stated therein on his own knowledge are true, and so far as stated on information, he believes them to be true," where the bill alleges no facts of which the agent had any personal knowledge so far as appears on the face of the bill, and there are no exhibits sustaining the material allegations of the bill. Shonk v. Knight, 12 W. Va. 667.

Although the affidavit filed with the bill is not of

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itself sufficient to authorize a judge to grant an injunction, yet if there are properly certified copies of documents and records filed with the bill as exhibits and evidence, and they, together with the affidavit, are sufficient to satisfy the judge that the injunction should be granted, it is not error for the judge to grant the injunction. Oil Run Petroleum Co. v. Gale, 6 W. Va. 525.

F. AMENDMENT.—As a general rule, the court will at any time before the hearing grant leave to amend, where the bill is defective as to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill or not repugnant thereto. The amendment may be made by common order before answer or demurrer, and afterwards by leave of the court. Holland v. Trotter, 22 Gratt. 136. See Bart. Ch. Pr. (2d Ed.) 344-351. See especially, monographic *note* on "Amended Bills" appended to Belton v. Apperson, 26 Gratt. 207.

G. CONSTRUCTION.—A preliminary injunction will be construed to be in accord with the allegations of the bill, if the language used admits of such construction. McEldowney v. Lowther (W. Va.), 38 S. E. Rep. 644.

VII. THE DEMURRER.

A bill for an injunction to the judgment of a justice on the verdict of the jury, which shows on its face that the plaintiffs have a plain, adequate remedy at law, is fatally defective; and on demurrer thereto the temporary injunction awarded should be dissolved, and the bill dismissed. Shay v. Nolan, 46 W. Va. 299, 33 S. E. Rep. 225.

Where a complainant in a bill of injunction appears and contests the case on a demurrer, he waives notice of the demurrer. Hyre v. Hoover, 3 W. Va. 11.

Where a bond is executed pursuant to a decree in equity requiring its execution in order to stay the issuance of an injunction, the fact that the bond does not conform to the requirements of the decree is no ground for a demurrer to a declaration on the bond, since the bond does not derive its efficacy from the decree directing its execution. Blankenship v. Ely, 98 Va. 359, 36 S. E. Rep. 484.

Failure to Allege That Complainant's Right Has Been Established in Action at Law.—A bill to enjoin the construction and maintenance of a millidam is not demurrable for want of equity, in that it contains no allegation that the complainant's right has been established in an action at law. Switzer v. McCulloch, 76 Va. 777.

Want of Jurisdiction.—Although a bill of injunction may pray for relief, which a court of equity has not jurisdiction to grant, still if the bill prays for other relief which the statements of the bill *prima facie* authorize, it is error in the court to sustain a demurrer to the bill and dissolve the injunction and dismiss the bill, because of its want of jurisdiction to grant all the relief prayed for. Frank & Co. v. Brunnemann, 8 W. Va. 462.

Nonjoinder of Parties.—Although it appears on the face of a bill of injunction that the personal representative of a deceased lessee, who died intestate, is a necessary party defendant to the suit, before final adjudication, yet if it appears by the bill that such personal representative had not at the time of the filing thereof been appointed, a demurrer to the bill should not be sustained and the injunction dissolved and the bill dismissed, merely because such personal representative is not made a party to the original bill, at least until a reasonable time for the appointment of such personal representative and making him a party defendant shall have been allowed by the court. Frank v. Brunnemann, 8 W. Va. 462.

Bill Demurrable for Want of Certainty.—The complainants in a suit to restrain the sale of lands under a deed of trust given to secure an unpaid balance of purchase money, claimed credit as mortgagors against such balance for damages for the cutting of timber upon a portion of the lands, which portion, they alleged, had been conveyed by their vendor, a defendant in the suit, to other persons prior to the conveyance thereof to them. There was no allegation in the bill that the cutting took place after their purchase, or by whom it was done, or that they did not get all the land for which they had contracted. *Held*, that the bill was demurrable for want of certainty and precision. Cleaver v. Matthews, 83 Va. 801, 3 S. E. Rep. 439.

Failure to Set Out in What Respect Injury Would Be Irreparable.—A bill alleging that the plaintiff is the owner of a tract of land covered by valuable growing timber, that the plaintiffs are engaged in cutting and removing the same, that, if not restrained, they will continue to cut and remove said timber, that said waste has greatly injured him, and that if the defendants are allowed to continue the cutting of said timber the injury will be irreparable; but not setting forth in what way the injury will be irreparable, does not show jurisdiction in a court of equity, and will be dismissed on demurrer. Watson v. Ferrell, 34 W. Va. 406, 12 S. E. Rep. 724.

A bill to enjoin the foreclosure of a usurious mortgage is demurrable, where it fails to show in what respect the plaintiff would be injured by the sale. Saunders v. Balto. Building & Loan Ass'n (Va.), 37 S. E. Rep. 775.

VIII. THE ANSWER.

"There seems to be some confusion of opinion among the legal profession, as to when and where an answer may be filed to a bill of injunction, and be considered and have its proper effect on a motion to dissolve. In the case of Goddin v. Vaughn's Ex'ors *et al.*, 14 Gratt. 102, JUDGE LEE in delivering the opinion of the court, at pages 129 and 130 says: 'Another objection taken for the first time in the argument here, is that the motion to dissolve was premature, or at least that the answer should not have been read on the hearing, because it had not been filed in court or at the rules. Generally it is true that an answer can only be filed during the session of the court or at the rules, but by our statute, as I think, an exception is made in cases of injunction. The object, in giving the judge in vacation power to dissolve an injunction, was to prevent delay and this would be to some extent defeated, if a party had to wait until the rule day or a session of the court, before he could put in his answer, and have the benefit of it on a motion to dissolve. I think the larger power to entertain and decide the motion to dissolve, embraces that of receiving the answer and making it a part of the record. If there was anything in the objection, it should properly have been made, when the motion to dissolve was heard,' etc. It seems to me, that these views of JUDGE LEE are correct and well founded, and I think in addition, that the answer may not only be received, as stated by JUDGE LEE and made a part of the record, but that a replication to such answer may likewise be

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received, and made a part of the record by the judge at the hearing of the motion to dissolve." Hayzlett v. McMillan, 11 W. Va. 464.

A conveyed a tract of land in trust to secure to B the payment of a note containing a provision that it was to be subject to any credit which the maker might show he had paid on said claim or debt upon a fair adjustment of all matters between them. The trustee, proceeding to sell the land under the deed of trust, was enjoined by A on the ground, among others, that he did not owe B anything on settlement, and prayed for a settlement to be had between them to ascertain his indebtedness, if anything, to B. The defendants filed an answer in the nature of a cross bill, alleging prior liens on the land by judgments against A, and making the judgment creditors of A parties to the suit, and praying for a convention of the lien creditors, and to ascertain the amounts and priorities of the liens. *Held*, that the court did not err in permitting the answer and cross bill to be filed. Martin v. Kester (W. Va.), 39 S. E. Rep. 599.

Where a bill of injunction to stay proceedings on a judgment charges the plaintiff at law with having failed to do an act on which the equity of his claim depends, and, in his answer, he takes no notice of the allegation, the court, on the hearing, will consider this as an admission that he has not done the act in question, and will decree against him without any exception to the answer, or any interlocutory order taking the bill for confessed in part. Page v. Winston, 2 Munf. 298.

IX. ORDER OF REFERENCE.

A bill to enjoin a carrier from collecting wharfage, and to require it to account for amounts paid by the several plaintiffs, did not aver how much was paid in the aggregate, or in what proportion or under what circumstances, and was wholly denied by the answer and not supported by proof. *Held*, that the court, on granting the injunction, could not order a reference to ascertain the amount of wharfage collected from the plaintiffs. Balto., etc., Co. v. Williams, 94 Va. 422, 26 S. E. Rep. 841.

X. THE BOND.

A. NECESSITY FOR.—An order from the chancellor granting an injunction to a judgment at law upon the "usual terms," is not sufficient to stay the proceedings, until the complainant has complied with the terms of the order by giving bond and security. Clarke v. Hoomes, 2 H. & M. 23.

The injunction should not take effect until the bond is given, but if by accident it is made to take effect before, this is not sufficient error to warrant the appellate court in reversing the order granting the injunction. A party ought to be allowed a reasonable time after his attention is called to the defect in the bond, by rule or notice, in which to execute a proper bond, and on his failure to do so the injunction ought to be dismissed. C. & O. R. Co. v. Patton, 5 W. Va. 234.

It is error in the chancellor to grant an injunction, without requiring security, except in the case of executors, administrators, and other fiduciary characters. Lomax v. Picot, 2 Rand. 247.

Same—Personal Representatives Not Required to Give Bond.—Executors and administrators, having given security for their administration, are not generally required to give security on obtaining injunctions. Wilson v. Wilson, 1 H. & M. 16; Lomax v. Picot, 2 Rand. 247; Shearman v. Christian, 1 Rand. 393; Va. Code 1887, § 3442. And if such bond be given it is void both as a statutory bond and at common law. State v. Johnson, 28 W. Va. 56.

B. CONDITIONS.—Where the conditions of an injunction bond are not as extensive as the statute requires, but it contains a material part of the condition required, the bond is not void, but binds the obligors to the extent of such condition or conditions; and where the bond contains some conditions or promises not required by the statute, and some of those which are required, it is valid and binding to the extent of the latter. Holliday v. Myers, 11 W. Va. 276. See Gillespie v. Thompson, 5 Gratt. 132; White v. Clay, 7 Leigh 68; Fox v. Mountjoy, 6 Munf. 36; Pratt v. Wright, 13 Gratt. 175, 67 Am. Dec. 767; Gibson v. Beckham, 16 Gratt. 321; Porter v. Daniels, 11 W. Va. 250.

An injunction bond payable upon the contingency specified in its condition, given before a deed of land which is a preference of one creditor over others, and which stands for the benefit of all creditors, on which bond judgment is recovered after the date of such deed, is entitled, under W. Va. Code 1891, ch. 74, § 2, to share in said land, the owner of such judgment being a creditor. The contingent character of the bond makes no difference. First Nat. Bank of Cumberland v. Parsons, 45 W. Va. 688, 32 S. E. Rep. 271.

Where an injunction bond does not bind the obligors to pay such costs as may become due, this is not a defect of which the obligors can complain. Gillespie v. Thompson, 5 Gratt. 132.

C. EXECUTION.—The Virginia statute (now Va. Code 1887, § 3442) does not require that the bond upon an injunction to a judgment shall be executed in the presence of the court, but it must be executed before the clerk of the court in which the judgment was obtained. The fact that it was given before the court will not, however, vitiate such bond. Harman v. Howe, 27 Gratt. 676.

In an action on a bond given to stay injunction proceedings, the defence was that the defendants signed as sureties under an agreement that the principal should also sign. It appeared that the principal's husband signed her name to the bond, at her request, and that the bond was filed in the injunction suit and proceedings therein accordingly stayed to the principal's benefit. *Held*, that such signing by the husband was a sufficient compliance with the agreement to bind the sureties. Blankenship v. Ely, 98 Va. 359, 36 S. E. Rep. 484.

The surety in the injunction bond being held insufficient, and another bond being executed with other sureties, upon a dissolution of the injunction the sureties in both bonds are equally liable. Bentley v. Harris, 2 Gratt. 357.

D. AMOUNT.—A bond was given upon an injunction to a judgment for money, and in the penalty it said "in the just and full sum of seven hundred and seventy-six, lawful money of Virginia." *Held*, that the word "dollars" was obviously left out by mistake, and the bond will be treated as if the word was in it. Harman v. Howe, 27 Gratt. 676.

Where an injunction bond has been signed, sealed and acknowledged by the obligors in the presence of the court, and has been accepted and acted on as their bond, the obligors are estopped to deny that the penalty of the bond conforms to the direction of the judge who awarded the injunction. Harman v. Howe, 27 Gratt. 676. See Wray v. Davenport, 79 Va. 19.

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E. REQUIRING NEW OR ADDITIONAL BOND.—It is within the power of a judge of the circuit court to make an order in vacation requiring a complainant to give a new injunction bond with additional security. Hutchinson v. Landcraft, 4 W. Va. 312.

If at any time the security for prosecuting an injunction shall prove to be insufficient, the court will require unexceptionable security to be given. Ross v. Pleasants, 1 H. & M. 1.

The power to grant injunctions in vacation and to require a bond to be then given carries with it, as a necessary incident, the right to hear and determine in vacation a motion to require a new bond to be executed with an enlarged penalty. Hutchinson v. Landcraft, 4 W. Va. 316; Mason v. Harper's Ferry Bridge Co., 17 W. Va. 407.

Upon a motion before a judge in vacation to require of the plaintiff a new injunction bond with an enlarged penalty, the proper order, if the old bond is insufficient, is, if the new bond is not given within such reasonable time, as the court under the circumstances shall fix, that after such time the injunction shall be dissolved until such bond be given. Mason v. Harper's Ferry Bridge Co., 17 W. Va. 408.

The order of a judge of the supreme court granting an injunction which had been refused by the lower court is, when returned by the lower court, a record there, in effect an order of the lower court; and the judge of the lower court may act upon it as an order of his own court and increase the bond fixed by the supreme court. This, however, cannot be done at rules, when the court is not in term; but the case must be matured as any other case, and regularly proceeded with. Ruffin v. Commercial Bank, 90 Va. 708, 19 S. E. Rep. 790.

It is error to order an increase of an injunction bond, where the claim of the adverse party is fully protected by collateral security. Ruffin v. Commercial Bank, 90 Va. 708, 19 S. E. Rep. 790.

If the powers of trustees suing in chancery are vacated, pending the suit, upon a bill filed against them by their *cestui que trust* and other trustees are appointed, it seems that the court may change the plaintiffs after answer filed upon terms of the new trustees paying the costs already incurred and giving security for future costs; but it cannot vacate an injunction bond given by the original trustees, and direct another to be executed, without previous notice to the defendants, that they may show cause against the motion. Galt v. Carter, 6 Munf. 245.

F. LIABILITIES ON THE BOND.

1. ACCRUAL OF LIABILITY.—Where the plaintiff in an injunction suit dismisses his bill at rules, the defendant has an immediate right of action on the injunction bond, and need not wait until the order of dismissal is confirmed at the next term of the court. Roach v. Gardner, 9 Gratt. 89.

The condition of an injunction bond is broken by a dissolution of the injunction in part, as well as by a total dissolution; so that an action lies on the bond, whether the injunction be partly or wholly dissolved. White v. Clay, 7 Leigh 68.

2. LIABILITIES OF SURETIES.—A principal debtor in a judgment obtained an injunction thereto, and executed an injunction bond, with a third person as surety; the surety in the judgment not being a party to the injunction. Upon a dissolution of the injunction, it was held that the surety in the injunction bond was liable for the debt enjoined, before the surety in the judgment. Bentley v. Harris, 2 Gratt. 357.

Where an injunction bond was executed by the obligors before the clerk of the court, and in the presence of the court, and was accepted and acted on as their bond, the surety is estopped from setting up the defence, that by express agreement with his principal he signed the bond upon the express condition that another person named should sign it, and that this fact was announced to the clerk at the time the said surety signed it, the obligee knowing nothing of such agreement. Harman v. Howe, 27 Gratt. 678.

Where an injunction is dissolved upon a condition, and that condition has been complied with by the defendant in equity, the surety in the injunction bond is not exonerated. Gray v. Campbell, 3 Munf. 251.

3. ACTIONS ON BOND.

a. Right to Maintain Successive Actions.—Where an injunction bond is made payable to the state, actions may be prosecuted thereon from time to time for the benefit of the person injured by the breach of the condition thereof, until damages are recovered in the aggregate equal to the penalty of the bond. State v. Hall, 40 W. Va. 455, 21 S. E. Rep. 760.

b. Parties—Joinder of Plaintiffs.—Where an injunction bond is joint as to the obligees, joint and several as to the obligors, a joint action may be brought by the obligees, and a joint judgment rendered for the whole of their demand, although the claims due them respectively may be of different amounts and may bear interest from different dates. Peerce v. Athey, 4 W. Va. 22.

c. Pleading.—In an action on an injunction bond brought to recover damages upon the dissolution of the injunction, where none have been awarded by the decree dissolving the same, the declaration must specify the particular injuries complained of occasioning such damages with such clearness and distinctness of statement that they may be understood by the party who is to answer the same. State v. Purcell, 31 W. Va. 44, 5 S. E. Rep. 301.

In an action on a bond given on an injunction to restrain the collection of a judgment, the plaintiff must show title to the judgment. State v. Hall, 40 W. Va. 455, 21 S. E. Rep. 760.

Where the condition of an injunction bond in pursuance of the statute provides that the plaintiff in the injunction cause shall faithfully prosecute said injunction, and shall pay the amount of the judgment enjoined, and all such costs as may be awarded against the complainants, and all such damages as shall be incurred in case the injunction be dissolved, the declaration must aver that the plaintiff in the injunction, by reason of the dissolution thereof, has incurred and become liable to pay the plaintiff in the suit on said bond some amount of damages. State v. Hall, 40 W. Va. 455, 21 S. E. Rep. 760.

d. Evidence.—On the trial of an action of debt on an injunction bond extracts from the decrees and orders in the injunction cause are competent and sufficient evidence without producing the whole record. White v. Clay, 7 Leigh 68. As to the admissibility of the record of an injunction cause as evidence in an action upon an injunction bond, see Arthur v. Crenshaw, 4 Leigh 394.

e. Defences.—In an action of debt on an injunction bond, the obligors are estopped to deny that there is such a judgment as that which the bond describes, or that the injunction has been awarded. Bank v

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Fleshman, 22 W. Va. 317. See Blankenship v. Ely, 98 Va. 359, 36 S. E. Rep. 484.

It is no plea to an action on an injunction bond, "that the injunction was not dissolved unconditionally; but upon terms that the plaintiff at law should execute a bond for securing the title to a tract of land;" without averring in the plea that such bond has not been given. Gray v. Campbell, 3 Munf. 251.

The failure of one of the obligors in a bond to sign it in person, if it can be set up as a defence in any case by the other obligors, cannot be set up where it appears that judgment has been rendered against such obligor, and no one has been injured by his failure to sign and acknowledge the bond in proper person. Blankenship v. Ely, 98 Va. 359, 36 S. E. Rep. 484.

f. Damages and Costs.—Where no bond has been required on suing out an injunction, damages are not recoverable, unless the injunction was sued out maliciously and without probable cause. Glen Jean, etc., R. Co. v. Kanawha, etc., R. Co. (W. Va.), 35 S. E. Rep. 978.

Where the condition of an injunction bond provides for the payment of such damages as may be awarded by the court, and the court simply dissolves the injunction and dismisses the bill, the order of dissolution necessarily imports that the damages are to be paid, unless they are expressly remitted by the terms of the order. Claytor v. Anthony, 15 Gratt. 518.

In an action on a bond for prosecuting an injunction to stay proceedings upon a judgment at law, for a debt bearing interest; which injunction is dissolved and the bill dismissed; the plaintiff is entitled to a verdict for the amount of the principal sum with lawful interest to the time of finding such verdict, the costs at law and in chancery (costs being awarded to the plaintiff by the decree), with damages on the said principal sum at the rate of ten per centum per annum, during the pendency of the injunction; although the condition of the bond be, for payment of the "judgment, and costs of the injunction" (if ruled to be paid "by the complainant"),—without mentioning interest or damages. Fox v. Mountjoy, 6 Munf. 36.

The surety in a bond for the prosecution of an injunction is not liable for the costs and damages which may accrue on an appeal to a superior court. Woodson v. Johns, 3 Munf. 230.

Same—Counsel Fees as Damages—West Virginia.—A reasonable amount paid as compensation to counsel as an item of the expense necessarily incurred in procuring the dissolution of an injunction wrongfully obtained may be recovered in a suit for damages upon an injunction bond. State v. Medford, 34 W. Va. 633, 12 S. E. Rep. 864; High on Injunctions (3d Ed.) 1061.

Same—Same—Virginia.—In an action on an injunction bond with condition "to pay all such costs as may be awarded against the plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved," fees paid to counsel in the injunction suit cannot be recovered as damages, although the bill be a pure bill of injunction. Wisecarver v. Wisecarver, 97 Va. 452, 34 S. E. Rep. 50, 5 Va. Law Reg. 462, and *notes*, pp. 465, 565, 578. See Burruss v. Hines, 94 Va. 413, 26 S. E. Rep. 875.

XI. COSTS.

A defendant who is properly enjoined from collecting a debt, though not from prosecuting it to judgment, is liable for the costs of the injunction proceedings. Shipman v. Fletcher, 95 Va. 585, 29 S. E. Rep. 325.

Where an injunction is granted to a judgment at law, it will, in general, be at the cost of the complainant. Mosby v. Haskins, 4 H. & M. 427.

Where an injunction against a judgment at law is perpetuated as to part, being the amount of just discounts claimed by the plaintiff in equity of which he might have availed himself at law if he had made defence, and is dissolved as to the residue, it is proper for the chancellor to decree that the plaintiff in equity shall pay the defendant there his costs. Donally v. Ginatt, 5 Leigh 359.

Where an injunction is perpetuated in part, the complainant should not, as a matter of course, be decreed to pay costs; and the error of awarding costs against the complainant is sufficient, on his appeal, to reverse the decree, although correct in every other respect. Ross v. Gordon, 2 Munf. 289.

Where, pending a bill for an injunction to a judgment and for the rescission of a contract for the purchase of land on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and procures the title, the injunction should be dissolved, but without damages, and with costs to the plaintiff. Young v. McClung, 9 Gratt. 336; Reeves v. Dickey, 10 Gratt. 138.

Where there is an injunction to a judgment against two or more persons, and only one signs the injunction bond or applies for the injunction upon dissolution there should not be an award of execution for damages and costs against all the judgment debtors, but only against those signing the bond or asking the injunction. Graham v. Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. Rep. 245.

Where a purchaser comes into equity to enjoin a judgment for the purchase money of land, on the ground of failure of title, he is entitled to costs, though the title is afterwards perfected, and the injunction dissolved. Reeves v. Dickey, 10 Gratt. 138.

Costs Cannot Be Decreed until Final Hearing.—Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction. Barnett v. Spencer, 2 H. & M. 7. See Davenport v. Mason, 2 Wash. 200.

XII. VIOLATION OF INJUNCTIONS.

Where the defendant's employees, without orders, drive across the complainant's railroad after the award of an injunction to restrain trespassing on its roadway, and the defendant disclaims all evil intent, it is error to impose a fine for the contempt. Postal Tel. Cable Co. v. N. & W. R. Co., 88 Va. 929, 14 S. E. Rep. 803.

Where an injunction is granted, which is not to take effect or be in force until the plaintiff executed a bond, acts done before the execution of the bond constitute no breach of the injunction. State v. Irwin, 30 W. Va. 404, 4 S. E. Rep. 413.

Where an injunction is granted, but not to take effect or be in force until the plaintiff executes a bond, it is a conditional granting of the injunction So, where such an injunction was granted on the fourteenth of July, 1886, the bond increased on the eighteenth of August, 1886, and no bond executed until the eleventh of October, 1886; and on the twenty-first of August and thirty-first of the same month, in the year 1886, acts were done which would have been contempt had the injunction been in force, it was held that the injunction did not take effect until after the acts were done, that there was no breach of the injunction, and consequently no

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contempt of the injunction order. State v. Irwin, 30 W. Va. 404, 4 S. E. Rep. 413.

Knowledge of Injunction.—Where a party has actual notice of an order of injunction, although it may not have been yet served, or be defectively served upon him, the order becomes operative on him from that time. Osborn v. Glasscock, 39 W. Va. 749, 20 S. E. Rep. 702.

XIII. MODIFICATION OF INJUNCTIONS.

A court of equity may modify an injunction on the furnishing of a bond of indemnity, where it appears that the party interested will suffer by continuing the injunction in force pending the litigation. Campbell v. Point Pleasant, etc., R. Co., 23 W. Va. 448.

Where an injunction, as awarded, is too broad, but the facts call for a more limited one, on a motion to dissolve, the injunction should be modified and made one warranted by the bill; and it is error to wholly overrule the motion to dissolve, and allow the excessive injunction to continue. Neale v. County Court, 43 W. Va. 90, 27 S. E. Rep. 370.

A preliminary injunction must not do what can only be done after full hearing by final decree, as by changing the possession of realty, or depriving one in possession of its benefits, in any other respect than as to the wrongful act proper to be enjoined; the proper purpose of such injunction being to preserve the present status until a full hearing on the merits shall be had. An injunction as to so much of it as is excessive is void, and ought to be modified on motion. Bettman v. Harness, 42 W. Va. 433, 26 S. E. Rep. 271.

An injunction which inhibits a life tenant from "cutting or removing any timber from said land, and from removing the buildings thereon or any part thereof, or from otherwise injuring the same," is entirely too broad and indefinite, and interferes with the life tenant's proper enjoyment of his tenancy. Greathouse v. Greathouse, 46 W. Va. 21, 32 S. E. Rep. 994.

XIV. CONTINUANCE OF INJUNCTIONS.

Although the answer plainly and positively denies the allegations of the bill, yet, if the facts and circumstances shown by the pleadings, exhibits and affidavits are strongly presumptive in favor of the plaintiff's equity, it is not appealable error for the circuit court to continue an ancillary injunction, awarded for the purpose of preserving the status of property, until the final hearing. Robrecht v. Robrecht, 46 W. Va. 738, 34 S. E. Rep. 801.

Where on the bill and answer denying all equity in the bill, there is a motion to dissolve an injunction, it is customary to dissolve; but for good cause the motion may be overruled, and the injunction continued till the hearing without any adjudication of the principles of the cause. Kahn v. Kerngood, 80 Va. 342.

On a motion to dissolve a mere ancillary injunction, the circuit court can only be required to investigate the main cause so far as to ascertain that the equities between the parties are sufficiently doubtful to justify the continuance of the injunction until the final hearing. Robrecht v. Robrecht, 46 W. Va. 738, 34 S. E. Rep. 801.

Upon an application to a court of equity to enjoin a judgment at law, and grant a new trial in the case, it is error in the court to perpetuate the injunction, set aside the judgment, and grant a new trial of the cause which had been terminated; and to finally dispose of the suit in equity. In such case the judgment at law is a security for anything the plaintiff at law may be entitled to; and a court of equity should continue the injunction, and direct proper issues; and upon the coming in of the verdict, perpetuate the injunction, or dissolve it in whole or in part according to the finding of the jury. Knifong v. Hendricks, 2 Gratt. 212, 44 Am. Dec. 385. See Bank of Washington v. Hupp, 10 Gratt. 23.

Injunction against Judgment for Purchase Money Not Dissolved until Vendor Tenders Good Deed.—An injunction to a judgment for the purchase money ought not to be dissolved until a good and sufficient deed for the land is tendered by the vendor. Grantland v. Wight, 2 Munf. 179.

Where Injunction Continued until Indebtedness Ascertained.—Where an injunction is obtained to a sale under a deed of trust on grounds that are insufficient or unsustained, the injunction, nevertheless, should not be dissolved until the indebtedness is ascertained by a commissioner of the court. White v. Mechanics', etc., Ass'n, 22 Gratt. 233.

XV. DISSOLUTION AND ABATEMENT.

A. COURTS WHICH HAVE POWER TO DISSOLVE.—Under the West Virginia statute, the power of the judge of a circuit court to dissolve an injunction in vacation is not confined to the county in which the suit is pending, but may be exercised in any other county of his circuit. Hayzlett v. McMillan, 11 W. Va. 464; Horn v. Perry, 11 W. Va. 694.

B. GROUNDS FOR DISSOLUTION.

1. EXISTENCE OF ADEQUATE LEGAL REMEDY.—An obligation given on the retainer of counsel to defend the obligor on the charge of forgery was assigned by the counsel and judgment was obtained thereupon by the assignees, on which judgment execution issued, under which a forthcoming bond was taken, and judgment was rendered thereupon. After these proceedings, without any defence having been made at law, and without any excuse for not making it, an injunction was obtained on the ground that the obligor was induced to employ the obligee by the menace that if he did not the obligee would act as counsel against him in aid of the prosecution. *Held*, that the injunction should be dissolved and the bill dismissed, for if in law such a contract was valid, a court of equity has no right to absolve a party from it; and if in law the contract was invalid, the defence should have been made in that forum. Hendricks v. Compton, 2 Rob. 192.

Where the defendant in a bill of discovery makes no discovery, but, on the contrary, denies the allegations of the bill, the injunction awarded on the bill should be dissolved. Webster v. Couch, 6 Rand. 519.

2. INJUNCTION IMPROVIDENTLY AWARDED.—Where a judgment has been enjoined and a new trial at law ordered, the court, if it is satisfied that the injunction ought to have been dissolved, will, although no verdict has been certified, set aside the order for a new trial, and dissolve the injunction. Vass v. Magee, 1 H. & M. 2.

Same—Where Bill Taken for Confessed.—Where a bill of injunction has been taken for confessed, for want of an answer, a motion by the defendant to discharge it as having been improvidently awarded will not be entertained. Turpin v. Jefferson, 4 H. & M. 483.

3. LACHES IN PROSECUTING CAUSE.—Where a plaintiff has failed to use due diligence to expedite his

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cause and procure the answers of all the defendants, he cannot complain that an injunction was dissolved before they had all answered. Shonk v. Knight, 12 W. Va. 667.

If an injunction be obtained to stay proceedings on a judgment or decree, and the plaintiff neglects for an unreasonable length of time to summon other defendants, or to have an order of publication, or to amend his bill, when he knows there are other necessary defendants in the cause, or otherwise unnecessarily fails to expedite the suit, the court will, on motion of the defendant, even before the answer is filed, dissolve the injunction because of such unreasonable delay caused by the plaintiff's negligence in preparing his case. But if the defendant, whose judgment is enjoined, acquiesce in it for years by making no motion to dissolve such injunction, if he then moves to dissolve it, even after the filing of his answer years after the filing of the bill, the court, because of his long delay, ought to refuse to dissolve the injunction on his motion, but ought to continue it till the hearing, unless the evidence to sustain the dissolution is such as to satisfy the court that the case cannot be changed by any proof which the plaintiff can produce; such, for instance, as a judgment or decree estopping the plaintiff from proving the material allegation in his bill. But in such case the court should require the plaintiff to expedite his cause, and as promptly as possible have it matured at rules and set for hearing, under the penalty, in case of failure, of a dissolution of his injunction on motion, before the cause is ready for hearing, because of such unreasonable delay. McCoy v. McCoy, 29 W. Va. 794, 2 S. E. Rep. 809.

An injunction was awarded against a common-law judgment on the ground of newly-discovered evidence. It appeared that the plaintiff suspected the existence of the ground of defence sought to be introduced before the rendition of judgment, and knew of two witnesses by whom it could be proved, if it did exist, but he failed to have these witnesses summoned, and consented to the judgment, upon the agreement that the plaintiff would not enforce the execution for a year. *Held*, that the injunction should be dissolved at the plaintiff's costs. Hevener v. McClung, 22 W. Va. 81.

4. NONADMISSION OF ATTORNEY PROSECUTING INJUNCTION PROCEEDINGS.—The fact that the attorney who prepared the complainant's bill of injunction had not been admitted to practice in the court where the injunction was granted is no ground for the dissolution of the injunction and dismissal of the bill. Peterson v. Parriott, 4 W. Va. 42.

5. INVALIDITY OF AWARD.—Where an award is held invalid, an injunction depending on it must be dissolved. Tate v. Vance, 27 Gratt. 571.

6. MULTIFARIOUSNESS OF BILL.—If a bill, in part a bill of injunction, is multifarious, that objection cannot be made on a motion to dissolve the injunction. It must be made at the hearing. Beall v. Shaull, 18 W. Va. 258; Shirley v. Long, 6 Rand. 764.

7. DEFECT OF PARTIES.—A motion to be admitted as a defendant is not regular. But in case of an injunction, if it appear that the person making the motion is interested in the subject of controversy, the court will order the injunction to be dissolved, unless the plaintiff will amend his bill, and make him a defendant. Harrison v. Morton, 4 H. & M. 483.

C. RIGHT TO DISSOLUTION.

1. DISCRETION OF COURT.—The dissolution of injunctions, and applications to hear or to postpone the hearing of motions to dissolve them, are largely matters of judicial discretion, and the appellate court will not disturb the action of the court below where it appears that the discretion has been soundly exercised, or where the contrary does not appear in the record. Ingles v. Straus, 91 Va. 209, 21 S. E. Rep. 490.

It rests in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it to a final hearing on the merits, especially where fraud is the gravamen of the bill, or where dissolution would result in greater injury than continuance till hearing. Jenkins v. Waller, 80 Va. 668.

2. LACHES IN SEEKING DISSOLUTION.—Where an injunction has been granted against a defendant, substantially in accordance with his answer, and the order has been acquiesced in by him for several years, and the practice it was intended to prevent has been abandoned, it is not error to refuse to dissolve it. Balto., etc., Co. v. Williams, 94 Va. 422, 26 S. E. Rep. 841.

D. DISSOLUTION IN VACATION.—Upon a motion in vacation to dissolve an injunction, it is error for the court to proceed to hear the case on its merits, and dismiss the bill, in the absence of the consent of record required by the statute. The injunction may be dissolved in vacation, but the hearing on the merits should stand over until the term. Mount v. Radford Trust Co., 93 Va. 427, 25 S. E. Rep. 244, 5 Am. & Eng. Corp. Cas., N. S., 92.

Where a cause has been removed and received by the clerk, the defendant may, upon notice, in vacation before the next term of the court to which the cause is removed, move the judge to dissolve the injunction which had been granted. Muller v. Bayly, 21 Gratt. 521.

The plaintiff in an injunction cannot deprive the defendant of the benefit of his answer, upon the hearing in vacation of a motion to dissolve, by filing exceptions thereto; for the motion and the exceptions may be taken up and heard at the same time and in vacation. Sandusky v. Faris (W. Va.), 38 S. E. Rep. 563.

Upon the hearing in vacation of a motion to dissolve an injunction, the judge may examine the bill, answer and exceptions thereto, and if the exceptions were not well taken, may disregard them. Sandusky v. Faris (W. Va.), 38 S. E. Rep. 563.

It is irregular to dissolve an injunction in court with a direction that the order shall not go out, and then in vacation to direct that the order shall go out. Randolph v. Randolph, 6 Rand. 194.

Where an injunction has been obtained in vacation, the defendant may file his answer and move the court to dissolve the injunction, without filing the answer either at rules or in term. Goddin v. Vaughn, 14 Gratt. 102.

E. STAGE AT WHICH DISSOLUTION MAY BE HAD.

Before Answer.—As a general rule, subject to some exceptions, an injunction, properly granted, will not be dissolved until the defendant has answered. Norfolk, etc., R. Co. v. Old Dominion Baggage Co., 97 Va. 89, 33 S. E. Rep. 385, 5 Va. Law Reg. 256.

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It is error to dissolve an injunction where the facts charged in the bill, if true, are sufficient to sustain the injunction, unless an answer has been filed denying the facts charged. Peterson v. Parriott, 4 W. Va. 42.

A preliminary injunction may be dissolved on motion before answer. Russell v. Dickeschied, 24 W. Va. 61.

Before Process Served on Defendant.—An injunction may be dissolved on motion before process is served on the defendant. Shields v. McClung, 6 W. Va. 79.

Before Final Hearing.—Where an injunction was granted on a bill alleging that the respondents were asserting ownership to land claimed to be paid for by the complainant, and the documentary evidence tended to establish the fact of payment, though denied by the respondents, it was error to dissolve the injunction before the cause was matured and came on for final hearing. Gray v. Overstreet, 7 Gratt. 346.

Where no motion is made to dissolve an injunction until the cause is regularly set for hearing on the court docket, the hearing shall be final. Byrne v. Lyle, 1 H. & M. 7.

F. MOTION.

1. NECESSITY FOR—WANT OF JURISDICTION.—Where the bill does not state a proper case for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings. Hudson v. Kline, 9 Gratt. 379; Morehead v. De Ford, 6 W. Va. 816.

2. NOTICE OF MOTION.—Where a motion to dissolve an injunction is made in open court in term time, it is not necessary to give the opposite party notice in writing of the intention to make such motion. Kester v. Alexander (W. Va.), 34 S. E. Rep. 819; White Sulphur Springs Co. v. Robinson, 3 W. Va. 542.

Where a bill of injunction is still at rules, not on the court docket, because not matured for hearing, the defendant may move the court to dissolve the injunction; but the opposite party, who does not appear, must have reasonable notice of such motion. Fadely v. Tomlinson, 41 W. Va. 606, 24 S. E. Rep. 645.

3. CONTINUANCE.—It is a general rule not to continue a motion to dissolve an injunction, unless from some very great necessity, because the court is always open to grant, and, of course, to reinstate, an injunction whenever it shall appear proper to do so; and because, too, the plaintiff should always be ready to prove his bill. Steelsmith v. Fisher Oil Co. (W. Va.), 35 S. E. Rep. 15; Kester v. Alexander (W. Va.), 34 S. E. Rep. 819; Pithole Creek Petroleum Co. v. Rittenhouse, 12 W. Va. 813; Arbuckle v. McClanahan, 6 W. Va. 107; Emmons v. Pidcock, 93 Va. 146, 24 S. E. Rep. 905; Ingles v. Straus, 91 Va. 209, 21 S. E. Rep. 490; Radford v. Innes, 1 H. & M. 7. See also, Tiffany v. Kent, 2 Gratt. 231.

On a motion to dissolve an injunction restraining a sale under a deed of trust, it is error to deny a continuance asked for by the plaintiff to enable him to obtain additional material evidence to prove that the notice of sale was defective, where he has been unable to obtain such evidence by the use of due diligence. Vaught v. Rider, 83 Va. 659, 3 S. E. Rep. 293.

4. CANNOT BE MADE BY PARTY IN CONTEMPT.—A court of equity will not dissolve an injunction upon the motion of a party in contempt for disobedience of an injunction in another suit restraining the same act as that in question. Fadely v. Tomlinson, 41 W. Va. 606, 24 S. E. Rep. 645.

5. MOVING PAPERS.—It is a correct course of proceeding, for a chancellor to dissolve an injunction upon the defendant's tendering a deed to the plaintiff, or filing it with the papers, without requiring it to be approved by the court, before the injunction shall be dissolved. M'Mahon v. Spangler, 4 Rand. 51.

Sufficiency of Answer Alone.—An injunction will be dissolved at the hearing of a motion to dissolve it on the bill and answer sworn to, where the answer fully, fairly, plainly, distinctly and positively denies the allegations of the bill on which the injunction was granted, and the material allegations of the bill are not supported by proof other than the affidavit verifying the truth of its allegations. Wise v. Lamb, 9 Gratt. 294; Hogan v. Duke, 20 Gratt. 244; Hughes v. Tinsley, 80 Va. 259; Moore v. Steelman, 80 Va. 331; Spencer v. Jones, 85 Va. 172, 7 S. E. Rep. 180; Motley v. Frank, 87 Va. 432, 13 S. E. Rep. 26; Ingles v. Straus, 91 Va. 209, 21 S. E. Rep. 490; Thomas v. Rowe (Va.), 22 S. E. Rep. 157; Rosset v. Greer, 3 W. Va. 1; Arbuckle v. McClanahan, 6 W. Va. 101; Hayzlett v. McMillan, 11 W. Va. 464; Shonk v. Knight, 12 W. Va. 667; Cox v. Douglass, 20 W. Va. 175; Livesay v. Feamster, 21 W. Va. 83; Mason City, etc., Co. v. Mason, 23 W. Va. 211; Schoonover v. Bright, 24 W. Va. 68; Bryant v. Groves, 42 W. Va. 10, 24 S. E. Rep. 605; Bronson v. Vaughan, 44 W. Va. 406, 29 S. E. Rep. 1022; Kester v. Alexander (W. Va.), 34 S. E. Rep. 819; Eakin v. Hawkins (W. Va.), 37 S. E. Rep. 622; Steelsmith v. Fisher Oil Co. (W. Va.), 35 S. E. Rep. 15.

Where a motion to dissolve an injunction comes up on the bill, answer and depositions used as affidavits, and the evidence does not show probable cause from which it may reasonably be inferred that the plaintiff will be able to make out his case upon the final hearing, the injunction should be dissolved. But if the complainant's case is supported by evidence regularly taken in the cause in his behalf, and on which he intends to rely on the final hearing, the injunction should not be dissolved on the bill and answer alone, but should be ordered to stand over to the hearing. Ingles v. Straus, 91 Va. 209, 21 S. E. Rep. 490.

Where an answer to a bill to enjoin a sale of land by the trustee denies all the grounds of equity stated in the bill, and there is no proof to sustain them the court may dissolve the injunction and dismiss the bill, or it may dissolve the injunction and have the sale made and proceeds distributed under its direction. Hogan v. Duke, 20 Gratt. 244.

Where an answer to a bill for an injunction denies all its equities and is sworn to, it is entitled to the weight of an affidavit, under Va. Code 1887, § 3281, and, on a motion to dissolve the injunction, heard on the bill and answer, the injunction should be dissolved. Thomas v. Rowe (Va.), 22 S. E. Rep. 157.

A judge in vacation may dissolve an injunction although certain formal defendants have not answered, where the substantial defendants have denied all the material allegations of the bill, and no proof has been taken to sustain such allegations. Livesay v. Feamster, 21 W. Va. 83.

An injunction should be dissolved on motion where the answer denies all the equities of the bill: and an answer may be received for such purpose in vacation. Hayzlett v. McMillan, 11 W. Va. 464.

Where a cause is regularly heard on the bill, answer (the answer denying the material allegations of the bill), general replication, exhibits, and upon a motion to dissolve an injunction, it is error in the

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court, in the absence of evidence tending to prove the material allegations of the bill, to refuse to dissolve the injunction and refer the cause to a commissioner to take the account prayed in the bill. Arbuckle v. McClanahan, 6 W. Va. 101.

Where the court erred, as in the case above stated, it is not error in the judge of the court afterwards upon proper notice and motion in vacation to dissolve the injunction, before the report of the commissioner is made, if the plaintiff, at the hearing of the motion to dissolve, still fails to present evidence tending to prove the material allegations of his bill; and in such case it is not error for the court to dissolve the injunction, before disposing of a report of a commissioner or exceptions thereto, or exceptions of the plaintiff to dispositions of the defendant. Arbuckle v. McClanahan, 6 W. Va. 101.

The debtor in a trust deed obtained an injunction on the allegation that in the lifetime of his creditor they settled, and that the trust deed debt was settled. The answer of the administrator of the creditor denied the allegation on oath and called for proof. The plaintiff failed to produce satisfactory evidence of his settlement. *Held*, that the bill should be dismissed. Flick v. Fridley, 83 Va. 777, 3 S. E. Rep. 880.

Where a motion to dissolve an injunction is heard upon the bill, answer and affidavits filed, the answer denying the material allegations of the bill, it is not error to consider at the same time, and refuse a petition for a rule against the defendant for contempt for violation of the injunction order, and to enter such refusal in the same order dissolving the injunction. Steelsmith v. Fisher Oil Co. (W. Va.), 35 S. E. Rep. 15.

Where an injunction is awarded under W. Va. Code, ch. 32, § 18, as amended by Acts 1897, ch. 40, the state must prove its case, or, on answer denying the allegations of the bill, a motion to dissolve must be sustained. State v. Reymann (W. Va.), 37 S. E. Rep. 591.

In a bill by a married woman to enjoin the sale of land belonging to her separate estate, under a deed of trust given to secure a note executed jointly with her husband, it was alleged that she was responsible for only half of the sum so secured and that she did not execute the deed of trust willingly but was forced to do so. The answer denied all the allegations of the bill. *Held*, that the injunction was properly dissolved, there being no proof or offer to prove the allegations of the bill. Spencer v. Jones, 85 Va. 172, 7 S. E. Rep. 180.

A bill was filed to enjoin the sale of property conveyed to secure a debt alleged to be usurious. The plaintiff averred that he expected to make full proof of his allegation, and disclaimed all benefits of any discovery from the defendant. The injunction was awarded. But afterwards the defendant filed an answer denying the allegation of the bill, and the plaintiff relied on the testimony of a single witness, unsustained by any corroborating circumstances. *Held*, that the injunction should be dissolved and the bill dismissed. Thornton v. Gordon, 2 Rob. 719.

Same—Answer Setting Up New Matter of Defence.—Where the equity of a bill of injunction is not denied, but a new equity is set up by the answer, to repel or avoid it, such answer, read as an affidavit on a motion to dissolve, is not sufficient, of itself, to support the motion. Noyes v. Vickers, 39 W. Va. 30, 19 S. E. Rep. 429. Where the bill sets forth a contract and the plaintiff's construction thereof, and the answer admits the contract and claims under it, but denies the correctness of the plaintiff's construction, this is not such a denial as, *per se*, entitles the defendant to a dissolution of the pending injunction. Hughes v. Tinsley, 80 Va. 259.

Same—Where Bill Waives Oath.—Although the complainant, in a bill for an injunction, waives an answer under oath from the defendant, yet such answer, denying the equities of the bill, must, on a motion to dissolve the injunction, be treated as a denial of the complainant's case. Ingles v. Straus, 91 Va. 209, 21 S. E. Rep. 490.

Same—Where Material Allegation in Bill is Not Denied.—Upon a motion to dissolve an injunction, a material allegation in the bill, which is not noticed in the answer, must be taken as true, and no other proof will be required. Randolph v. Randolph, 6 Rand. 194.

6. EVIDENCE.—On a motion to dissolve an injunction the defendant is not required to invalidate by full proof the allegations of the bill, but the burden of proving such allegations rests on the plaintiff. It is sufficient for the defendant to show that the evidence of the plaintiff is entitled to no credit. North v. Perrow, 4 Rand. 1.

Where a motion to dissolve an injunction is heard on the bill, answer and affidavits, and the evidence does not show probable cause to believe that the complainant will be able to make out his case upon the final hearing, the injunction should be dissolved. But if the complainant's case is supported by evidence regularly taken in the cause in his behalf, and on which he intends to rely on the final hearing, the injunction should not be dissolved on the bill and answer alone, but should be ordered to stand over to the hearing. Ingles v. Straus, 91 Va. 209, 21 S. E. Rep. 490.

On a motion to dissolve an injunction before the answer is filed, the allegations in the bill must be taken as true. Peatross v. McLaughlin, 6 Gratt. 64; Ludington v. Tiffany, 6 W. Va. 11.

Where, upon a motion to dissolve an injunction, the appellee declines to answer the appellant's bill, he must be regarded as admitting the same to be true. Peatross v. McLaughlin, 6 Gratt. 64.

An administrator who enjoins a judgment against himself in his representative character on the ground that he is a creditor of the estate of the deceased must be prepared, on the motion to dissolve, to show from his account that he is a creditor. Deloney v. Hutcheson, 2 Rand. 183.

It is error to dissolve an injunction on affidavits merely when by the pleadings the burden of proof is on the defendant moving such dissolution, as the plaintiff has the right to cross-examine the defendant's witnesses and rebut their testimony. Grobe v. Roup, 46 W. Va. 488, 33 S. E. Rep. 261.

Upon a motion to dissolve an injunction awarded on a bill filed to enjoin the sale of personal property under executions levied thereon, the court of necessity must consider the executions, and where, upon the evidence in the cause, it appears that they were considered, they are properly copied into the record of the cause. Ford v. Watts, 95 Va. 192, 28 S. E. Rep. 179.

G. ORDER OF DISSOLUTION—NECESSITY.—Where an injunction is awarded until the coming in of the answer, it will not be dissolved by the coming in of the answer, but will remain to await the order of the court. Turner v. Scott, 5 Rand. 332. See, however, Beal v. Gibson, 4 H. & M. 481.

An injunction may be dissolved by necessary im-

plication, as, for example, where the enforcement of a deed of trust is restrained, and the collection of the debt secured enjoined, by the court below, and the appellate court, reversing on that point, decrees the debt secured to be valid and subsisting, and remands the cause with directions to collect under the deeds of trust and apply proceeds in a given order. Atkinson v. Beckett, 36 W. Va. 438, 15 S. E. Rep. 179.

The reversal of a final decree may by necessary implication dissolve an injunction. Atkinson v. Beckett, 36 W. Va. 438, 15 S. E. Rep. 179.

H. EFFECT OF DISSOLUTION.—An order dissolving an injunction, based on the merits of the case, where the only relief sought by the bill is such injunction, is, as regards finality, such a decision as will sustain the defence of *res judicata*. Gallaher v. City of Moundsville, 34 W. Va. 730, 12 S. E. Rep. 859.

Dismissal of Bill.—Where the bill is not merely a bill of injunction, but is filed for other objects, to which the injunction is auxiliary, the bill should not be dismissed, as a matter of course, on the dissolution of the injunction. Noyes v. Vickers, 39 W. Va. 30, 19 S. E. Rep. 429.

On the dissolution of an injunction, the complainant has a right to continue his cause as an original suit; therefore, if the chancellor, without his consent, dismisses the bill at the same time that he dissolves the injunction, it is error. Blow v. Taylor, 4 H. & M. 159.

Where there is no doubt as to the balance due upon a bond and the injunction against the sale of the land by the trustee might have been dissolved and the bill dismissed, the court may, nevertheless, retain the cause and have the sale made by the trustee under its direction. Michie v. Jeffries, 21 Gratt. 334; Crenshaw v. Seigfried, 24 Gratt. 272. See also, Terry v. Fitzgerald, 32 Gratt. 843.

Virginia Code 1873, § 14, providing that where an injunction is wholly dissolved the bill shall be dismissed at the next term, applies only to a pure bill of injunction, and not where the bill prays for other relief besides the injunction. Therefore, pending the litigation for the subjection of the land to a sale for the purchase money, it it not error to appoint a receiver to rent the land, and, if necessary, to collect the bond given by the vendee for the rent. Adkins v. Edwards, 83 Va. 300, 2 S. E. Rep. 435; Pulliam v. Winston, 5 Leigh 324.

The act passed the 20th of January, 1804, providing that, in all cases where hereafter any injunction shall be wholly dissolved, the bill shall stand dismissed of course, with costs, unless at the next term sufficient cause shall be shown against it, does not apply to bills filed before the act took effect. Gallego v. Quesnall, 1 H. & M. 205.

Under the statute, upon the dissolution of an injunction, the bill should be dismissed of course, unless some ground for retaining the cause be shown at the next term. Anderson v. Ellington, 2 H. & M. 16.

The third section of the act of January 20, 1804, concerning proceedings in chancery, which provides for the dismissal of a bill on dissolving an injunction, does apply to cases in which the bill claims other relief besides injunction. Hough v. Shreeve, 4 Munf. 490; Singleton v. Lewis, 6 Munf. 397; Pulliam v. Winston, 5 Leigh 324.

After an injunction has been wholly dissolved, if the cause be set for hearing on the motion of the defendant in equity, he cannot take advantage of the circumstance that the bill should have been dismissed under the statute. Franklin v. Wilkinson, 3 Munf. 112.

Where an injunction is wholly dissolved in a county or corporation court, the bill is not to stand dismissed until two terms succeeding have been held in such county or corporation; and the appellate court will not presume, from lapse of time, that two such terms have been held; but this must expressly appear in the transcript of the record Pitts v. Tidwell, 3 Munf. 88.

Where the assignor and assignee of a bond are made defendants to a bill exhibited by the obligor for an injunction and general relief, the obligor alleging that he paid the money to the assignor without notice of the assignment, if that allegation is afterwards disproved, the injunction dissolved and the bill dismissed as to the assignee, the cause ought yet to be retained and further proceeded in to give the complainant relief against the assignor. Ruffners v. Barrett, 6 Munf. 207.

Same—Discretion of Court.—Upon the dissolution of an injunction to a sale under a deed of trust, it is within the discretion of the court either to dismiss the bill, or retain it for the purpose of administering the trust. If there are conflicting interests between the parties as to their respective rights and interests they should be decided, and a decree made for the sale of the property and the proper application of the proceeds. But whether the discretion vested in the court has been soundly exercised or not depends upon the facts and circumstances of the particular case. Anderson v. Phlegar, 93 Va. 415, 25 S. E. Rep. 107.

Same—Personal Decree.—Where, upon a bill filed to enjoin a void judgment, the plaintiff is denied all relief because he has an adequate remedy at law, it is error to enter a personal decree against the plaintiff for the amount of the judgment enjoined, upon the dissolution of the injunction. In such case, the only power possessed by the court is to dissolve the injunction and dismiss the bill with costs. Kanawha, etc., Ry. Co. v. Ryan, 31 W. Va. 364, 6 S. E. Rep. 924.

Should the court, after having granted an injunction against the enforcement of a judgment alleged to have been satisfied, dissolve the same at a final hearing, it ought not to enter a personal decree against the plaintiff for the amount of the original judgment enjoined, but should simply dissolve the injunction, and dismiss the bill, with costs, and without prejudice to the plaintiff as to his defence at law against the enforcement of the execution. Howell v. Thomason, 34 W. Va. 794, 12 S. E. Rep. 1088.

Same—Res Judicata.—A decree dismissing a bill generally, without any reservation to the plaintiff to sue thereafter, is conclusive between the parties, and it is error to dismiss an injunction bill on motion for failure to prosecute alone, without adding "without prejudice to such other suit as the plaintiff may see proper to institute." Buskirk v. Chafin (W. Va.), 37 S. E. Rep. 552.

I. EFFECT OF REFUSAL TO DISSOLVE.—A refusal by a court to dissolve an injunction is equivalent to holding that upon full notice and argument the injunction should have been granted. Bristow v. Home Building Co., 91 Va. 18, 20 S. E. Rep. 947.

Although notice should be given to the adverse party of an application for an injunction and the appointment of a receiver, except in cases of obvious necessity to prevent a failure of justice, yet, if upon

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a motion to dissolve the injunction and discharge the receiver, the court sustains its original order, this is equivalent to holding that, upon full notice and argument, the injunction ought to have been granted, and, on appeal, the decree awarding such injunction and appointing a receiver will not be reversed for the want of such notice in the first instance. Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. Rep. 946.

J. DAMAGES AND COSTS.—The damages on the dissolution of an injunction to a judgment become, as to the party obtaining such damages, a part of the judgment, and are embraced in the lien of the judgment upon the equity of redemption. Michaux v. Brown, 10 Gratt. 612.

Where there is an injunction to a judgment against two or more persons, and only one signs the injunction bond or applies for the injunction, upon dissolution there should not be an award of execution for damages and costs against all the judgment debtors, but only against those signing the bond or asking the injunction. Graham v. Citizens' Nat. Bank, 45 W. Va. 701, 32 S. E. Rep. 245.

Where, on a bill to enjoin a judgment at law, it appears, on the final hearing, that the judgment ought not to be enjoined, and that the plaintiff in equity has had credit for a sum to which he is not entitled, the court should not only dissolve the injunction and dismiss the bill, but should decree that the plaintiff pay that sum to the defendant. Todd v. Bowyer, 1 Munf. 447.

Where, pending an injunction to a judgment for money, the judgment creditor dies, and there is a revival in the name of his administrator of the suit in equity, but not of the judgment at law, it is not regular, though the object be to avoid the delay that would take place after a dissolution of the injunction in reviving the judgment, to make a decree in the suit in equity for the money which will be payable to the creditor upon such dissolution. The court of equity should dissolve or perpetuate the injunction, or perpetuate it in part and dissolve it for the balance, and it may in the latter case direct that no damages shall be paid by the complainant, but in no case should a decree be made for the damages payable to the creditors on the dissolution. Medley v. Pannill, 1 Rob. 63.

Where a stranger to a judgment obtains an injunction against it, and the injunction is dissolved, he is as much liable to pay the ten per cent. damages prescribed by statute as a party to the judgment. Claytor v. Anthony, 15 Gratt. 518.

Order to Pay Damages on Finding of Jury.—In a suit by a property owner against an internal improvement company to enjoin it from prosecuting a work that will irreparably injure his property, where the court has directed an issue of *quantum damnificatus*, it is error, upon the finding of the jury to decree the amount so found against the company in such form that execution can be issued upon the foot of the decree. The order should be that, when the company pays to the owner, or deposits in court, as the case may be, the sum found by the jury, the injunction shall be wholly dissolved, but until that time it is continued in full force and effect. Ohio River R. Co. v. Ward, 35 W. Va. 481, 14 S. E. Rep. 142; Mason v. Bridge Co., 20 W. Va. 243.

Computation of Damages.—Upon the dissolution of an injunction on a judgment, the damages for retarding execution by the injunction, should be computed on the aggregate of principal, interest and costs, appearing due on the judgment at the date of the injunction. And the damages should be ascertained, and the precept to levy them inserted, in the body of the execution. Washington v. Parks, 6 Leigh 581.

Where an injunction was dissolved, and on appeal the decree was affirmed, it was held that ten per cent. damages should be computed from the time the injunction was granted to the date of the dissolution thereof in the court below, but not for the time it was pending in the appellate court. Jeter v. Langhorne, 5 Gratt. 193.

K. ABATEMENT BY DEATH OF PARTIES.

Death of Plaintiff.—Where a complainant in a bill of injunctions dies after the answer has been filed and before the decision of the cause, an order may be obtained on a motion of the defendant, that, unless the representatives of the complainant shall appear within a certain time fixed by the court and cause the suit to be revived in their names, the injunction shall stand dissolved. Carter v. Washington, 1 H. & M. 203.

Four plaintiffs united in the same bill for an injunction against five defendants to stay proceedings on four several judgments against them respectively, on grounds of equity common to all. The injunction was awarded, and, pending the suit, two of the plaintiffs and three of the defendants died. The chancellor ordered, that, unless the living plaintiffs and the representatives of the deceased plaintiffs should revive the injunction in the name of the representatives of the deceased plaintiffs against those of the deceased defendants, on or before a certain day, the injunction should stand dissolved. *Held*, that the order was irregular and erroneous. McKays v. Hite, 2 Leigh 145.

A judgment suspended by an injunction may be revived on the death of either the plaintiff or defendant; and the injunction operates on the judgment or *scire facias*, prohibiting the issue of execution thereon. Richardson v. Prince George, 11 Gratt. 190.

Death of Defendant.—Where the defendant dies after filing his answer to a bill of injunction and before the decision of the cause, an order may be obtained, on the motion of his representatives, that, unless the complainant, within a certain time fixed by the court, shall revive the suit against them, the injunction shall stand dissolved. Kenner v. Hord, 1 H. & M. 204.

Where an injunction has abated on account of the death of the defendant, the court will make a rule that it shall stand dissolved, unless the complainant shall revive it against the representatives of the defendant within a given time after they shall have qualified. White v. Fitzhugh, 1 H. & M. 1.

Where a judgment against a principal and his surety is enjoined by them, and, pending the suit, the surety dies, the injunction should not be dissolved without a rule for his representative to revive the suit in his name. Jackson v. Arnold, 4 Rand. 195.

XVI. REINSTATEMENT OF INJUNCTION.

A court of chancery is always open to reinstate, as well as to grant an injunction. Radford v. Innes, 1 H. & M. 8.

A demurrer to an amended bill praying for the reinstatement of an injunction which had been dissolved was overruled and the bill sustained, and the court refused to reinstate the injunction which had

been properly dissolved. *Held*, that the court did not err in refusing to reinstate the injunction, as the questions arising from the allegations of the bill had never been presented to the court. Spencer v. Jones, 85 Va. 172, 7 S. E. Rep. 180.

Where an injunction is awarded until the coming in of the answer, it is of course at an end upon the filing of the answer; but the plaintiff may move to reinstate it. Beal v. Gibson, 4 H. & M. 481. See Turner v. Scott, 5 Rand. 332.

A motion to reinstate an injunction, on additional evidence tendered by the complainant, is in the nature of an original application, and, if refused, the complainant may apply to any one of the judges of the court of appeals. Gilliam v. Allen, 1 Rand. 414; Webster v. Couch, 6 Rand. 519.

XVII. SUCCESSIVE INJUNCTIONS.

Where an injunction is dissolved, but the bill is not dismissed, its pendency in a county court is no bar to the complainant's obtaining another injunction in the superior court of chancery. Roberts v. Jordans, 3 Munf. 488.

Where a bill for an injunction against a judgment at law has been dismissed, and an appeal taken, it is irregular to apply to the appellate court, pending the appeal, for a new injunction to stay proceedings on the same judgment. Graves v. Graves, 2 H. & M. 23.

XVIII. APPEALS.

A. FROM ORDER REFUSING TO AWARD INJUNCTION.—Where a judge of a circuit court refuses to award an injunction, the remedy is by application, accompanied by the original papers and the order of refusal, to a judge of the supreme court, who may review and reverse the action of the circuit court judge, and award the injunction; which injunction, so awarded, it is the province of the circuit court judge to enforce and restrain any disobedience thereto, by attachment or other proper process. Nor does it matter that the injunction in question is the second or supplemental bill for an injunction, since a motion to reinstate the injunction on additional evidence, is in the nature of an original application for an injunction; and where the circuit judge refuses to enforce obedience to such injunction so awarded by a judge of the supreme court, the writ of mandamus will be issued. Wilder v. Kelley, Judge, 88 Va. 274, 13 S. E. Rep. 483.

B. FROM ORDER OVERRULING MOTION TO DISSOLVE.—The exercise of a sound discretion without abuse by a circuit judge in overruling a motion in vacation to dissolve an injunction is not reviewable and reversable action. McEldowney v. Lowther (W. Va.), 38 S. E. Rep. 644.

Where the principles of a cause are adjudicated in an order rejecting a motion to dissolve an injunction, an appeal may be refused, if the court or judge to whom the petition for appeal is presented, deems it proper that the cause should be proceeded in further in the court below before an appeal is allowed therein. And if, in such case, an appeal is allowed, it may be dismissed as prematurely allowed. B. & O. R. Co. v. Wheeling, 13 Gratt. 40.

An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted. Talley v. Tyree, 2 Rob. 500; Lomax v. Picot, 2 Rand. 247.

Where a bill of injunction is filed in the clerk's office and process issues thereon, it is a case pending in court within the letter and spirit of chapter 136 of the Code of West Virginia, and an appeal will lie from an order of a judge of a circuit court made in vacation in relation thereto. Hutchinson v. Landcraft, 4 W. Va. 312.

An order which refuses to dissolve an injunction and to discharge a receiver decides, in effect, that the property held by the receiver is, for the present at least, in proper hands, and to this extent it adjudicates the principles of the case. From such order an appeal may be taken. Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. Rep. 947.

A refusal to dissolve an injunction appointing a receiver is an appealable order, although the causes in which the question arises are still at rules. Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. Rep. 947.

C. FROM ORDER DISSOLVING INJUNCTION.—An order dissolving an injunction is reviewable by appeal under Va. Code 1887, § 3454, and a motion may be made for the reinstatement of the injunction, and an appeal taken from the refusal to reinstate: but where the lower court refuses the injunction in the first place, the remedy is not by appeal, but by application to a judge of the supreme court accompanied by the original papers and the order of refusal. Va. Code 1887, § 3436; Fredenheim v. Rohr, 87 Va. 764, 13 S. E. Rep. 193.

The W. Va. statute, Acts W. Va. 1872-3, ch. 17, § 1, allowing an appeal from a decree or order dissolving an injunction, did not authorize an appeal from an order granting or refusing to dissolve an injunction, and an appeal from such order should be dismissed as improvidently granted, notwithstanding the fact that a statute was subsequently enacted authorizing an appeal from such order. Robrecht v. Wharton, 29 W. Va. 746, 2 S. E. Rep. 793.

Where one has taken forcible possession of premises, and an injunction is granted prohibiting him to do anything further, and to permit the plaintiff to cultivate the land, this is not an order "changing the possession of property," within the meaning of the statute, Acts W. Va. 1872-3, ch. 17, § 1, which provides that an appeal shall be allowed "in any case in chancery, wherein there is a decree or order dissolving, or refusing to dissolve, an injunction, or requiring * * * the possession or title of property to be changed." Robrecht v. Wharton, 29 W. Va. 746, 2 S. E. Rep. 793.

Under Va. Code 1887, §§ 3454, 3455, no appeal lies from a decree dissolving an injunction, where the only question involved is whether a partner waived his co-partner's homestead exemption on executing a note for less than $500. Shoemaker v. Bowman, 98 Va. 688, 37 S. E. Rep. 278.

Under the act of January 27, 1810, a judge of the superior court of chancery was not empowered to grant an appeal from an order for the dissolution of an injunction. Spencer v. Smith, 4 Munf. 323.

From an order overruling an injunction and adjudicating the principles of the cause, an appeal lies. Va. Code 1873, ch. 178, § 2; Kahn v. Kerngood, 80 Va. 342.

The order of the lower court failed to show to which of two injunctions it referred,—one enjoining a sale under a trust made to secure purchase money, and the other enjoining an attachment in another court to collect the purchase money. *Held*, that a dissolution of the first injunction carried with it that of the second, though granted on a supplemental bill reciting grounds other than those set forth in

the original bill. Thompson v. Edwards, 3 W. Va. 659.

Whether an act of assembly authorizing the establishment of public roads, which allows appeals to this court on questions of law only, is constitutional, does not arise on an appeal from a decree dissolving an injunction to proceedings under the act, as it is not an appeal from any judgment pronounced in condemnation proceedings under the act. Painter v. St. Clair, 98 Va. 85, 34 S. E. Rep. 989.

If proceedings at law are enjoined by a court of chancery and the injunction is afterwards dissolved, and, on appeal, the order of dissolution is wholly affirmed, an execution may be sued out on the judgment at law, before the decree of affirmance is entered up in the court of chancery. Epes v. Dudley, 4 Leigh 145.

When a party has obtained an injunction from the court of chancery to a judgment at law, which is afterwards dissolved, and he appeals to the court of appeals, he cannot be required to give security for the amount of the judgment enjoined, but only for such costs as may be awarded against him by the appellate court. Eppes v. Thurman, 4 Rand. 384.

A party appealing from an order dissolving an injunction can only be required to give security to perform the decree of the inferior court, and to pay the costs and damages awarded in the appellate court, if the decree shall be affirmed. *Quære*, whether, where bond and security have been given to perform the decree of the court below, and further security is required in the appellate court, which the party cannot give, the surety in the first bond is discharged. M'Kay v. Hite, 4 Rand. 564.

D. FROM ORDER CONTINUING INJUNCTION.—Although the answer plainly and positively denies the allegations of the bill, yet, if the facts and circumstances shown by the pleadings, exhibits and affidavits are strongly presumptive in favor of the plaintiff's equity, it is not appealable error for the circuit court to continue an ancillary injunction, awarded for the purpose of preserving the status of property, until the final hearing. Robrecht v. Robrecht, 46 W. Va. 738, 34 S. E. Rep. 801.

No appeal lies from a decree overruling a demurrer, giving the defendant leave to answer, and continuing an injunction in force until the further order of the court, where there was no motion to dissolve, and the cause was heard solely upon the demurrer to the bill. Norfolk, etc., Ry. Co. v. Old Dom. Baggage Co., 97 Va. 89, 33 S. E. Rep. 385.

E. FROM ORDER REINSTATING INJUNCTION AND DIRECTING NEW TRIAL.—An order of the superior court of chancery reinstating an injunction and directing a new trial of an issue at law is not an interlocutory decree from which an appeal can be allowed. Price v. Strange, 2 H. & M. 615.

F. USELESS APPEALS NOT GRANTED.—Upon a pure bill of injunction to enjoin the performance of certain acts, but containing no prayer for any mandatory acts to be performed, where the injunction as prayed has been granted, without any mandatory provision, if it appear that the injunction has been dissolved by the trial court, and pending an appeal (without supersedeas) from the order of dissolution the acts enjoined have been performed, the court of appeals will not disturb the action of the trial court, as a reversal would be unavailing to the complainant even if the decree were wrong. Reid Bros. & Co. v. Norfolk City R. Co., 94 Va. 117, 26 S. E. Rep. 423.

G. EVIDENCE.—On an appeal from a preliminary order of injunction made by a judge of the circuit court in vacation, the appellate court will not consider any depositions in the cause taken by the appellant subsequent to the time such order of injunction took effect. Freshwater v. Pittsburgh, etc., R. Co., 6 W. Va. 503.

XIX. WRONGFUL INJUNCTION.

An action against a defendant for maliciously and without probable cause suing out an injunction against a plaintiff whereby the operation of his mill was suspended, is barred after one year from the dissolution of the injunction. In case of death, the cause of action would not survive. The damages allowed to be recovered by or against a personal representative under § 2655 of the Code are direct damages to property and not those which are merely consequent upon a wrongful act to the person only. Mumpower v. City of Bristol, 94 Va. 737, 27 S. E. Rep. 581.

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528 *Warwick & Barksdale v. Mayo, Mayor.

April Term, 1860, Richmond.

(Absent DANIEL, J.*)

1. **Prohibition—Variance between Affidavit and Declaration—Demurrer.**†—In prohibition, a variance between the affidavit and the declaration, not being a matter in bar of the proceeding, cannot be taken advantage of by demurrer to the declaration.
2. **Jurisdiction of Mayor—Obstruction of Street—Claim of Freehold.**—In a proceeding before the mayor or other justice to impose a penalty upon a party for obstructing a street, if a claim to the freehold is set up in the defendant or in those for whom he acts, the mayor or justice has jurisdiction to try the fact whether the claim is *bona fide* made.
3. **Same—Same—Same.**—In such case if the claim is *bona fide* made, the jurisdiction of the mayor or justice is ousted; he cannot enquire into the validity of the claim; and he has no power in such case to proceed to a summary conviction.
4. **Same—Same—Claim of Incorporeal Hereditament.**—This principle applies as well to the case where an incorporeal hereditament or real franchise is claimed or resisted, as to a controversy touching the freehold itself.
5. **Ejectment—Judgment—Effect as to Public Easement.**‡—A recovery of a judgment in ejectment is subject to any easement in the public to use the land recovered as a street or highway; and the right of the public to the easement, is not drawn in question or in any way affected by a controversy between the plaintiff and the city as to the ownership of the soil.

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*He was related to one of the parties.

†**Prohibition.**—See *foot-note* to West v. Ferguson, 16 Gratt. 270, and other *foot-notes* there referred to.

‡**Public Highways—Ownership of Fee.**—It is a well settled rule of the *common law* that a public highway only vests in the commonwealth a right of passage; but the freehold and profits (such as trees upon it and mines under it), belong to the owner of the soil, who has a right to all remedies for the freehold, subject, however, to the easement. Bolling v. Mayor, 3 Rand. 563.

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In January 1859 Abraham Warwick and William J. Barksdale presented their petition to the Circuit court of the city of Richmond, praying the court to prohibit Joseph Mayo, the mayor of the city, from imposing a fine upon them for placing an obstruction in what was said to be 12th street. After stating that the mayor had imposed one fine upon them for obstructing said street, and that he was proceeding to impose upon them further fines for the same matter, they alleged that in an action of ejectment which they had brought
529 *against the city of Richmond, they had recovered the ground on which the obstruction had been placed; that they had been put in possession of said ground by the sheriff, under a writ of possession, and that they had proceeded to enclose it. That in return to the summons to them to show cause why they should not be fined for obstructing the street, they could only allege in their defence the judgment and writ of possession aforesaid; but that the mayor, in disregard of the legal effect and authority of said judgment and execution, and of the fact that the petitioners had been put in possession of the premises by the sheriff, rendered a judgment against them for a fine of twenty dollars for enclosing their said ground; and that he was proceeding to inflict a like fine for each day they held the exclusive possession of said ground by enclosing the same as aforesaid. Wherefore they prayed that the mayor might be prohibited from proceeding to inflict fines and judgments upon them. This petition was sworn to by Abraham Warwick.

A summons having been served upon the mayor, he made a return, in which he set out an ordinance of the city, by which any person putting an obstruction in a street of the city was subjected to a fine of not less than one nor more than ten dollars for the first day, and for each day after the first, not less than two nor more than twenty dollars. And that in pursuance of this ordinance, he had imposd a fine of ten dollars upon Warwick & Barksdale; and that the obstruction in the street not having been removed, he had again fined them twenty dollar a day for eight days; the said obstruction being placed and remaining all that time in and upon 12th street, one of the common highways of the city.

The defendant requiring the petitioners to declare in prohibition, they filed a declaration, in which they set out their recovery in the action of ejectment; the
530 *putting them in possession by the sheriff under the writ of possession: and their enclosing the ground according to the boundaries thereof as laid off by the officer. That the mayor well knowing all this, but pretending that the said piece of ground was still lawfully a public street of the city and highway of the commonwealth, did, under pretence of an ordinance, which they set out, summon them to appear before him to show cause why they should not be fined for obstructing 12th street in the city of Richmond. And they aver that in obedience to said summons they appeared before the mayor, and showed and alleged for cause why they should not be fined for the pretended offence aforesaid: First—that the judgment in the aforesaid action of ejectment, the record of which they then and there exhibited before the said mayor, had conclusively determined that the said piece of ground was no part of any street of the city of Richmond; and consequently, he the said mayor, acting on behalf of the city and under a city ordinance, had no lawful power or jurisdiction to re-examine and retry a question already solemnly adjudged by a superior court of law in a controversy between the plaintiffs on the one part and the city of Richmond on the other. Second—that if the judgment in ejectment was not conclusive of the question, still the plaintiffs claimed bona fide the fee simple of the said land, and the right of exclusive

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See the principal case cited for this proposition in Jordan v. Eve, 31 Gratt. 10; Western Union Tel. Co. v. Williams, 86 Va. 700. 718, 11 S. E. Rep. 106; Hodges v. Seaboard & Roanoke R. Co., 88 Va. 654, 664, 14 S. E. Rep. 380. See principal case also cited in Spencer v. R. R. Co., 23 W. Va. 423. See also, Page v. Belvin, 88 Va. 985, 14 S. E. Rep. 843.

Mr. Lile, in his "Notes to 1 Min. Inst." at p. 42, says: "The statement * * * that the public acquires only an easement of right of way over a public highway, must be understood as applying to highways acquired by *condemnation* or *dedication*, and not by an outright conveyance of the fee-simple title." Indeed, at the present day, the whole question as to the ownership of the fee depends upon how the land in controversy became a public highway. If the property was acquired by condemnation proceedings, whether or not the fee simple passed depends upon the statute under which the condemnation was had. Mr. Lile says that, in Virginia, it would seem that under ch. 43, of the Code, the public only acquires an easement of passage in land condemned for *public road*. But, by Va. Code, § 1083, where land is condemned for the uses of a city, the title to the land absolutely vests in the city, in fee simple.

So, where land is *dedicated* for a public highway if the dedication is made under the provisions of a statute, the effect necessarily depends upon the terms of the statute under which it is made. See Lile's Note to pp. 14, 15. As to statutory dedication of streets, etc., in Virginia, see Pol. Supp. § 2510a.

There remains one other method by which land may be converted into a public highway, *i. e.*, by common-law dedication. In regard to common-law dedication, Mr. Lile says: "In the absence of a contrary intent, or, probably, in the absence of a formal grant, such a dedication (*i. e.* a common-law dedication), when not otherwise provided by statute, passes only the *easement of use* to the public, the fee remaining in the original dedicator or his assigns." Lile's Notes on Mun. Corp., pp. 16, 19. This accords with the proposition first laid down in this note.

See generally, monographic *note* on "Municipal Corporations" appended to Danville v. Pace, 25 Gratt. 1. On the general subject of Easements, see monographic *note* on "Easements" appended to Hardy v. McCullough, 23 Gratt. 251.

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possession of the same, utterly denying the existence of any right in any quarter to use or occupy the same as a street of the city or as a highway of the commonwealth; while the mayor on the other hand was asserting a supposed right of the city to use and occupy the land as a street of the city: and thus it was a plain controversy about the title to the freehold and inheritance of the land; a controversy which the mayor had no lawful power or jurisdiction to decide, try or examine.

531 *The defendant demurred to the declaration; and the court sustained the demurrer. And thereupon Warwick & Barksdale applied to this court for a supersedeas; which was awarded.

Macfarland & Roberts and N. P. Howard, for the appellants, insisted:

1. That though anciently in a case of prohibition a variance between the suggestion and declaration might be taken by demurrer, as seems to have been held in Gomersal & Bishop's Case, 1 Leonard 128, and Harrow's Case, 7 Mod. R. 113, yet this was because the suggestion was held to be in the nature of a writ, 2 Lutwyche's R. 1179, 1181, but that at a subsequent period, the law was settled otherwise in England. 1 Wms. Saund. 318, note 3 and c; Thompson v. Dicas, 1 Cromp. & Mees. R. 768. In Virginia the objection can only be taken by plea in abatement, Code, ch. 171, § 18, p. 648.

2. That there was no variance; but that the first ground of objection to the action of the mayor, involved both grounds stated in the declaration. That the first insisted that the judgment conclusively determined there was no street there. And they referred to King v. Milnrow, 5 Maule & Sel. R. 248; Wills v. Sutherland, 4 Exch. R. 211, 218, 219; affirmed, 5 Id. 718; 4 Rob. Pr. 2, 3. That the averment, that the objection to the jurisdiction was taken before the mayor, was mere surplusage; United States v. Peters, 3 Dall. R. 121; Miller v. Marshall, 1 Va. Cas. 158; Hutson v. Lowry, 2 Id. 42. That there were but two classes of cases in which the objection to the jurisdiction was necessary to be taken: these are, 1st, where the objection is that the cause of action did not arise within the local limits of the jurisdiction, Anonymous, 1 P. Wms. 476, 11 Mod. R. 132; Mendyke v. Stint, 2 Id. 272; and 2d, the case of a prohibition to a suit in the Ec-

532 clesiastical *court for tythes, where a modus is set up. Bannister v. Hopton, 10 Mod. R. 12. But that there was another class of cases substantially like that before the court; and that is where the court prima facie had jurisdiction, but some matter is relied on which shows that the court cannot proceed if it is true. Driver v. Colgate, 4 Burr. R. 2040; Howe v. Nappier, Id. 1944, which is explained in Buggin v. Bennett, Id. 2035; Marsden v. Wardle, 25 Eng. L. & E. R. 146; Hutson v. Lowry, 2 Va. Cas. 42. That application for a prohibition may be made as well after as before sentence or judgment; De Haber v. Queen of Portugal, and Wadsworth v. Queen of Spain, 7 Eng. L. & E. R. 340; and if the court has not jurisdiction, the plaintiff himself may have the writ. Bac. Abr. Prohibition C; Paxton v. Knight, 1 Burr. R. 314; Reese v. Lawless, 4 Bibb's R. 394. That an objection fatal on demurrer to an ordinary declaration may be none to a declaration in prohibition; Comyn's Dig. Prohibition I; Leyfield's Case, 10 Coke's R. 88, 94 b. That the objection on account of the variance was not taken in the court below; and if had been, the affidavit might have been amended. Howe v. Nappier, 4 Burr. R. 1945.

3. That the effect of the recovery in ejectment was to determine that the locus in quo was no part of the street. And they referred to City of Cincinnati v. White, 6 Peters' R. 431; Barclay v. Howell's lessee Id. 514; Hunter v. Trustees of Sandy Hill, 6 Hill's N. Y. R. 407; Dummer v. Selectmen of Jersey City, 1 Spencer's New Jer. R. 86, 109; Doe v. Cowley, 11 Eng. C. L. R. 339; Rowan's ex'ors v. Town of Portland, 8 B. Monr. R. 239; Mayo v. Murchie, 3 Munf. 258; Stiles and others v. Curtis, 4 Day's R. 328.

4. That the appellants objecting to the proceeding of the mayor on the ground that there is no street over the lot enclosed by them, their objection raises a question of title in relation to land. Pritchard v.

533 *Atkinson, 4 N. Hamp. R. 291; Spears v. Bicknell, 5 Mass. R. 125; People v. Onandaga Common Pleas, 2 Wend. R. 263. And that if this objection was made bona fide, of which there could be no question upon the demurrer to the declaration which expressly avers it, the jurisdiction of the mayor was thereby ousted, and he could not proceed further after the objection was made. Regina v. Burnaby, 2 Ld. Ray. R. 900; S. C. Comyn's R. 131; The Queen v. Cridland, 90 Eng. C. L. R. 853, 866 to 872; Paley on Summary Conv. p. 15, 48 to 52; Fitzherbert's Natura Brevium, [47] B. [138] C; 2 Inst. 311, 312; Tinniswood v. Pattison, 54 Eng. C. L. 243; Miller v. Marshall, 1 Va. Cas. 158; Mountney v. Collier, 16 Eng. L. & E. 233; Marsh v. Dewes, 20 Id. 356.

Daniel, for the appellee, insisted:

1. That the demurrer was properly sustained on the ground of the variance between the affidavit and the declaration. That the affidavit showed that the only ground on which the appellants relied before the mayor, was the conclusiveness of their judgment in ejectment; and the other objection to the jurisdiction of the mayor, was not made before him. That the purpose of the declaration in prohibition is merely to set out with more precision and accuracy, the matter of the suggestion, which is here substituted by the affidavit; and if the declaration varies from the suggestion, it is fatal. He referred to Bacon's Abr. Prohibition F; Harrow's Case, 7 Mod. R. 113; Gomersal & Bishop's Case, 1 Leon-

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ard's R. 128; Mayo, mayor, v. James, 12 Gratt. 18.

2. That looking to the objection to the jurisdiction stated in the affidavit, the judgment in ejectment did not afford any ground of objection to the jurisdiction of the mayor. That by the charter of the city the council had full authority over the
534 streets of the city, *and had exercised that authority by imposing a fine on any person who obstructed a street, and it was made the mayor's duty to impose the penalty. That the judgment in ejectment, though it decided the title to the property, decided nothing as to the easement of the street over it; and it did not appear from the affidavit that any other objection to the existence of the street was set up before the mayor, than was to be deduced from the judgment. He referred to Goodtitle v. Alker, 1 Burr. R. 133; Bolling v. Mayor of Petersburg, 3 Rand. 563; Angel on Highways, ch. 7, § 319, note 1; Note of Hare & Wallace to Dovaston v. Payne, Smith's Lead. Cas. 44 Law Libr. 139, and the American cases cited by these authors.

3. That though it may be true that at common law, a justice of the peace has no authority to decide upon a question of title to real estate, still the authority may be given by statute; and in every such case it is a question of construction. See the case of Brittain v. Kinnaird, 5 Eng. C. L. R. 137, which is said in Mould v. Williams, 48 Id. 472, to be more often recognized than any other case; Regina v. Higgins, note D to In re Appledore Commutation, 55 Eng. C. L. R. 147. That the charter of the city gave to the council authority over the streets in the largest terms; charter of 1842, Sess. Acts 1841-42, p. 133, 136; charter of 1852, Sess. Acts 1852, p. 263, 264; Code, ch. 54, § 17, p. 285; and the council by its ordinance has vested the authority to punish all obstructions in the streets in the mayor. To do this he must necessarily consider the extent of the right claimed—the limits of the streets.

ALLEN, P. The plaintiffs in error preferred a petition to the Circuit court of the city of Richmond, which was verified by affidavit, and by which they prayed for a rule against the defendant in error to
535 *show cause why he should not be prohibited from inflicting a fine of twenty dollars upon the plaintiffs for each day they should continue to hold the exclusive possession of a piece of ground on the western side of twelfth street in the said city, by enclosing the same. The proceeding is founded on the Code, ch. 155, p. 612; which provides that it shall not be necessary to file a suggestion on any application for a writ of prohibition, but the same may be applied for on affidavit only.

Upon filing the petition, treated as an affidavit, the rule asked for was awarded; the defendant made a return thereto, and having afterwards required the plaintiffs to file a declaration, one was filed, to which the defendant demurred generally, and also tendered a special plea, to which the plaintiffs objected, and moved the court to reject it: of which motion the court took time to consider.

At another day the general demurrer to the declaration was sustained; which rendered it unnecessary to pass upon the special plea tendered and objected to; and the same is not copied into the record. To the judgment sustaining the general demurrer refusing the prohibition and dismissing the plaintiffs' application, a supersedeas has been awarded by this court.

In argument here, it is insisted on behalf of the defendant, that there was a variance between the affidavit and the declaration; and for that reason the demurrer was properly sustained.

Conceding, for the purposes of this case, that a suggestion is in the nature of a writ, and the affidavit under the Code comes in the place of the suggestion, the objection could not be taken in this mode. The Code, ch. 171, § 18, declares that a defendant on whom process summoning him to answer, appears to have been served, shall not take advantage of any variance in the writ from the declaration, unless the same be
536 pleaded *in abatement. The objection goes not to the substance but to the form; for taking the matters averred to be true, enough appears to entitle the plaintiffs to judgment as far as relates to the merits of the cause, provided the law be as they suppose it to be. Being matter of form, the objection, in the absence of the provision in the Code referred to, could only be taken by special demurrer; and the effect of the Code, ch. 171, § 30, 31, is to abolish special demurrers in all cases: the 30th section prescribes the form, being the form of a general demurrer, and the 31st declares that the court shall not regard on a demurrer any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading or insufficient pleading, or not, unless there be omitted something so essential to the action or defence that judgment according to law and the very right of the cause cannot be given.

Passing by this formal objection, the question on the merits is whether, upon the matters averred in the declaration, it was within the rightful jurisdiction of the mayor to proceed to impose a fine for an alleged obstruction in the place claimed to be a street of the city. It is said in Paley on Convictions, p. 1, that the examination and punishment of offences in a summary manner by justices of the peace, out of their sessions, and without the intervention of a jury, or an open trial, are founded entirely upon a special authority conferred and regulated by statute. The authority of the mayor of the city to impose fines for obstructing the streets is conferred by the act passed March 30, 1852, Sess. Acts, p. 259, entitled an act revising and reducing into one act the provisions of the charter of the city of Richmond. The 1st section provides, that the 54th chapter of the Code of

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Virginia shall be applicable to the said corporation and the council of the city, as far as may be consistent with the
537 charter. *The 17th section of that chapter confers the powers to lay off streets, &c., and have them kept in good order: and to carry into effect these and other powers, ordinances and by-laws may be made, and fines prescribed for violations thereof. Similar authority is granted to the city council by the charter, § 26, p. 263; and by the 50th section of said act it is provided, that any claim to a fine or penalty under the act, or any ordinance or by-law of the city, if it be limited to an amount not exceeding twenty dollars, shall be cognizable by the mayor, recorder or any alderman of the city. In pursuance of the authority so conferred, and to punish for a violation of an ordinance of the common council for preventing obstructions of the streets and alleys of the city, a copy of which ordinance is set forth in the declaration, the mayor proceeded to impose the fine which has led to the present controversy. In enforcing this ordinance, the mayor must necessarily, in ordinary cases, enquire into the fact whether the place where the obstruction is put, is a street or public alley, and his judgment and sentence on that, as upon every other question properly falling within his conceded jurisdiction, is conclusive and final. But the question still remains, whether, by the principles of the common law, a bona fide claim of title to the property does not oust the jurisdiction of the justice or officer exercising such summary jurisdiction. And the principle involved is, whether the title to lands may, in this collateral way, be subjected to the jurisdiction of police officers, proceeding without writ, deciding without the intervention of a jury, who hold no court of record, and therefore no record of their proceedings is preserved, and from whose judgment there is no appeal. The recognition of such a jurisdiction might in effect submit the whole beneficial interest in the freehold to the absolute control of such inferior tribunal: for by
538 successive fines the *right of the owner might be so impaired as to be of no value.

The author before referred to, Paley on Convictions, p. 48, states, "that it has always been held as a maxim, that where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted. This principle is not founded on any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes; and is always implied in their construction." For the first proposition he refers to a declaration of Lord Ch. J. Holt in Regina v. Speed, 1 Ld. Ray. R. 583, who is reported to have said, that "without doubt if the defendant has but the color of title, the justices have no jurisdiction." Though whether he did use the expression thus imputed to him, has more recently been doubted.

But for the proposition that this principle is not founded on any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes, no authority is cited.

The principle, I conjecture, flows from a higher source than any mere judicial decision. It is derived, as it seems to me, from magna charta itself, which declared that no freeman should be taken or imprisoned, or be disseized of his freehold, but by the lawful judgment of his peers, or by the law of the land. Coke, in his reading upon magna charta, 2 Inst. 48, 50, says that "by lawful judgment of his peers," is meant the verdict of his equals, and by "the law of the land," the due course and process of the law. That the phrase is defined by 37 Edw. 3, ch. 8; and the words "by the law of the land," are rendered "by due process of law:" that is, he continues, by indictment or presentment by good and lawful men, where such deeds are done in due manner, or by writ original of the common law.

539 *In consequence of this express inhibition, no case has been referred to in which an attempt has been made to hold or maintain a plea by mere plain concerning a freehold, where the freehold was directly in issue; and in the recent statute of 9 and 10 Vict. in relation to County courts, ch. 96, § 58, it is provided that such courts shall not have cognizance of any action of ejectment, or in which the title of any corporeal or incorporeal hereditament comes in question.

In Comyn's Digest, title County (C 8), treating of the County court, it is laid down, "that it cannot hold plea by plaint concerning freehold; and therefore, if a man in a plaint in replevin justifies, avows, or makes cognizance as in the freehold of B, the jurisdiction of the County court is ousted." Again: "If the County court holds plea where it has no jurisdiction, the proceeding is coram non judice and void; and trespass lies against any who act under the process of the court. And if freehold or other plea which ousts the jurisdiction be pleaded, all the subsequent proceedings are void." And the authority for these positions which Comyn refers to is Cannon v. Smallwood, 3 Levinz 203. That case was referred to and recognized as a controlling authority in Tinniswood v. Pattison, 54 Eng. C. L. R. 243. There, in trespass for taking and impounding the plaintiff's beasts, the defendant pleaded a suit in the County court by J. S. against the now plaintiff, where the then defendant pleaded freehold in A, and justified the taking damage feasant in said freehold of A. The then plaintiff to this conusance pleaded in bar that A was bound to repair fences, and that for default of repair the beasts escaped. On this plea issue was taken, and the jury found the fences out of repair, and the plaintiff had judgment, and precept issued thereon, under which the now defendant, being bailiff, seized and impounded the beasts. The effect of the pleadings was

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a justification of the seizure under
540 *process issued upon a judgment of the County court. Upon demurrer, it was objected that the judgment was void et coram non judice, because after freehold pleaded the County court had not jurisdiction, because freehold cannot be tried without writ "sans brief" in the Norman French of the report. It was replied, that the freehold was not tried there, but a collateral matter, whether the fences were in repair. But the court held that by the trial a charge on the freehold was put in issue, and that the County court had no power after freehold pleaded to proceed in the cause, directly or collaterally, and the proceedings were coram non judice and void. The case in 54 Eng. C. L. R. 243, of Tinniswood v. Pattison, was very similar in its facts; and Tindal, C. J., said, that the case of Cannon v. Smallwood was a distinct authority to show that the County court has lost its jurisdiction in the matter, and that the plaintiff below should have proceeded by the queen's writ of replegiare facias: showing that the principle of magna charta, as expounded by Coke, was at the foundation of the objection.

The judge refers to Coke's Commentary on the Statute of Gloucester, ch. 8, 2 Inst. 310, 11. Speaking of the jurisdiction of the sheriff in the County court, he says he shall not hold plea of trespass for taking away charters concerning inheritance of freehold; for it is a maxim of the law, that pleas concerning charters or writings relating to the freehold should not be pleaded without the king's writ in courts not of record, according to the law and custom of England. These authorities, ancient and recent, show what is and ever has been the law of England, and the principle on which it is founded. To these may be added Fitz. Nat. Brev. 47 B; Rex v. Speed, 1 Ld. Raym. 583; Regina v. Burnaby, 2 Id. 900.

In Virginia, it is not pretended
541 that justices of the *peace or officers of corporations have ever been empowered by any statute to try, without writ, titles to land in civil causes. The eleventh article of the bill of rights declares, that in controversies respecting property, and in suits between man and man, the ancient trial by jury of twelve men is preferable to any other, and ought to be held sacred.

Though this provision may not amount to a positive restriction upon the power of the legislature in reference to all controversies respecting property of every kind, and suits between man and man, no matter what may be the amount in dispute, it is nevertheless a provision which should always be kept in mind in construing the acts of the legislature; and we are not warranted in giving such an interpretation to their acts as to impute to the legislature the intention of setting aside this article by mere implication. In civil cases we see no such jurisdiction is conferred, and it would be a strained construction which would impute to the legislature the intention to confer such jurisdiction where such officers were invested with power to impose fines, and the question arose collaterally. We have for instance a provision in the Code, copied from former laws, p. 450, ch. 101, § 2, subjecting a person to a fine of three dollars for each offence of shooting, hunting, &c., within the enclosed bounds of another person, without license from the owner. It would be a forced construction which would authorize the justice, upon complaint for violating this law, to adjudicate upon the question of title: The contrary was held by all the judges in The Queen v. Cridland, &c., 90 Eng. C. L. R. 853, a proceeding under a statute imposing a fine for committing a trespass by entering on land in search or pursuit of game; all concurring that where there was a bona fide claim of title set up, the justices have no longer jurisdiction to proceed to a summary conviction. The regard which
542 the legislature *has always had for this right to a freehold is further manifested by provisions contained in the laws regulating appellate jurisdiction, conferring as a general rule such appellate jurisdiction where the title or bounds of land shall be drawn in question. The principle is recognized also in the 11th section, article 6, of the present constitution, declaring in what cases appellate jurisdiction may be conferred on this court, and providing that it shall not have jurisdiction in civil causes, where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, &c.

The question has never been presented for adjudication in any case in Virginia, where the justice was exercising the jurisdiction conferred to proceed to a summary conviction. But that a justice of the peace had no jurisdiction to try titles to freehold or any fee simple estate or interest in an incorporeal hereditament, was expressly determined in Miller v. Marshall, 1 Va. Cas. 158, where a prohibition was awarded to the justice who was proceeding to try a cause before him for the recovery of a rent reserved by deed to one and his heirs forever. On this branch of the case I conclude that, whether upon a trial of a civil cause, or in the exercise of the general power conferred by statute to proceed to a summary conviction, the justice, mayor, or any such subordinate officer, is bound to dismiss his summons immediately on being convinced that the case involves a bona fide claim of title to real estate, unless the jurisdiction is expressly conferred by statute. Nor is there any difference in this respect between corporeal and incorporeal hereditaments. Indeed, most of the cases where the question arose were cases involving the right to incorporeal hereditaments, or some charge or servitude sought to be imposed on the land.

Miller v. Marshall was the case of
543 a fee simple interest *in rent; Cannon v. Smallwood, an obligation to

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repair fences—a servitude on the land. In Randall v. Crandall, 6 Hill's R. 342, an action of trespass quare clausum—the defence that the locus in quo was a public highway, raised the question of title to land, which could not be tried before a justice, as a right of way over another's land affects the owner's title. In Striker v. Mott, 6 Wend. R. 465, under a statute that a justice should not have cognizance where the title to lands came in question, it was held that a claim to a right of way involves the title to the premises over which it passes. In Pritchard v. Atkinson, 4 N. Hamp. R. 291, under a statute giving justices jurisdiction to try causes where the sum in controversy did not exceed a certain amount, except such wherein the title to real estate might be drawn in question, covenant was brought assigning as a breach that the land was encumbered with a highway, and one dollar damages recovered; and it was held the justice had no jurisdiction. The question of title was necessarily involved, as such an easement, a highway, was a real franchise. See also Heaton v. Ferris, 1 John. R. 146; Saunders v. Wilson, 15 Wend. R. 338; Spear v. Bicknell, 5 Mass. R. 125; People v. Onandaga Common Pleas, 2 Wend. R. 263, to the same effect.

Regarding it to be the law, that the jurisdiction of the mayor to convict summarily is ousted where a claim of title to real estate is set up bona fide, and that the claim to hold it discharged from such an easement as a highway, which is a real franchise, is a controversy concerning the title to real estate, it remains to enquire, in the third place, whether the matters averred in the declaration, or any of them, admitted to be true by the demurrer, do show such bona fide claim by the plaintiffs as to entitle them to the prohibition prayed for?

544 The declaration sets out that the *plaintiffs theretofore instituted an action of ejectment for the property in question against the city of Richmond; that in said suit they claimed the fee simple; and that by default they recovered judgment against the city, which being revived, execution issued thereon, and possession was delivered by the sheriff. Whereupon the plaintiffs forthwith enclosed it, and have ever since held the same so enclosed, in their exclusive possession and occupation, as by said judgment and execution thereupon made, they were authorized to do.

It then sets forth the proceedings of the mayor under the ordinance of the common council of the city imposing fines for obstructing the streets or public alleys, and that in obedience to his summons they appeared before him and showed for cause why they should not be fined: First—that the judgment aforesaid had conclusively determined, that the said piece of ground was no part of any street in the city of Richmond, and that the mayor had no power to re-examine and re-try a question already adjudged. Secondly—that if that question was not determined by the judgment in ejectment, still that the plaintiffs did then and there bona fide claim and still do bona fide claim the fee simple of said land and the right to the exclusive possession thereof, and did then and there bona fide deny and still do bona fide deny the existence of any right in any quarter to use or occupy the same as a street of the city or as a highway of the commonwealth; while the mayor in that proceeding was asserting a right of the city to use and occupy the land as a street of the city.

The cause first alleged why he should not be fined, rests upon the effect of the judgment in ejectment and possession delivered or the execution issued on the judgment. That this without more and irrespective of any other claim of title conclusively determined that the piece of ground was

545 no part of any street, &c. *The cause shown looks rather to the propriety of imposing a fine, upon the proof, than to an assertion of title with any view to oust the jurisdiction. Treating it however as a claim resting solely on the effect of the judgment and execution, the mayor it seems to me, would have had a right to consider whether in passing on the question, he looked to the claim of title so set up, or in any way passed upon it. Notwithstanding the strong language used or attributed to Holt and some of the judges, that any color or pretence of title should oust the jurisdiction of the justice, I think the rule as laid down in The Queen v. Cridland, 90 Eng. C. L. R. 853, is the more reasonable; that is, that the justices have jurisdiction to try the fact whether the claim is bona fide made, or I may add, whether it sets up any claim whatever in opposition to the right asserted. The right to the public easement, if it existed, was incorporeal, and belonged to the public or the commonwealth; and although under the charter the control or superintendence of the street or highway be conceded to the municipal authority, all prosecutions for obstructing, &c., are conducted in the name of the commonwealth. The easement comprehends no interest in the soil. "The right of freehold (says Swift, J., in Peck v. Smith, 1 Conn. R. 103) is not touched by establishing a highway, but continues in the original owner of the land in the same manner it was before the highway was established, subject to the easement. The dedication or laying out of a street within a corporation does not affect the ownership of the soil, and however enlarged the easement may be, when within the limits of a corporation, in order to the beneficial use of it, and to effect the purposes intended when the easement was created; subject to such use, whether enlarged or limited, the title remains in the owner. Notwithstanding the easement, the owner retains many and

546 valuable interests. *He is entitled to the minerals under it; he may make any use of it not inconsistent with the enjoyment of the easement; as is fully shown in the notes of Hare & Wallace to Dovaston v. Payne, 2 Smith's Leading Cases 90 (44 L. Li. 141), where the authorities are col-

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lected. Amongst the rights of the owner is the right to maintain trespass: the point decided in Peck v. Smith, 1 Conn. R. 103, and in Lade v. Shepherd, 2 Strange R. 1004: though to maintain trespass he must have not only the right to possession, but the actual possession.

The right of the owner to recover in ejectment was affirmed by the Court of king's bench in Goodtitle v. Alker, 1 Burr. R. 133.

Since this decision, the doctrine seems to be considered as settled in England, and the elementary writers lay it down as established law. Runnington 130; Adams 18, 19; Saunders Pl. & Ev. 98. It has been recognized by almost every judge who has had occasion to refer to it in America; as may be seen by reference to the note of Wallace & Hare, ubi supra; and followed in Cooper v. Smith, 9 Serg. & Rawle 26; Alden v. Murdock, 13 Mass. R. 256; and see also Watrous v. Southworth, 5 Conn. R. 305; Wooster v. Butler, 13 Id. 309; Reed v. Leeds, 19 Id. 182.

A doubt has been cast upon the right of the owner of the soil of a highway or public square, to recover in ejectment against one who takes exclusive possession of the ground, by the cases of the City of Cincinnati v. White, 6 Peters' R. 431; and Barclay v. Howell's lessee, Id. 498; cases much relied on in the argument here. The cases are reviewed in the note of Wallace & Hare, and it is shown that the remarks of the learned judge there were the extrajudicial dicta of an individual; for it was obviously well understood that the cases were carried to the Supreme court for the settlement of the right of the public to the ease-
547 ment; *and as the plaintiff claimed exclusive possession, the court, in deciding against that claim, probably did not feel called upon to decide on the right to recover subject to the easement, for which the plaintiff cared nothing. Whatever however may be the law of that forum, in Virginia the rule has been established by an authoritative decision of the very point in accordance with the settled doctrine of the English courts and the courts of this country, so far as we have been referred to them, except the Supreme court.

In Bolling v. Mayor of Petersburg, 3 Rand. 563, which was a writ of right by the demandant against the corporation of Petersburg, a special verdict was found, showing title in the demandant and his ancestors, and finding certain proceedings by which a public road was established over the tract of land, which said road, so established, had always been used as a public road from that time; and that the land in controversy was a part of said road. There were other findings, showing the erection of a wharf on said land by the corporation, and that it had exclusive possession of the wharf, &c.

Judge Carr, in his opinion, in which the other judges concurred, after disposing of the question of title, says, "The next question is as to the public highway. Does this disable the demandant from recovering the land? It certainly would not in England, as many cases show." The judge then refers to Lade v. Shepherd, 2 Strange's R. 1004; quotes at length from the opinion of Lord Mansfield in Goodtitle v. Alker; refers also to 1 Wilson 107; 6 East 154; Bac. Abr. title Highways, letter B; and then proceeds, "It is clear from these cases (and others might be added), that in England the right of way has been considered as an easement not affecting the right of soil."

And he then shows that the laws of
548 Virginia *had not changed the common law. And the other questions being determined in favor of the demandant, judgment was rendered in his favor.

The court did not rest its opinion upon any supposed distinction between seizin and possession. They took seizin to be as Lord Coke in 6 Rep. 57b, defines it as being identical with possession, and rely upon the case in 2 Strange 1004, which was trespass for a wrong done to the possession.

It results from these authorities, that no question as to the easement was or could have been raised in the ejectment. Whether the ownership of the soil remained in the original proprietor, or vested in the lot owners whose lots bounded on the street, or was vested in the corporation, did not affect the public easement. As to the public, represented by the commonwealth, if entitled to the easement, a controversy respecting the ownership of the soil, was res inter alios acta, and however determined, having no effect whatever on the public right. The judgment, if it could be used in evidence in a controversy affecting the public franchise, could only be used for the purpose of showing an entry under a claim of right, and to define the extent of the claim and possession; and not as showing or tending to show that no such real franchise attached to the property. If the case had rested on the first ground assigned in the declaration, I think the demurrer would have been properly sustained.

But the second cause assigned, admitted by the demurrer to be true, does show a bona fide claim to the exclusive possession and title, and denies that the land was subject to any easement in the public, or any right in any quarter to use or occupy the same as a street or as a highway. This claim, thus bona fide made, covers the whole ground; it involved the enquiry as to the existence of such an easement, an
549 enquiry *which the mayor had no right to enter into, or jurisdiction to try or determine the question. And the demurrer should therefore have been overruled.

If the judgment in the ejectment, the record of which is exhibited, was entitled of itself to the conclusive effect claimed for it, there could be no reason for remanding the cause for any other proceedings, as the record speaks for itself, and could not be contradicted; and therefore it became nec-

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essary to examine the question so elaborately discussed.

It is difficult to perceive what question of fact was intended to be raised by the plea offered and objected to, for it would seem, from the affidavit of M. Bates, made part of the mayor's return, that he gave evidence tending to prove a dedication of the place in controversy for a public street, and the enjoyment of the easement by the public, showing that there must have been some claim of and enquiry into the title before the mayor. But this is matter not appearing on the demurrer to the declaration, and therefore can have no influence on the judgment to be rendered on the demurrer.

It results from the foregoing examination of the questions presented and argued, that in proceedings to convict summarily before a justice or other officer exercising the like powers, if a claim to the freehold is set up in the defendant or those for whom he acts, the officer has jurisdiction to try the fact, whether the claim is bona fide made: If it be so made and the jurisdiction is ousted, he cannot enquire into the validity of the claim, and he has no power in such case to proceed to a summary conviction. That the doctrine applies as well to the case where an incorporeal hereditament or real franchise is claimed or resisted as to a controversy touching the freehold itself: That the recovery in ejectment by the judgment referred to, was subject to any ease-
550 ment in the public to use the *same as a street or highway, and the right of the public to the easement was not drawn in question or in any way affected by a controversy between the plaintiffs and the city as to the ownership of the soil. But that under the second cause assigned in the declaration it appears, there was a bona fide claim to the exclusive enjoyment of the property, free from the right of way or easement claimed for the public; and that such claim so made, could not be tried by the mayor, but ousted his jurisdiction. It is to be regretted that in a matter, where the public convenience is so much involved, that the right to the easement itself had not been presented either by an action of trespass against the city authorities for removing the obstruction, or some proceeding to abate the alleged nuisance, so that the right might have been settled by a court of record having competent authority. The question before us does not reach the merits, but merely the power of the mayor to enquire into them. The judgment must be reversed with costs. And this court proceeding &c. it seems that the declaration &c. are &c.; therefore considered that the demurrer be overruled, and the cause is remanded for a decision of the motion to reject the plea tendered, and for further proceedings: which is ordered to be certified.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

551 *Cooper v. Hepburn & als.

April Term, 1860, Richmond.

(Absent ALLEN, P., and LEE, J.*)

1. **Devises—Contingent Fees—Afterborn Children—Sale of Land by Guardian—Parties.**†—H devises real estate to M during his natural life, and to his children if he should have lawful issue; if not, then at his decease to H's grandchildren. At the death of H, M is not married, but he afterwards marries and has lawful children. Upon the birth of the first child of M, the remainder was vested in the child, subject to open and let in the afterborn children as they severally came into being; and the remainder in favor of the grandchildren was defeated. And therefore the grandchildren were not necessary parties to a suit by the guardian of M's children for a sale of the real estate.
2. **Sale of Infants' Lands—Statute.**‡—M as guardian of his infant children files a bill for the sale of the real estate held by himself for life and by his children in remainder; and it is sold accordingly. This is authorized by the statute.§
3. **Same—Failure to Formally Aver Suit Brought as Guardian—Effect.**|—Though the bill does not formally aver that the suit is brought as guardian, yet it states that the plaintiff is the guardian, and the whole frame of the bill is in pursuance of what is required to be set out in such a case, and the infants are made defendants. The omission of this formal averment does not vitiate the proceedings.
4. **Same—Irregularities—Effect on Purchaser.**¶—One of

*They were sitting in a Special court of appeals.

†**Wills—Construction—Contingent Fees.**—In Walker v. Lewis, 90 Va. 582, 19 S. E. Rep. 258, it is said: "It is a well-established rule of the common law that while no remainder can be limited after a limitation in fee, yet two contingent fees, by way of remainder, may be limited as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, and is immediately avoided if the first does vest in interest. 1 Lom. Dig. 417; 2 Min. Inst. (4th Ed.) 895; *Cooper v. Hepburn*, 15 *Gratt.* 551, 559."

In Stokes v. Van Wyck, 83 Va. 733, 3 S. E. Rep. 387, the principal case is cited as authority for the proposition that the law leans in favor of the vesting of estates as soon as possible.

‡**Sale of Infants' Lands by Guardian.**—The principal case holds that a guardian may file a bill for the sale of the real estate of his infant children held by himself for life and by them in remainder and have the land sold accordingly. This is approved in Zirkle v. McCue, 26 Gratt. 525, and *note*; Reed v. Hedges, 16 W. Va. 198; Faulkner v. Davis, 18 Gratt. 671, and *note*, citing the principal case.

§See 1 Rev. Code of 1819, ch. 108, § 16, 17, 18, 19, 20, p. 409; Sup. Rev. Code, ch. 104, § 2, p. 134; Code, ch. 128, § 2, 3, 4, 5, p. 535-6.

|**Same—Failure to Aver Suit Brought as Guardian—Effect.**—For the proposition that, though the bill, in a suit for the sale of infants' lands, does not formally aver that the suit is brought as guardian, yet it states that the plaintiff is guardian, and the whole frame of the bill is in pursuance of what is required to be set out in such case, and the infants are made defendants, such omission of this formal averment does not vitiate the proceedings, the principal case is cited and followed in Zirkle v. McCue, 26 Gratt. 525. See generally, monographic *note* on "Infants."

¶**Judicial Sale—Reversal of Decree—Effect upon Purchaser's Title.**—In Dunfee v. Childs, 45 W. Va. 165, 30

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the infant defendants having been over fourteen years of age when the bill was filed, it was irregular not to require her to file her answer. But the sale having been decreed, and it having been made more than six months after the decree, and confirmed without objection, it is too late for the purchaser eighteen months afterwards to object to the irregularity.**

5. **Same—Same—Same.**—The court, if it deemed it necessary for the protection of the purchaser, might have directed the infant to file an answer after the objection was made.

552 *6. **Same—Private Bids—Bid Accepted by Court—Effect.**—Upon a bill for the sale of infants' real estate, the court decrees a sale, and directs the commissioner to sell at private sale; and he advertises for sealed proposals, which are to be opened at a certain day in the presence of the court. Proposals are put in, and the court accepts one of them, and forthwith confirms the sale, and directs the party to execute it according to its terms. Such a purchaser stands upon the same footing as any other purchaser at a judicial sale; and is not entitled to any other or further relief.

7. **Appellate Practice—Order of Lower Court Based upon Facts Not Found in Record—Effect.**††—When it appears to the Court of appeals that the order of the Circuit court was based upon the evidence of facts not found in the record, that court may reasonably and justly presume that the order is right; that it was in accordance with and justified by the facts.

S. E. Rep. 106, the principal case is cited as authority for the proposition that, under the Virginia statute, Code 1849, ch. 178, § 8, if the sale of property be made under a decree or order of the court, after six months from the date thereof and such sale is confirmed though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be a restitution of the proceeds of the sale. But the case at bar holds that the reversal of a decree under which land is sold will not affect the title of the purchaser, if he is not a party to the suit, or, though a party, has no interest in the debt or cause for which the land is sold; but, if he is a party with such interest in the decree, his title falls with such reversal. If a decree confirming a sale be reversed for error in it, the purchaser's title falls, whether he be a party or not. Where necessary parties, having title, are not before the court, the purchaser's title falls with reversal of decree of sale.

See, in accord with the principal case, Quesenberry v. Barbour, 31 Gratt. 500, and *note*; Capehart v. Dowery, 10 W. Va. 148; Thomas v. Davidson, 76 Va. 344; Lancaster v. Barton, 92 Va. 626, 24 S. E. Rep. 251, all citing the principal case. See generally, monographic *note* on "Judicial Sales" appended to Walker v. Page, 21 Gratt. 636.

**Code, ch. 178, § 8, p. 676. "If a sale of property be made under a decree or order of a court, after six months from the date thereof, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled."

††**Appellate Practice—Order of Lower Court Based upon Facts Not Found in Record—Effect.**—For the proposition contained in the seventh headnote of the principal case that, when it appears to the court of appeals that the order of the circuit court was based upon the evidence of facts not found in the record, that court may reasonably and justly presume that the order is right; that it was in accordance with and justified by the facts, the principal case is cited and approved in Board of Supervisors v. Dunn, 27 Gratt. 620, and *note*.

Prior to May 1817 William Hepburn, of the city of Alexandria, departed this life, having first made his will, which bears date in February of that year, and which was duly admitted to probate in the Orphan's court of Alexandria county.

As introductory to certain bequests, the testator says: "On the first day of February one thousand eight hundred and sixteen, I sold Esther (whom I bought some years ago of Benjamin Dulany, Esquire) and her three children, Moses, Letty and Juliana Eliza, to Hannah Jackson, and the said Hannah Jackson has since manumitted and set free the said three children, who have been maintained and supported by me since the death of their mother Esther, and are to be supported by me during my life." And after some directions for the care of the three children, he makes the following provision: "I give unto Moses the son of Esther aforesaid, the houses and lots where I now live (one of the aforesaid lots I bought of William Herbert, junior, trustee for the creditors of Robert Conway, and the other I bought of Joseph Manderville) together with my fishing shore during his natural life, and to his children, if he should have lawful issue; if not then I give the said lots and fishing shore, at his decease, to my grandchildren equally and their heirs forever."

553 *In May 1848 Moses Hepburn instituted a suit in the Superior court of law and chancery for Alexandria county, for the sale of the property mentioned in the foregoing devise. The writ directs the sheriff to summon Prudence Crandall Hepburn and three others by name, infant children of Moses Hepburn, to answer a bill exhibited against them by Moses Hepburn in his own right and as their guardian. The bill is in the name of Moses Hepburn, a free man of color, of the town and county of Alexandria, and sets out the devise in the will of William Hepburn, as herein before given. States that the plaintiff in the year 1827 intermarried with Amelia R. Braddock, and had by her four children (the defendants), all of whom were infants under age. That at the March term 1848 of the County court of Alexandria, he had qualified as guardian of said children. That he knows of no property belonging to his children except their reversionary interest in the lots of ground before mentioned. And he sets out at length the grounds upon which he believes it will be for the interest of the infant children that the property should be sold. And making the four children parties defendants, he asks for the appointment of a guardian ad litem, who shall answer the bill on oath: that the lots may be sold, and the proceeds

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reinvested in such manner as to the court may seem just and proper; and for general relief.

At the October rules 1848 William C. Yeaton was appointed guardian ad litem of the infant defendants; and at the December rules he filed their answer, submitting their interests to the protection of the court.

In November 1849 the cause came on to be heard, when the court made a decree appointing a commissioner to contract (after thirty days' notice) for the sale of the land in the bill mentioned, to be paid in Virginia state stock; the said contract to be subject to the approval of the court.

554 *The commissioner having had the property divided into lots, offered it for sale at public auction; but after some of the lots had been struck off, he withdrew the others, thinking the price at which the lots were sold was inadequate. His report of the sale was excepted to by the plaintiff, upon the ground that the property was sold at public sale, instead of by private contract. And when the cause came on again to be heard in June 1852, the exception was sustained; and the commissioner was directed to proceed according to the original decree in the cause.

The commissioner proceeded to advertise for proposals for the purchase of the property, which were to be under seal, and to be opened in the presence of the court on the 10th day of May 1853. Three offers were put in on the 9th of May, of which the highest was that of Lewis Cooper. He proposed to give for the property sixteen thousand two hundred dollars, payable in six per centum stock of the state of Virginia; one-fourth on the acceptance of his bid, or within ten days thereafter; one-fourth on the 15th day of January 1854; one-fourth on the 15th of July 1854; and one-fourth on the 15th of January 1855, with interest until the respective deliveries, and to pay a part of the above, not exceeding two thousand dollars, in money within ten days of the acceptance, should the court require it.

The record does not show what was done on the 10th of May; but the cause came on to be heard on the 13th, when the court made a decree, reciting that Cooper had paid to the commissioner two thousand dollars in money, and had executed his bond with surety, with condition to deliver the Virginia state stock at the times stated in his proposal, and accepting his proposal, and confirming the sale; and directing the commissioner to convey to Cooper the property upon the delivery of the stock.

555 And on the 18th of *the same month the court made another decree in the cause, directing the commissioner to lend to Moses Hepburn the balance of the two thousand dollars, after deducting the expenses of the sale.

In February 1854 the commissioner reported to the court that Cooper had delivered to him two thousand one hundred dollars of the Virginia state stock; but that he had failed to deliver the residue of the stock which was then due; and that about the 26th of July 1853 the commissioner had received from the agent of Cooper a notice that at the next term of the court he would move said court to set aside the sale, and to refund the money paid by him, for defect of title to the property sold to him.

At the February term of the court Cooper presented his petition, stating that since he had made the payments on his purchase, he had accidentally learned from the result of a certain suit lately decided in the same court, that it was very doubtful whether the plaintiff and his children had any title to the land sold, for the reason that the plaintiff in the suit was a slave, and his children in the eye of the law bastards; and therefore the parties were incapable of taking any thing under the will of William Hepburn. He therefore prayed that the court would direct an enquiry into the sufficiency of the title to the property.

At the same term the court, without noticing the petition of Cooper, reciting that it appearing from the report of the commissioner that Cooper had failed to comply with the decree of May 13th, 1853, it was ordered that he appear at the May term next, and show cause why he had failed to comply with the said decree.

At the November term 1854 Cooper was permitted to file a supplemental petition, in which he says that on a further examination of the proceedings in the suit, he had ascertained that they were so ir-

556 regular *that no valid title to the land could be made to him: and he sets out various objections to the proceedings, viz:

1. That the bill of complaint, though it states the fact that the plaintiff had been appointed guardian of the infant defendants, yet does not aver that he sues as such.

2. That the bill is for a sale of his own as well as the infants' interest in the land, which is not authorized by the statute.

3. That the evidence showed one of the infant defendants was over fourteen years of age, and that she had not filed her answer.

4. That the evidence did not appear to have been taken in the presence of the guardian ad litem, or upon interrogatories agreed on by him.

5. That the grandchildren of the testator, to whom the property was limited over on the death of Moses Hepburn without lawful issue, were necessary parties.

At the same term of the court Thomas Dundas and others, the grandchildren and heirs of William Hepburn, presented their petition, in which, after setting out their relationship to William Hepburn, and the proceedings in this suit, they say that the plaintiff Moses Hepburn is a slave; that his guardianship of the infant defendants is void; and they ask that the sale may be set aside and the suit dismissed; or if this may not be done, that they may be made parties, so that as parties interested under the will of William Hepburn, they may have

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an opportunity of protecting their interests before the court.

No further steps seem to have been taken in the case until the May term of the court for 1856, when the cause coming on to be heard upon the petitions, they were rejected. At the November term a rule was made upon Cooper to show cause, on the first day of the next term of the court
557 why the land purchased *by him should not be resold to satisfy the unpaid installments and interest due on his said purchase; and upon his failure to do so, the land would be ordered to be resold at the cost and risk of the said Cooper. And on the same day a decree was made directing the commissioner to pay over to Moses Hepburn the interest and dividends due to him, which had been collected by the commissioner on the Virginia state stock mentioned in his report of February 1854. And the cause was continued for further proceedings.

The evidence on which the sale was decreed, showed that in November 1848, when the depositions were taken, the oldest child of Moses Hepburn was fifteen years old.

Cooper applied to this court for an appeal from the decree; which was allowed.

H. Winter Davis and Beach, for the appellant.

Francis L. Smith, for the appellees.

DANIEL, J. The question, which it seems to me ought to be disposed of first, is that raised by the fifth assignment of error, to wit, whether all the proper parties to the suit are before the court. The grandchildren of William Hepburn the testator, it is insisted, took under his will such an interest in the real estate in controversy as entitled them to be heard in answer to any bill seeking its sale. The clause of the will by which this interest is supposed to be conferred, is as follows:

"I give unto Moses the son of Esther aforesaid, the houses and lots where I now live (one of the aforesaid lots I bought of William Herbert junior, trustee for the creditors of Robert Conway, and the other I bought of Joseph Manderville), together with my fishing shore, during his natural life, and to his children if he should have lawful issue; if not, then I give the
558 said lots and *fishing shore at his decease to my grandchildren equally and their heirs forever."

The will bears date the 28th February 1817, and appears to have been admitted to probate on the 26th of May 1817. At the date of the will Moses Hepburn had no children; indeed, according to the statements of the bill, his marriage did not take place till about the year 1827. There are, as appears from the record, five children, the issue of that marriage. In this state of things, in order to come to the conclusion that the grandchildren of the testator mentioned in the clause in question, have still an interest in the devise, we should have to construe said clause as meaning that the vesting of the first remainder was dependent on the double contingency of Moses Hepburn having children, and of their (or some of them) surviving him. This, it seems to me, we cannot do. The law leans in favor of the vesting of estates: and if, therefore, the meaning of the will was doubtful, we should, instead of seeking for a construction that would postpone the vesting of the estate, and impart to the remainder an additional feature of contingency, incline rather to that construction which would regard the remainder as vesting on the happening of the earliest contingency, to wit, the coming into being of the children of Moses Hepburn. There is, however, no reasonable doubt as to the intention of the testator; the plain and natural effect of the language which he has employed, is to give the estate to Moses for life; remainder to his lawful children, if he shall have any, with an alternative remainder to the grandchildren of the testator, dependent on Moses' dying without having had any lawful children. At the death of the testator, both of the remainders were contingent; and until the birth of the first child of Moses Hepburn, the grandchildren had an interest in the subject of the devise: But on the happening of
559 that event, the first *remainder vested, and the second or alternative remainder was thereby defeated. Doe v. Perryn, 3 T. R. 484; Fearne on Remainders 312; Right v. Creber, 5 Barn. & Cres. R. 866; Hannan v. Osborn, 4 Paige's R. 336; Doe v. Provost, 4 Johns. R. 61; 4 Kent's Comm. 234, and note.

These authorities all show, that in cases of the kind the remainder becomes vested in the children of the life tenant as they severally come into being, subject to open and let in afterborn children, and that the remainders over are gone; and that if any of the children die in the lifetime of the life tenant, the estate descends to their heirs.

It is clear, therefore, as I conceive, that there was no error in the failure of the Circuit court to make the grandchildren of the testator parties to the suit; unless indeed such error arises out of the court's dismissing the petitions of the appellant and the petition of Thomas Dundas and others, so far as they were founded on the allegations that Moses Hepburn is a slave; that his marriage was illegal; and that his children are bastards; and that consequently, the said last mentioned petitioners are entitled to or interested in the lands sold. I am satisfied that the course pursued by the court in that particular was correct. It will be seen, that in the petition of the appellant, filed in February 1854, he states, that since paying a portion of the purchase money of the property in question, he had accidentally learned, from the result of a suit recently decided by the Circuit court of Alexandria (the court by which the decree under consideration was rendered), that it was very doubtful whether he could get any title to the land he had purchased.

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by reason of the said Moses Hepburn being a slave, and his supposed children being, in the eye of the law, bastards, and consequently unable to take any thing under the will of the testator William Hep-
560 burn. *We have before us no record of the suit above referred to, nor any account of, or statement in respect to it, further than what is contained in the petition. We may very reasonably conjecture that the reference is to the suit of Hepburn v. Dundas, which was decided by this court, upon an appeal in January 1856, and is reported in 13 Gratt. 219. Were we at liberty to look into that case, in passing upon this, we should there see that all the grounds on which the petitions were founded, so far as they relate to the matter in hand, had been entirely removed before the Circuit court made its order dismissing the petitions. In that case, the question whether Moses Hepburn was a free man or not, was distinctly presented to, and decided by this court in his favor. The case was an action of ejectment brought by Moses Hepburn and his sister Juliana, claiming to recover a certain tenement of James H. Dundas, as brother and sister and heirs of Letty, a free woman of color, to whom said tenement had been devised by the will of William Hepburn. Upon a demurrer to the evidence, the Circuit court had rendered a judgment, at its March term in 1853, in favor of the defendant. From this judgment an appeal was taken to this court in 1854; and at its January term 1856 (as before stated) this court reversed the judgment of the Circuit court, and rendered judgment for the plaintiffs in error; thus affirming the freedom of Moses and Juliana, and their right to take by descent from their sister.

At its May term 1856 the Circuit court made its order in this case, dismissing the petitions; the court and the parties having doubtless awaited the decision of this court in the case of Hepburn v. Dundas. Could we, therefore, properly regard the record in that case as a part of the record in this, all difficulty as to the question in hand would be at an end. As, however, neither the parties nor the Circuit court have
561 made *any such reference to said record as to identify it, and show conclusively to this court that it was relied on, and acted upon in the court below, we are not, I apprehend, at liberty to treat it as a part of the record in this case, and have therefore to pass upon the action of the Circuit court in respect to the petitions, without the aid of the decisive proof it would afford of the propriety of such action.

Looking at the case in the aspect in which it is presented in the absence of such aid, I am still satisfied that no error has been established in the course of the court in the particular under consideration. It may, I think, be safely affirmed, that when it appears to this court that the order of a Circuit court was based upon the evidence of facts not found in the record, this court may reasonably and justly presume that the order is right; that it was in accordance with, and justified by the facts.

Now, the sole reliance of the appellant, in his petition to the Circuit court to establish that Moses Hepburn was a slave, was upon the proceedings in a suit in that court. We cannot doubt that the Circuit court had full knowledge of all that was proved or decided in that suit. The appellant has failed to furnish us with any record of that suit. He has placed in this record no evidence of what was proved in it, or of what was its ultimate result. In the absence of such record, are we not well justified in concluding, that if produced it would fail to sustain the pretensions of the appellant, and that the order of the Circuit court was in conformity to its true bearing on the rights of the parties? Such a conclusion would seem to me to be just.

If additional support be needed to sustain this view, it may, I think, be derived from other considerations, which will be briefly adverted to. Moses Hepburn is recognized by the testator in his will as far back
562 as *1817 as being then a free man. In his bill he states that he was married in the year 1827. Of this there is no positive proof, but, from the deposition of the witness McKnight (taken in 1848), who states that he is acquainted with his wife and children, and who gives the ages of the latter, his marriage must have occurred at least as early as 1832 or 1833. In neither of the petitions is it stated that there was any further illegality or irregularity in his marriage than such as arises from the alleged fact that he was a slave. There is no allegation that the marriage was not in all its legal observances and forms, such as, if the parties were free persons, would have made it valid.

In his bill he further alleges, that he had duly qualified in the County court of Alexandria as the guardian of his children; and this is admitted in the petition of the Dundases; and in 1848 he institutes the present suit, as a free person of color, and so conducts it till 1854, when the petitions were filed; no question having ever been raised, so far as the record discloses, as to his title to freedom, from 1817 to 1854, a period of nearly forty years. If these circumstances, tending to show that for thirty-seven years he had been acting, and had been recognized and treated by the community, as a free person, are not, of themselves, in the absence of all proof to the contrary, except the presumption derived from his color, sufficient to overcome that presumption, and conclusively establish his freedom, they certainly persuade strongly to such a result; and when I consider them in connection with what has been said in respect to the suit referred to in the first petition of the appellant, I experience no difficulty in coming to the conclusion that the Circuit court properly disposed of the petitions, so far as they sought to impede the proceedings on the allegation that Moses Hepburn was a slave.

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The question which seems to me to
563 be the most *proper to be considered next in order, is that raised by the second assignment of errors. It is there objected, that the court had no power or jurisdiction to make a sale of the lands; that the law does not authorize a guardian to have a sale of the land of his wards, when, as here, according to the bill, he is tenant for life, and the infants have only a remainder in the lands; that the law contemplates the guardian as simply a fiduciary, and no where authorizes him to file a bill for the sale of real estate wherein he has an interest as well as the infant wards. I do not think that the objection is well founded. The law of 1819, as modified by the act of 1826, which governed the subject at the time when the first decree directing the sale was made, authorized the guardians of infants to file a bill for the sale of the real estate of their wards, as well where more than one infant should be interested in the land sought to be sold, as where any one or more of those interested should be of full age; and the 2d section of chapter 128 of the Code, which had taken effect before the court made its order (of the 19th of June 1852) sustaining the exception to the report of the sale under the first decree, and directing the commissioner to proceed according to said decree, provides for the exhibition of a bill by the guardian of any minor when he thinks "that the interest of the ward will be promoted by a sale of his real estate, or real estate in which he is interested with others, infants or adults."

The language of the law as it stood, whether at the date of the original decree or at the date of the order of June 1852, directing the commissioner to execute the original decree, is, I think, sufficiently broad to cover the case. The term "real estate" applies as well to life estates or estates in remainder, as to absolute or entire fees.

Doubtless, one of the leading ob-
564 jects in conferring *the power in question upon the guardians and the courts, was to enable the former more fully to provide for the support, maintenance and education of their wards; and it is urged against the exercise of the power in the present case, that the sale will not in any manner promote that object, inasmuch as the interest upon the fund during the life of the father is to be enjoyed by him, and not by his children.

I cannot think, however, that the object just mentioned, important as it is, is the only one contemplated by the laws in question. It is not difficult to conceive of numerous instances, in which the want of a power in the courts to sell the remainder of a ward, would occasion the most serious injury to his future interests. The call for a sale of the real estate of an infant, looking to his interest alone, may be just as obvious and urgent in the case where he is the owner of a portion, as where he is the owner of the whole of the fee; and no good reason is perceived why language broad enough to cover both cases should be construed to have conferred the power to sell in the one case and to have withheld it in the other.

When, as here, the guardian is himself the owner of the life estate, there may be considerations, arising out of such fact, of a character to quicken the diligence of the court, in scanning the proceedings, and in seeing to it that the rights of the infants are fully protected; but such considerations furnish no serious grounds for supposing that cases of the kind were designed to be wholly excluded from the operation of the laws under consideration.

The objection stated in the fourth assignment of error, namely, that the evidence on which the decree was founded does not appear to have been taken in the presence of the guardian ad litem, has been met and obviated by the supplement to the record brought up and filed since the appeal
565 was allowed; from which *it sufficiently appears that Yeaton, the guardian ad litem, was present at the taking of the depositions.

It is true, as stated in the first assignment of error, that the appellee Moses Hepburn does not formally aver in his bill that he brings the suit in his capacity of guardian; but this surely can furnish no sufficient ground for reversing the proceedings, when it is seen that the bill distinctly states his qualification as the guardian of his children; sets out the property belonging to them; details the facts and reasons going in his opinion to show that it would be to the interest of the children, as the remaindermen, as well as to his own, as the life tenant, that the lands should be sold and the proceeds properly invested; makes the children all parties; asks that a guardian ad litem be appointed; and indeed throughout its whole frame and structure shows that it was filed with reference to the statute, and with the intent to conform the proceedings to its provisions.

It appears from the deposition of McKnight, that one of the children, Prudence Crandall Hepburn, was over fourteen years of age at the date of the institution of the suit; and it is alleged, as the ground of the third assignment of error, that she has not answered the bill in proper person, as required by the statute.

I do not deem it necessary to consider what weight the Circuit court ought to have allowed to this objection, if it had been brought to its notice before the order confirming the sale was made; inasmuch as it appears it was not raised until at the end of some eighteen months thereafter.

It was certainly an irregularity, due doubtless to inadvertance on the part of the court, to order a sale without first requiring the answer in question to be filed. But I cannot think that a purchaser under such an order, who has allowed the sale to
566 be confirmed *without objection on his part, has thereafter a peremptory right to make an irregularity of the kind the ground either of vacating the order of

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sale, or of delaying the execution of subsequent orders passed to enforce his compliance with the terms of his purchase. If the purchaser regarded the error as one by which his title to the property purchased might be in any manner thereafter affected, he ought to have brought it to the notice of the court before the confirmation of the sale.

It is argued, however, that owing to the unusual course pursued in making the sale in this case, to wit, by means of written proposals or bids made by those desiring to purchase, to the commissioner, and by him reported to the court for its acceptance, the purchaser did not, and could not know whether he was the highest bidder, nor whether, if so, his bid would be accepted by the court, until the report had been returned to the court, his bid accepted, and the sale confirmed; the acceptance of his bid, and the confirmation of the sale by the court, being simultaneous—parts of the same order. Under such circumstances, it is argued, that it would be harsh to apply to the purchaser the rules governing in cases where the sale is conducted in the ordinary mode. In neither case, whether the sale is made in the mode pursued in this case, or by way of public auction, is there any complete contract until the report of the commissioner is returned to and approved by the court, and the sale confirmed; and I can see no substantial reasons for making any distinction between the two cases in respect of the time or opportunity to be allowed the purchasers to show why their inchoate bargains should not be perfected. But in truth, in the present case it is apparent that the purchaser did know, before or at the time the sale was confirmed, that his bid had been accepted by the court. For it is seen from the
567 *record, that the report of the bids was returned to the court on the 10th of May, and the order, reciting the payment, by the purchaser to the commissioner, of the cash stipulated for in his proposal, accepting the bid, and confirming the sale, was made on the 13th of May 1853; and on the same (last mentioned) day, he entered into, and acknowledged in open court, his bond, setting out the order, and binding him in all respects to fulfill and comply with its requirements.

It is further seen, that the court, at its May term 1853, was still in session on the 18th of the month, an order in this cause being made on that day; that in July 1853 Cooper notified the commissioner in writing of his purpose to move the court to set aside the sale and refund him the cash he had paid, on the ground of defect of title to the property sold to him; that at the February term 1854 he filed his first petition, setting out the objection already disposed of, of Moses Hepburn being a slave; that at the same term an order was made directing him to show cause, at the following May term, why he had failed to comply with the order of May 1853; and that at the May term 1854 an order was made allowing the filing of the petition, which should have been, but was not, entered at the February term, to be then entered.

It thus appears that Cooper had, after a knowledge of the fact that his bid was accepted, during the term at which the sale was confirmed, as well as repeatedly thereafter, the amplest opportunity to acquaint himself with all the proceedings in the cause, and to show, if he could, why he should not be compelled to complete his purchase. Yet nothing is heard of the irregularity in question till the November term 1854, when it is for the first time brought to the notice of the court by Cooper, in his supplemental petition then filed.

This review of his conduct, in-
568 stead of showing him *entitled to any exemption from the rules applicable to the case of a purchaser, at a judicial sale made in the usual mode, seeking, after a confirmation of the sale, to be excused from his purchase, exhibits such a degree of laches on his part as justly subjects his case to the most rigorous application of those rules. He was not in a position to ask that the sale should be set aside, and he discharged from his contract. The most that he could, in accordance with principles repeatedly announced by this court, properly ask, under the circumstances, was, that he should be protected against any future assertion of claim by the infant over fourteen years of age. See Cralle v. Meem, 8 Gratt. 496; Daniel v. Leitch, 13 Gratt. 195; Goddin v. Vaughn, 14 Gratt. 102. If the result of the proceedings is to afford such protection, there was no error to his prejudice in dismissing the petition; and such I think is the case.

It has been shown that the case was one over which the court had jurisdiction; and that all proper parties were before the court. The guardian ad litem had regularly filed his answer as well in behalf of the infant over fourteen years of age as the others; testimony had been duly taken showing that the interests of the infants would be promoted by a sale; and a sale obviously most advantageous to the infants had been made and confirmed. When, in this state of things, the omission in question was brought to the notice of the court, it might, in abundant caution, and out of regard for a strict observance of the provisions of the statute, intended as an additional safeguard to the rights of the infants, very properly, I think, have ordered the answer to be filed, and stayed all further action in the case till it was filed. But the court (as I feel justified in concluding from the history of the case), being fully satisfied that the bargain which it had made for the infants was a good one; that all before
569 *the court representing their interests were satisfied with the sale; and that the effect of calling for the answer would be simply to delay the proceedings, without in any manner changing the result, has not thought it necessary to supply the omission. I am still satisfied, however, that the

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purchaser is in no danger of any future disturbance of his title; that even without reference to the 8th section of chapter 178 of the Code, the infants would not be allowed, because of the defect in the proceedings complained of, to set aside a sale so manifestly beneficial to their interests. Be this as it may, the provisions of that statute do, I think, afford the purchaser full protection. The sale was not made till more than three years after the first order of sale in the cause, and more than eleven months after the second order directing the commissioner to proceed to execute the first order; and the statute declares, that if a sale of property be made under a decree or order of a court, after six months from the date thereof, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled. The revisors in their note to this section, at p. 878 of their report, after adverting to the fact that purchasers at judicial sales, especially in cases where there are infant parties, are often liable to have their titles impeached after a great lapse of time, and under circumstances most unjust and oppressive, recommend the adoption of the section as a means of remedying the evil. It was argued here that this section does not apply to cases where the lands of an infant are sold at the instance of his guardian, but to those cases only where the sale is in invitum, and incidental or collateral to the main objects of a hostile suit.

570 I can perceive, however, *no just ground for the distinction. The terms of the section are sufficiently comprehensive to embrace both classes of cases; and if it be just and proper that purchasers, under erroneous orders or decrees of sale, in any class of cases, should be protected against impeachments of their titles by infants interested in the cases, it would seem to me peculiarly just and proper to afford them such protection in those cases where the proceedings are for the benefit of the infants, and where the amplest and most efficient means have been prescribed for the protection of their interests.

I see no error in the decree, and think it should be affirmed.

ROBERTSON, J. With a single exception, I concur in the opinion of Judge Daniel.

It seems to me, that when a sale is confirmed by the court at the same time that the bids are opened and one of them accepted, the purchaser should be allowed a reasonable time after such confirmation, within which to make objections to the title.

In the case of a judicial sale made in the ordinary mode, the purchaser has an opportunity, and it is his duty to look into the title after he knows that he is the highest bidder, and before the sale is confirmed. If he fails to avail himself of this opportunity, and allows the sale to be confirmed without objection, it is not unreasonable that he should be precluded from objecting to the title afterwards. But no such opportunity exists when the sale is confirmed at the time of opening and accepting the bid. To hold that the purchaser stands on the same footing in each case, is in effect to require that he shall take the trouble and expense of investigating the title before he bids, or at least before he knows that he is the highest bidder—a rule which, if not known, must operate unjustly

571 *against purchasers at judicial sales; and, if known, can only have the effect of depreciating the price of the property, by diminishing the number of bidders.

Under the circumstances of this case, however, I concur in the affirmance of the decree of the Circuit court.

MONCURE, J., concurred in the opinion of Daniel, J.

Decree affirmed.

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572 *Mason v. Chappell.

April Term, 1860, Richmond.

1. **Sales—What Necessary to Constitute Fraud.***—To constitute fraud in a sale, it is not sufficient that there shall be false representations by the vendor: but he must know at the time he makes them, that they are false; or at least he must make them as statements of facts within his own knowledge, when he has no knowledge of the subject.

2. **Same—Express Warranty—What Constitutes.**†—Any affirmation of the quantity of the article at the time of the sale, intended as an assurance to the purchaser of the truth of the fact affirmed, and acted on by the purchaser, is an express warranty. But no affirmation, however strong, will constitute a warranty, unless it was so intended.

3. **Same—Specific Article—Implied Warranty.**‡—Where a specific article is ordered and furnished, though the purchaser states the purpose to which he intends to apply it, there is no implied warranty

*Sales—Fraud—Scienter.—Whether the imputation of *fraud* be *suppressio veri*, or *suggestio falsi*, the case of Mason v. Chappell, 15 Gratt. 582, settles the law in Virginia, that the *scienter must be shown*. Proctor v. Spratley, 78 Va. 267, 268, citing the principal case. See the principal case also cited and approved in Crislip v. Cain, 19 W. Va. 490.

†Same—Express Warranty—What Constitutes.—The rule laid down in the second headnote as to what constitutes an express warranty has met with approval in Herron v. Dibrell, 87 Va. 296, 12 S. E. Rep. 674; Milburn Wagon Co. v. Nisewarner, 90 Va. 717, 19 S. E. Rep. 846; Reese v. Bates, 94 Va. 329, 26 S. E. Rep. 865; Crislip v. Cain, 19 W. Va. 481, 482, 543.

‡Same—Specific Article—Implied Warranty.—See Gerst v. Jones, 32 Gratt. 523, where the principal case is cited and approved as to the proposition laid down in the third headnote. But, in this case (Gerst v. Jones), the transaction was not a sale of an existing chattel selected by the purchasers, but an executory contract to manufacture and deliver, from time to time, as they might be needed, a number of tobacco boxes for a *particular purpose, known to the seller*.

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on the part of the vendor that it is suitable for the purpose; and he will not, in the absence of fraud or an express warranty, be held liable, however unfit and defective it may turn out to be.

4. **Same—Failure of Article Sold to Answer Representation—Presumption.**—The mere fact that an article sold does not answer to the representation made respecting it, is not ground to assume that it was not the genuine article sold, so as to entitle the plaintiff to recover for a failure by the vendor to comply with his contract.

5. **Same—Article Worthless—Right to Recover Price.**—The mere fact that an article proves to be worthless, will not entitle the purchaser to recover back the price paid.

This was an action on the case in the Circuit court of Alexandria county, by Richard C. Mason against P. Stockton Chappell. The declaration contained two counts. The first was for the breach of a warranty, upon the sale by the defendant to the plaintiff of one hundred and fifty barrels of a manure called "Chappell's fertilizer;" the second was the common money counts in assumpsit. The plaintiff alleged that the article received by him was wholly worthless, and therefore he claimed to recover back the whole price, four hundred and sixty-three dollars and fifty cents, paid by him.

573 *Upon the trial the defendant demurred to the evidence; and the plaintiff joined therein. And from the evidence it appeared, that some time in September or October 1852, the defendant sold to the plaintiff one hundred and fifty barrels of an article manufactured by the defendant, called "Chappell's fertilizer," to be used on the plaintiff's land, at the price of four hundred and sixty-three dollars and fifty cents; and that the defendant, at the time of the sale, recommended highly said article as a manure, and said that on its application to poor lands it would produce good crops. That defendant further said to the plaintiff, "I wish you had some very poor land on which to apply it;" to which plaintiff replied, "I can accommodate you in that particular exactly."

The plaintiff also introduced in evidence an advertisement of the defendant in the Alexandria Gazette, with several letters thereto annexed, in which the value of the fertilizer as a manure was set forth; and also a pamphlet describing the article, and directing the mode of its use; and this was accompanied with numerous letters from persons who had used the article, the most of whom commended it highly; and among these was a letter of Commodore Jones, an acquaintance and friend of the plaintiff.

It was further proved by the plaintiff, that the said fertilizer was well applied to his land, and wheat sown where the fertilizer was applied; that the crop produced on said land was a very indifferent one, and not so good as that produced on the same land two years before; that it was in fact the worst crop the witnesses ever saw on the land, and that they had long been acquainted with it, being near neighbors of the plaintiff.

The court sustained the demurrer, and rendered a judgment for the defendant. And thereupon Mason applied to this court for a supersedeas; which was awarded.

574 *Green, for the appellants:

The evidence, spread out in the demurrer to evidence, most amply sustained (according to the principle established by Green v. Judith, 5 Rand. 1, and the other authorities of that class, now become very numerous) the several allegations, on the part of the plaintiff, respecting his purchase of the (real or pretended) manure in question, his payment of the purchase money for the same, and the utter worthlessness of the article, upon a perfectly fair trial of it; leaving open to debate no points which it would not be inexcusable to discuss but one, namely, whether other facts, necessary for maintaining the action, in connection with these, are sufficiently made out. This enquiry I shall present under the several aspects following:

1. It is not necessary to make out any other facts; because those already stated establish a total failure of the consideration upon which the plaintiff had paid his money; and thus entitle him to recover it back, under the count for money paid, or under that for money had and received. On this trite topic I forbear to cite any authorities.

2. If this be not so, still the plaintiff was entitled to recover upon additional facts, which a jury would have been fully justified in finding from the evidence, and which therefore the court below was bound to consider as established. As against the defendant (no matter what the real truth of the matter may be), we must take it—from his own declarations to the plaintiff—from his written communication to him—from his printed advertisement referred to in the correspondence between them which led immediately to the purchase, and from the pamphlet, bearing in like manner upon the transaction—from each one, and from all of these, we must take it, that the article known by the name of "Chappell's fertilizer," which the defendant professedly sold to the plaintiff, would, if it had

575 *been furnished genuine, have accomplished all the results, or at least, the most important of them, or at the very least, some of them, which the defendant

The court said that the seller, in undertaking to furnish the boxes, impliedly agreed they should be reasonably fit for that purpose: that, if the purchasers had gone to the factory of the seller and themselves selected certain boxes, such as they believed would answer their purpose, the seller would not be liable however worthless the boxes might prove to be; but that the purchasers made no selection, they relied upon the skill and judgment of the seller, as a manufacturer, to furnish an article fit for the purpose for which they were ordered; and, therefore, since the boxes proved unfit for that purpose, the seller was liable in damages for the injury caused thereby.

held out in prospect to the plaintiff, and which constituted the sole inducement to the latter for laying out his money in the purchase. In this point of view, the things published by the defendant, in the shape of certificates from others, are important evidence against him, whether they be real or fictitious; he cannot deny their reality or their truth, after displaying them to the public and to the plaintiff in the manner he did; and therefore, as against him, they (besides his own declarations) establish, that, if the article, furnished under that name, failed upon a fair trial to accomplish the results ascribed by them to it, at least in some good measure—as the article actually furnished by the defendant to the plaintiff did fail—it must be because the article so furnished was not genuine; at least, that it was not of good quality, probably because the ingredients used in making it were spurious or damaged, or because the article itself, after it was manufactured, had become damaged and worthless. On all these points, the court was bound, upon the demurrer to evidence, to make the strongest inferences a jury could make against the demurrant; and I submit that these now stated are not only rational, but moreover, the only fair ones. If so, the defendant violated the warranty which the law implies in all such cases, and which the declaration in this case alleges, that the article sold and delivered was genuine and of good quality. Laing v. Fidgeon, 4 Camp. R. 169; S. C. 6 Taunt. R. 108; Jones v. Bright, 5 Bingh. R. 535; S. C. 3 Moore & Paine R. 155; Brown v. Edgington, 2 Mann. & Grang. 279; S. C. 2 Scott's N. R. 496; Shepherd v. Pybus, 3 Mann. & Grang. 868; 4 Scott's N. R. 434; Gallagher v. Waring, 9 Wend. R. 28; Howard v. Hoey, 23 Id. 350; Carnochan v. Gould, 1 Bailey's R. 179; Barnett v. Stanton, 2 Alab. R. 181.

576 *3. Moreover, there are other additional facts in this case, which in like manner the court was bound to consider as established, that make out against the defendant a case of express warranty. These I shall not here give trouble by pointing out more particularly than is indicated by allusions in the statement which I subjoin of legal propositions bearing upon the point. On this head it has long since been settled, that in order to constitute such a warranty, the word "warrant" need not be used, nor any word of precisely similar import (Cave v. Coleman, 3 Mann. & Ryl. 2; Salmon v. Ward, 2 Carr & P. 211; Wood v. Smith, 4 Carr & P. 45; S. C. 5 Mann. & Ryl. 124; Breemen v. Buck, 3 Verm. R. 53; Roberts v. Morgan, 2 Cow. R. 438; Buckman v. Haney, 6 Engl. Ark. R. 339); that any representation or affirmation concerning the quality or properties of an article sold, put forward, not as matter of opinion or belief merely, but for the purpose of assuring the buyer as to the truth of what is so represented or affirmed, and of inducing him to make the purchase, is, if accordingly received and relied upon by the purchaser, an express warranty (Hillman v. Wilcox, 30 Maine R. 170; Whitney v. Sutton, 10 Wend. R. 413; Osgood v. Lewis, 2 Harris & Gill 495; Kinley v. Fitzpatrick, 4 How. Miss. R. 59; McGregor v. Penn, 9 Yerg. R. 74; Hawkins v. Berry, 5 Gilman 36; Randall v. Thornton, 43 Maine R. 230; Jones v. Bright, 2 Ross. Lead. Cas. 360, 361; Sheppard v. Pybus, 42 Eng. C. L. R. 452; Reese v. Williams, 16 Ill. R. 69; 2 Rob. Pr. 355 to 359, 359 to 363); and that the question, whether such a representation or affirmation was so advanced on the one side, and so accepted on the other, is a question of fact for the jury, which ought to be left to their determination, and concerning which their verdict will in these cases, as it will in all others, not be set aside unless manifestly contrary to a correct finding upon the evidence. Power v. Barham, 4 Ad. & Ell. 473;

577 S. C. 7 Carr & P. *356; Chapman v. Murch, 19 Johns. R. 290; Duffee v. Mason, 8 Cow. R. 25; Cook v. Moseley, 13 Wendell 277; Foggart v. Blackweller, 4 Ired. Rep. 238. And from these now perfectly settled principles the doctrine has been logically deduced, which in a recent case has been asserted, namely, that where the vendor's statements form the sole basis (as in this case they did) of the sale, that his declarations shall ordinarily be regarded as a warranty of what they import. Beals v. Olmstead, 24 Verm. R. 114.

Brent and Kinzer, for the appellees:

The ancient rule of the common law, caveat emptor, is the law of this state. By this law the vendor is not bound to answer to the vendee for that goodness or quality of the articles sold unless he warrants them to be good, or unless he knew them to be otherwise; in other words, there must be either a warranty of fraud to make the vendor answerable for the quality or goodness of the articles sold. 2 Kent Com. 478; Wilson v. Shackelford, 4 Rand. 5.

In the present case there is no imputation of any intention on the part of the defendant to deceive or defraud the plaintiff.

1. To enable the plaintiff to recover, the evidence must show a warranty, either express or implied. We maintain that neither can be drawn from the evidence. It is conceded that no precise words are necessary to create a warranty; but every affirmation of goodness or quality is not a warranty. To constitute a warranty, the intention of the parties must be looked at; the affirmation or representation made by the vendor at the time of sale to constitute a warranty must have been so intended by him, and relied on as such by the vendee. Otherwise every such affirmation will be treated as simplex commendatio, and therefore not binding.

578 *The following cases illustrate this principle: Chandelor v. Lopus, 2 Croke's R. 2; Jackson v. Wetherill, 7 Serg. & Raw. 482; McFarland v. Newman, 9 Watts' R. 55; Swett v. Colgate, 20 John. R. 196; Seixas v. Wood, 2 Caines' R. 48.

The case of Prideaux v. Bunnett, 1 J.

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Scott, N. S., 613; S. C. 87 Eng. C. L. R. 613, would seem to rule the present case. That was an action to recover the price of an article called "Prideaux's patent self-closing valve," for which plaintiff had a patent. The plaintiff, as did Chappell, issued cards and circulars, highly laudatory of the value and utility of his valves. The defendant returned to the plaintiff one of these circulars with a written order, "Please prepare us a smoke-preventing valve," &c. The plaintiff sent one of his valves, but it was found not to be of any use for the purpose for which it was designed. On being sued for the price, the defendant relied on the statements contained in the circular which had been sent to him by the plaintiff—to the effect that the patent article would consume smoke, and effect a considerable saving in fuel—as amounting to a warranty that it should be fit for the purpose to which it was to be applied; it was held that no such warranty could be implied, and the plaintiff was entitled to recover his price.

2. Was there an implied warranty? The plaintiff maintains, that where an article is ordered to be manufactured for a particular purpose, the law implies a warranty, that it is fit for that purpose. This rule seems to be of modern origin. Down to the period of the decision in Parkinson v. Lee, 2 East. R. 314, year 1802, the common law rule of caveat emptor was maintained in all its integrity. The doctrine of implied warranties was resisted as an innovation sought to be borrowed from the civil law.

It appears, however, that it was at
579 length engrafted on the common *law rule. In Hibbert v. Shee, 1 Camp. R. 113, year 1807, and in Gardner v. Gray, 4 Id. 144, Lord Ellenborough recognized the principle, that a sale by sample implied a warranty, that the bulk of the goods corresponded in quality with the sample. And in a great number of subsequent cases (many of which are cited by the plaintiff in his petition), the English common law courts have fully established the principle of implied warranty as above laid down. But this principle has been applied to cases where warranted by the usage of trade, as in Jones v. Bowden, 4 Taunt. R. 847; to sales by sample, where the difficulty or impossibility of inspecting the goods at the time of sale has been said to justify a presumption of warranty, as appears from the cases cited in the petition; Gallagher v. Waring, 9 Wend. R. 20; Howard v. Hoey, 23 Wend. R. 351; Barnett v. Stanton, 2 Alab. R. 181; Carnochan v. Gould, 1 Bail. R. 179; and to cases where an order was given for an undescribed and unascertained thing, stated to be for a particular purpose, which the manufacturer supplies, as in the cases cited by plaintiff; Jones v. Bright, 3 Moore, p. 155; Brown v. Edgington, 2 Man. & Grang. 279.

But later authorities seem to place the authority of the class of cases above referred to upon a principle wholly distinct from and independent of the doctrine of warranty. In Chanter v. Hopkins, 4 Meeson & Welsb. 399, Lord Abinger regards this principle as applicable to executory sales or contracts where the goods bargained for or ordered do not correspond in specie with those delivered. A warranty is a part of the contract, yet collateral to the main object of it, and the breach of such a contract, a breach of warranty. But where a party undertakes to sell or furnish a particular article, and furnishes a different one, it is a breach of contract, as where a man agrees to sell peas and furnishes beans, and
580 where a man orders *sheathing copper, and does not receive such. In such cases the contract is not complied with. In such cases, therefore, the vendee must seek to recover damages on the ground of a failure of the article delivered to correspond with the article sold, and he must declare on the contract as executory, and not as executed, and aver that the vendor has failed to comply with the stipulations of his contract by delivering a different article. In declaring on a warranty on an executed contract of sale, it is admitted that the right of property in the article sold has passed to the vendee, and in such case nothing is better settled, than that there can be no recovery unless there is fraud, or express warranty. 1 Smith's Lead. C. 222, 226. In the present case the defendant sold and the plaintiff bought "Chappell's fertilizer." "Chappell's fertilizer," plaintiff avers in his first count, was delivered to him, but he avers that it was unfit for the purpose for which it was sold and delivered. In this view of the case, he cannot recover unless there was an express warranty or fraud.

It cannot be pretended that the plaintiff did not receive Chappell's fertilizer; for the plaintiff's witness proved "that one hundred and fifty barrels of Chappell's fertilizer were delivered to him." Even if the fertilizer had not been delivered, but another and different article, still the plaintiff could not recover on the allegations of his declaration.

But the doctrine of implied warranty has never been held to apply to the case of a sale of a known ascertained article. And in addition to the case of Prideaux v. Bunnett, we cite Chanter v. Hopkins, 4 Mees. & Welsb. 399; Olivant v. Bayley, 5 Ad. & El. 288; S. C. 48 Eng. C. L. R. 287; Camac v. Warriner, 1 Man. Gr. & Scott, 356; S. C. 50 Eng. C. L. R. 354.

3. Even if there had been a warranty, the plaintiff has not shown any breach thereof. The plaintiff only proved that the fertilizer was well applied to his land,
581 *and that his crops were indifferent. This alone surely would not authorize any jury to infer therefrom that the fertilizer furnished was not of good quality and of no value.

The plaintiff should have also shown that the directions given for the use and application of the fertilizer, had been followed out by him. If we are to presume a warranty from the printed advertisement and pamphlet of the defendant, such warranty

should be qualified or limited by the instructions contained in the pamphlet, and said to be essential "to secure the full effects of the manure." They should be treated as a part of the warranty; and if so regarded, it was at least incumbent on the plaintiff to show that he had observed them. Every description of fertilizers will sometimes fail. The soil may not have been properly prepared. The fertilizer may have been improperly or injudiciously applied. The season may have been unpropitious. On these points the evidence is dumb; and no attempt was made by the plaintiff to exclude the presumption that the failure may have arisen from extrinsic causes. In Jones v. Bright the copper was assayed, and it was shown that its decay arose from intrinsic defects, occasioned by want of skill in its manufacture, or from the use of improper materials.

In Brown v. Edgington evidence was given tending to show that the rope had been badly manufactured, and was of inferior materials.

4. The plaintiff cannot recover under the second count in the declaration, on the ground of "a total failure of the consideration."

We have before shown that it is too late for the plaintiff to say that he did not receive "Chappell's fertilizer." And it seems well settled that a breach of warranty does not entitle a purchaser of a specific article, which has been accepted by him, to
582 rescind *the contract of himself, and bring an action to recover the price, but he must sue on his warranty. Powell v. Wells, 2 Cowp. R. 818; Weston v. Downes, 1 Doug. R. 23; Payne v. Whale, 7 East's R. 274.

Even admitting that the plaintiff did not in point of fact get "Chappell's fertilizer," but another article; yet having received it and used it, he could not sue for the recovery of what he paid under this count, for, there being a part execution of the contract, the parties cannot be placed in statu quo. Hunt v. Silk, 5 East's R. 449.

ROBERTSON, J. It is well settled law, in this state, that in a sale of personal chattels a full price does not import a warranty as to quality. The vendor is not liable for defects in quality unless he warrants, or makes some fraudulent representation, or, knowing of a latent defect, omits to disclose it.

It is unnecessary to enquire into the correctness of the position taken by the plaintiff's counsel, that a recovery for a fraudulent representation may be had under the money counts, because there is no evidence in the case tending to show fraud. To constitute fraud the scienter is necessary. It is not sufficient to show that false representations were made by the vendor; it must also be shown that, at the time he made them, he knew them to be false; or, at the least, that they were made as statements of facts within his own knowledge, when in truth he had no knowledge whatever upon the subject.

Here, there is no evidence that any latent defect, known to the vendor, was concealed by him; or that he did not honestly believe that the representations he made were true. If therefore he can be held liable at all, it must be for a breach of warranty, or for a failure to comply with his contract.

To constitute a warranty, no particular form of expression
583 *is required; an apparent intention to warrant is sufficient. It is enough, if the words used import an engagement on the part of the vendor that the article is what he represents it to be. Any distinct affirmation of quality made by the vendor, at the time of the sale, not as an expression of opinion or belief, but as an assurance to the purchaser of the truth of the fact affirmed, and an inducement to him to make the purchase, is, if accordingly received, and relied on, and acted upon by the purchaser, an express warranty. But no affirmation, however strong, will constitute a warranty, unless it was so intended. If it is intended as a warranty, the vendor is liable, if it turns out to be false, however honest he may have been in making it: but if it is intended as an expression of opinion merely, or as simple praise or commendation of the article, he is not liable, unless it can be shown that he knew at the time that it was untrue. And in that case, it is inaccurate to say that he is liable for a breach of warranty. His liability arises from the fraud of which he was guilty, and should be enforced in an action on the case for deceit.

It is often very difficult to determine whether an affirmation was intended as a warranty, or as a mere expression of opinion. But in this case there is no such difficulty. It is clear that there was no intention to warrant. All that the defendant said and published amounted to no more than simple praise or commendation of the article. The plaintiff too seems not to have relied so much upon the representations of the defendant, as upon those made by Commodore Jones, and others who gave certificates.

But it is insisted that the defendant is liable upon an implied warranty.

If the plaintiff, relying on the defendant's skill and judgment, had applied to him to furnish a manure which would produce such effects as are attributed
584 to *"Chappell's fertilizer," without specifying what particular kind of manure he wanted, and the defendant had accordingly furnished an article, which, instead of producing such effects, proved to be entirely worthless, there would be good ground for the proposition that there was an implied warranty from which liability would arise.

If an order is given for an undescribed, unascertained thing, stated to be for a particular purpose, the vendor will be held liable, unless it answers, in a reasonable degree, the purpose for which it was purchased. But where a specific article is

ordered and furnished, the law is well settled that, although the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for the purpose; and he will not, in the absence of fraud, or an express warranty, be held liable, however unfit and defective it may turn out to be. Chanter v. Hopkins, 4 Mees. & Welsb. 399; Olivant v. Bailey, 48 Eng. C. L. R. 287; Prideaux v. Bunnett, 87 Eng. C. L. R. 613.

In the case of Chanter v. Hopkins, Lord Abinger says, "A good deal of confusion has arisen in many cases on this subject, from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a warranty, and a breach of such contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfill; as, if a man offers to buy peas of another, and he sends
585 him beans, he does not perform *his contract, but that is not a warranty: there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him any thing else in their stead, it is a non-performance of it. So if a man were to order copper for sheathing ships—that is, a particular copper prepared in a particular manner—if the seller sends him a different sort, in that case he does not comply with the contract: and though this may have been considered a warranty, and may have been ranged under the class of cases relating to warranties, yet it is not properly so. Now, in the present case the question is, whether or no the order has not been complied with in its terms." 4 Mees. & Welsb. 404-5.

So in this case, the only proper enquiry is, has the plaintiff's order been complied with according to its terms, by furnishing him with "Chappell's fertilizer"—a manure which was well known by that name.

There is no averment in the declaration that a different article from that ordered by the plaintiff was furnished. On the contrary, the allegation there is, that "Chappell's fertilizer" was bought and delivered, and that it was warranted by the defendant to be of good quality, and reasonably fit for the purposes of the plaintiff; and damages are claimed for a breach of that warranty. The testimony shows that the article called "Chappell's fertilizer" was delivered by the defendant to the plaintiff: and there is nothing in the record from which it can be inferred that the precise article known by that name was not furnished, except only the fact that the effects resulting from its use, have not been such as "Chappell's fertilizer" was represented to produce, and may perhaps have generally produced.

It is argued that this of itself is sufficient to show that a spurious article was furnished. That, as against the defendant, it must be taken as true that the article
586 *known by the name of "Chappell's fertilizer," which the defendant professedly sold to the plaintiff, was really as valuable as it was said to be, and would, if it had been furnished genuine, have accomplished the results, or at least some of them, which it was said that it would accomplish; and that the article furnished under that name, having, upon a fair trial, failed to accomplish any of these results, was not genuine and unadulterated, but was, on the contrary, spurious, adulterated, or damaged to such an extent as to be not only not of reasonably good quality, but altogether worthless.

If this argument be sound, then the cases which have been cited, and all others of the same class, have been incorrectly decided; for it was as applicable in them, as it is in this case. But its unsoundness is manifest. To assume that an article is not genuine because it does not answer to the representations made respecting it, in effect converts mere representations into warranty, and destroys the rule that the vendor is not responsible for the truth of such representations, unless they are made fraudulently. To hold that the representation gives a right to infer, if the article does not come up to it, that it is spurious, adulterated, or damaged; and to make the vendor liable for not furnishing a genuine, unadulterated, undamaged article, is obviously the same thing in substance as to make him liable merely because the representation turns out to be untrue.

There is then no reason to doubt that the plaintiff got the identical article that he ordered; and that he occupies "the position of a man who has had the misfortune to order a particular chattel, on the supposition that it will answer a particular purpose, but who finds that it will not."

But it is insisted that if the plaintiff has no other right to recover, he can do so
587 under the money counts, *because of a total failure of the consideration for which he paid his money.

The answer is, that, if he can recover in any mode, upon such a failure of consideration as has been shown to exist in this case, it follows, that whenever an article is bought under the belief (however it may have been induced) on the part of the purchaser, that it is sound and of good quality, and it turns out to be in fact worthless, the rule that the vendor is not liable except for warranty, or for fraudulent representation or concealment, would be entirely abrogated; for, to avoid its effect, the purchaser would only have to declare as for a total failure of consideration.

I can find no ground upon which the plaintiff is entitled to relief, even conceding

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that upon the demurrer to evidence the court should infer that the article purchased by him was intrinsically and wholly worthless—a concession, the propriety of which may well be doubted; for it is by no means certain that this is such a reasonable inference from the testimony that the court ought to make it.

It seems to me to be clear that the judgment should be affirmed.

The other judges concurred in the opinion of Robertson, J.

Judgment affirmed.

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588 *Bennett & als. v. Toler & als.

April Term, 1860. Richmond.

[78 Am. Dec. 638.]

Devise—"To Daughter for Life, Remainder to Children"—Interest of Illegitimate Children.*—Upon a devise to a daughter for life, and at her death the property to be equally divided among her children; an illegitimate child of the daughter will take with her legitimate children.

This was an appeal from the decree of the Circuit court of Pittsylvania, in a suit instituted by the children of Henry Toler deceased, against Crafton Bennett and others. The only question in the case arose on the construction of the sixth clause of the will of Joseph Toler deceased.

Joseph Toler died in 1819, and his will was duly admitted to record in the County court of Pittsylvania. The sixth clause is as follows:

"6th. I give to my beloved daughter Mary Bennett, the tract of land she now lives on, bought of Creps. Also the following negroes: Aggy, Lazenberry, Locky and Sapy. My will is, at the death of my daughter Mary Bennett, that the land and negroes given to her shall be equally divided amongst her children."

The facts are, that Mary Bennett, before her marriage with Lewis Bennett, became the mother of a natural child; and after the birth of this child she married Lewis Bennett and had by him several children, who or whose descendants were the defendants in this case. This natural child, who was called Henry Toler, was born sixteen or eighteen years before the death of Joseph Toler, and was known and recognized by Joseph Toler as the child of Mrs. Bennett. At the death of Joseph Toler, Mrs. Bennett was married to Bennett and had several children by him then liv-
589 ing. *Henry Toler was then alive; but died intestate in the lifetime of his mother, having married, and leaving the plaintiffs his children, his heirs and distributees. Mrs. Bennett afterwards died, and this suit was brought by the children of Henry Toler, claiming that he took under the will of Joseph Toler, as one of the children of Mary Bennett. The court below decreed in their favor; and the defendants obtained an appeal to this court.

The case was argued orally before a court of four judges, by Macfarland & Roberts, for the appellants, and Grattan, for the appellees: and the court having directed that it should be argued again before a full court, printed notes of argument were submitted by Read and Macfarland & Roberts, for the appellants, and Grattan, for the appellees. The reporter trusts that on a question of such interest he will be excused for giving the argument at length.

Read, for the appellants:

There is no rule of construction, we submit, better settled by an unbroken chain of English and American decisions, than this: Where there are legitimate and illegitimate children in existence at the death of the testator, gifts to "children" as a class exclude illegitimates. And no case can, we think, be cited in which legitimate and illegitimate children have taken under the same description. 2 Jarm. Wills, 2 Amer. ed. p. 93-4, and American cases cited; Bagley v. Mallard, 4 Cond. Eng. Ch. R. 563. In the last case cited, the testator gave the residue of his property, after the death of his wife and daughter, to all the children of his sons James and William and of his daughter Sarah, in equal shares. William was dead and had an only surviv-

*Devise to Daughter for Life, Remainder to Issue—Interest of Illegitimate Issue.—In Flora v. Anderson, 67 Fed. Rep. 187, Longworth devised a part of his estate in trust for his daughter for life, with remainder to the issue of her body surviving her. At the time the will was made the daughter was nearly fifty years of age and had no legitimate issue. After the death of the daughter, F, alleged to be an illegitimate child of the testator's daughter, claimed the remainder. The court held, that the devise to "issue" meant *prima facie* legitimate issue, and an intention to include illegitimate issue, must be deduced from the language of the will itself, without resort to extrinsic evidence. And in commenting upon and distinguishing the principal case the court said: "Attention is also called by counsel for the complainant to the fact that the legislature of Ohio appears to have been dissatisfied with the construction given to the statute in Gibson v. McNeely, and as a result passed the act of April 3, 1867 (64 Ohio Laws, 105), which enacts that 'bastards shall be capable of inheriting from and to the mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance in like manner as if born in lawful wedlock.' But that statute was passed four years after the death of Longworth, and after all rights under his will had vested. Particular attention is called by counsel for the complainant to the case of *Bennett v. Toler*, 15 Gratt. 588, decided by the supreme court of Virginia in the same year that Gibson v. McNeely was decided by the supreme court of Ohio. In that case the law was held to be as claimed for the defendant, but that ruling was made expressly upon the statute of Virginia, and therefore is not to be regarded as applicable in this case." The principal case is cited in the dissenting opinion of RICHARDSON, J., in Greenhow v. James, 80 Va. 650. See also, 5 Va. Law Reg. 112, where the principal case is cited; 1 Min. Inst. (4th Ed.) 450.

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ing daughter, Elizabeth. It was held that Elizabeth took no part of the residue,
590 although the testator *had, in a previous clause in the same will, devised to her a leasehold in trust, describing her "as his grandchild Elizabeth, the only surviving child of his son William." We also refer to Lomax on Executors, edition of 1857, vol. 2d, top p. 34-36. The same author in his Digest, vol. 3, p. 235-36, lays down the same rule, and adds, "Nor will the application of this rule fail, though the children were described in reference to the mother." In a note on the same page (236), the question is asked, "Has the Virginia statute, as to the capacity of bastards to inherit, any influence in changing this doctrine?" But in his late work on executors, the broad rule of the English courts is laid down, without adverting to the Virginia statute. Lomax on Ex'ors, p. 34.

It will doubtless be conceded that this canon of constructions is entirely settled as a part of the common law of England, and as such, binding in our own courts, unless it is abrogated by our act of descents, which permits bastards to inherit from their mother.

If the act referred to had legitimated all bastards and removed all their disabilities, they might answer the description of "children." But surely a statutory provision which merely removes one of the disabilities of a bastard, in permitting him to inherit from his mother, cannot have the effect of changing his designation and bring him under the description of "children," in a will or deed.

The expression "children," unless qualified, means, in legal technicality and construction, ex vi termini, lawful children. This is its legal meaning in wills and deeds, unless qualified; and every testator in a will or grantor in a deed is presumed to use the word in its technical sense, unless the contrary intention manifestly appears from the face of the instrument itself. But it was contended in the court below, that by the common law a bastard was filius
591 nullius, and *that it was for this reason that he did not take under a bequest to children. It should be borne in mind, however, that the rule that a bastard is "filius nullius," applied only to cases of inheritance: he was subject to no other disability—he had all the privileges of citizenship—he could hold real and personal estate, and give and convey to others. And so far as devises and bequests were concerned, he never was regarded as filius nullius. Jarman says that illegitimate children, born at the time of making the will, may be objects of a devise or bequest by any description which will identify them. 2 Jarm. Wills, p. 94. By the common law a bastard cannot take by descent, but he might always take under a bequest. Now, the reason that in a bequest "children" means lawful children, is founded doubtless on the presumed intention of every testator, in the absence of qualifying expressions, to provide for lawful, in preference to spurious offspring. It is true, that in its primitive sense its more literal meaning, in common vocabulary, might have been legitimate offspring—Qui ex damnato coitu nascuntur, inter liberos non computenter. We have an instance in the Epistle to the Hebrews from which we infer that the word "sons" in common parlance at that day meant only legitimate sons—"Then are ye bastards, and not sons." But doubtless the controlling motive in giving such a construction to the word "children" was, as we have stated, that in a great majority of cases the testator is presumed to prefer, as objects of his bounty, legitimate children to bastards. Such a preference tends to discourage vice —to encourage purity and chastity. Such a preference is a reproof and punishment to the mother; and the parent, as an example and warning to his other children, in legal construction, only intends to provide for legitimate offspring, when he makes a bequest to his "children." The same motive would be presumed to
592 *influence a testator who is a collateral relation, or a stranger in blood to the children of the mother who are the objects of the testator's bounty. And while the legislature, acting on the supposed natural affections of the mother, casts her estate on the unfortunate offspring of her own illicit connexion, and thus in default of a last will provides for the bastard out of the property of one who brought it into being, such a legislative provision could throw no light on the intention of a testator, who is under no legal or moral restraint to provide for the children of the guilty mother; and is presumed by considerations of public morality and decency, to discriminate, in dispensing his bounty, in favor of lawfully begotten offspring.

The argument on the other side seems to us to be no more than this: Whereas by a rule of testamentary construction as well settled as any principle of the common law, children in a bequest means only legitimate children, and the testator is always presumed to intend only legitimate children; yet the act of assembly which permits bastards to inherit from their mothers, changes the supposed intention of the testator, and furnishes the new rule of construction, that "children in testaments shall embrace bastards."

If the English rule is once broken in upon, it would be difficult to foresee all the consequences that would result from its abrogation.

If bastards of a particular female come under the description of children, then in all deeds and in all wills, limiting estates over after the death of a female, to her children, in all instruments in which property is granted or given to the children of nieces or aunts, or to the grandchildren of a particular female, or to grandchildren generally, the words children and grandchildren would let in bastards. Powers of appointment to dispose of property among the children of a particualr female

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would be improperly executed, unless
593 *bastard children shared in the distribution. A gift to the grandchildren of A, under such a construction, might let in a bastard grandchild whose mother also was a bastard: And possibly the precedent might be stretched to embrace unprocreated and unborn bastard offspring, under the idea that they can inherit from the mother as soon as they come into existence: and even a gift to the "lawful issue" of the mother, might embrace illegitimates, for the argument is, they are lawful issue to inherit, and should be deemed legitimate in a bequest.

All the cases show that "child," taken simpliciter, means a legitimate child only. Wigram, V. C., in Dover v. Alexander, 24 Eng. Ch. R. p. 275, 280. Children and legitimate children, in the construction of wills, are convertible terms. And it seems to us the conclusive answer to the argument, that our act of descents has made them children of the mother, quoad their heritable capacity from her, is, that they still continue to be illegitimate children—and are not included in a devise to "legitimate children," or "children," which are convertible terms.

But there are, we submit, strong reasons why judicial construction should not go in advance of legislative action in removing those time honored restraints upon incontinency and vice that have produced their good effects in our own state, as well as in England. It is difficult to estimate the sanative influence of those rules that keep up the legal distinction between bastards and lawful children, on the morality and social happiness of a community. If a morbid feeling for the unoffending offspring, instead of a stern determination to preserve the chastity of the parent, had influenced the decisions of the English chancellors, illicit intercourse would have been encouraged, and its fruits more numerous. The public virtue and happiness of a state can never be promoted by
594 increasing *the number of this unfortunate class by the effort to diminish their disabilities. A testamentary construction that has been so long approved and is so varied in its application, should not be for slight cause abrogated. When Pope Alexander enacted a canon that children born before the solemnization of matrimony might nevertheless become legitimate by the subsequent marriage of their parents, and in consequence of this canon all the Bishops of England, in the reign of Henry the 3d, petitioned the lords to adopt the same rule of legitimation in respect of hereditary succession, all the earls and barons with one voice responded, in the sentiment so often quoted, "We are not willing to change the laws of England which have hitherto been used and approved." The opponents of such an innovation thought "that the great interest of morality is a part of the policy of every well regulated state." They doubtless believed that the inviolable character of the bonds of matrimony and the status of the bastard by the English law operated as a prodigious restraint on vice and lewdness that legislation and judicial decisions soon operate on public opinion—and they could not foresee the effects of such an innovation, and were not disposed to risk it.

It would not become us to enquire into the policy of the existing law of Virginia, which in a humane spirit, consulting as well the supposed inclination of the mother to provide for her offspring, as the condition of the bastard itself, has moderated the rigor of the common law, both in respect to legitimating the offspring of parents who subsequently marry, and which also gives the bastard a capacity to inherit from its mother. But the legislature has stopped at this point. It has not enacted that the word "children" in a bequest shall be held to embrace natural children. At the date of this enactment, the rule which excludes bastards in bequests to children, was
595 as operative *and binding in Virginia as the rule which prevented them from inheriting from their mother. The legislature has repealed the latter and left the former untouched. There is but little connection between the two rules. The repeal or abrogation of the one is entirely compatible with the existence and continued operation of the other. At the date of this enactment a bastard could not inherit from his putative father, from his mother or any other person. After the passage of the act he might well succeed to her property in case of her intestacy, and not acquire the full designation of "legitimate child" or "child;" which in a will are convertible terms. We might go further and concede, that as a bastard might inherit from the mother, in that restricted sense alone, quoad the right of hereditary succession to her property, he has one of the rights of a legitimate child: but he is still the bastard son of his mother, and if, as in the case under discussion, a grandfather uses the expression "children of my daughter Mary," only the legitimate children of Mary are meant. The mother's name is used for the purpose of identifying a particular set of grandchildren. Suppose Mary had been the only child of the testator and he had given the property in dispute to his grandchildren, no one could doubt but that an illegitimate child of Mary would be excluded.

Nor does the abrogation of one of these rules repeal the other on the ground that the rule ceases when the reason of it no longer exists. We have endeavored to show that one of the reasons, and the principal one, that excludes bastards from answering to the description of children, in testaments, is the presumed intention of a testator to prefer lawful to illegitimate offspring, and upon this idea the courts have given as fixed a meaning to "children" as to the word "heir." Not that bastards could not take, by a proper description under a will, but that in order to take
596 as devisee *or legatee, they must be

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clearly identified. Now if the legislature permits a bastard to succeed to the estate of his mother, it is no reason why the testator should desire the bastard to take his estate under his will. The legislature permitted a bastard to inherit from the mother, under the presumption that if she had made a will, natural affections would have prompted her to provide for him; and that she is under a moral obligation to do so, inasmuch as the disgrace of his status is her fault and not his. This reason, we insist, has no application to a testator who might be a stranger even in blood to the mother and children—who is not supposed to have the feelings of a mother towards her spurious offspring, and who is under no legal or moral obligation to make provision for them.

Grattan, for the appellees:

The legal policy of a people upon any social, economical or political subject, is the proper object of consideration and determination by the legislative department of the government; and the frame of their institutions, or their practical administration, must be radically defective and vicious, if the legal policy adopted by the proper department of the government, is thwarted, perverted or defeated by any other department of the same government. A wiser than Solomon has said, "If a house be divided against itself, that house cannot stand."

Of the social subjects which must engage the consideration of a legislator, there are none of more importance than those which relate to marriage, the relations of husband and wife, parent and child, and of inheritance; and there are none on which all civilized governments have more certainly adopted a policy for themselves. The considerations which may lead to different conclusions are obvious enough, and the conclusion reached in each case has
597 depended upon the *relative weight which has been given to these considerations. So far as I am informed, the general policy of the civil law has commended itself to the modern European nations, except England; and it has become the basis of their law on these great social subjects, only so modified as to suit their peculiar circumstances.

England stands by herself on these subjects. It was in relation to them that her sturdy barons replied to king and church, nolumus leges Angliæ mutare. She has repudiated the civil law, and has adopted and adhered to a policy of her own, which has been, with some slight modifications, sternly enforced by the legislative and judicial departments of the government, down to the present day. It is truly an English policy, not adopted even by Scotland. Has it been *adopted by the legislature of Virginia?

1st. As to marriages. By the English law the marriage even before the act of 26th George 2d, must have been by a priest. See Addenda 1 to 2 Roper on Husband & Wife, p. 445 and onwards, 32 Law Libr. So it must be since that act, except as to particular religious sects. Id. 483. It must be solemnized in a church or chapel. Id. 484. It must be by publication of banns or by license. Id. And if any of these are omitted, the marriage is null and void. If the parties are within the prohibited degrees of consanguinity or affinity, the marriage was formerly voidable; now it is absolutely void. Shelford on Marriage and Divorce, ch. 3, p. 154, and onwards. So, of idiots and lunatics; Id. p. 183; and by the act of 15 George 2, the marriage of a lunatic as to whom a commission of lunacy has been found, though in a lucid interval, is void. Id. 192. And without going into further detail, it may be stated that the rubrics of the established church in relation to the celebration of marriage, have been enacted by statute; and are therefore to be strictly followed. Id. 29. See 33 Law Libr.

598 *2d. By the law in Lord Coke's time, if the husband was within the four seas, and the wife had issue, no proof was to be admitted to prove the child a bastard, unless the husband had an apparent impossibility of procreation. 1 Thomas' Coke, ch. 11, p. 138, marg. This strictness has been slightly modified since; but even now, if the husband has had access to his wife within a period which would render it possible for the child to be his, he will be held to be the father. 2 Bacon's Abr. 79, title Bastard. Within the enclosure of legal marriage, it is the policy of the English law to hold that the children born of the wife are the children of the husband. If the marriage is according to the prescribed forms and between the proper parties, the policy of the law is to consider whether a child has been born within its folds, rather than whether it is the offspring of the husband. And see Tucker, P., in Garland v. Harrison, 8 Leigh 368, 389.

3d. It is the same policy which has moulded the law of England in relation to bastards. Their legal disabilities are imposed upon them, not because they are illegitimate, but because they are born out of lawful wedlock. If the policy of the law had been only to limit heritable blood to legitimate children, then the law of England might have extended legitimacy, as the laws of other countries have done, to children born out of lawful matrimony; but that was not the policy of the law; that policy was to confine heritable blood to children born in lawful wedlock; and therefore it has illegitimated, as to this purpose, all others. The phrases "legitimate children," "illegitimate children," and "bastards," must necessarily have a larger or more limited meaning, dependent upon the laws of the country to which they are applied. Children are legitimate in Scotland and Virginia who are illegitimate in England; are bastards in England who are born in lawful marriage in Scot-
599 land. And so it *has been held that a child may have heritable blood and

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inherit an estate in Scotland as heir to his father, and that same child have no heritable blood in England, and be incapable of inheriting an estate there from the same father. Doe ex dem. Birtwhistle v. Vardill, 5 Barn. & Cres. 438, 11 Eng. C. L. R. 266.

4th. 1. In England, a child born before the marriage of the parents, though they afterwards marry and the father recognizes the child as his, is a bastard in law as well as in fact, and has no heritable blood. Supra, 5 Barn. & Cress. 438. 2. Children of marriages within the prohibited degrees, are bastards, and cannot inherit. Formerly the marriages were only voidable, and if the father died before the marriage was dissolved, it could not be done afterwards; but now such marriages are null, without more, and the issue cannot inherit. Shelford Marriage and Divorce, ch. 3, p. 154 to 157, 171 to 173, 179, 33 Law Libr. 3. So if a marriage is not solemnized in a proper place, and by proper license or banns, the marriage is null and void to all intents and purposes whatever; Roper Husband and Wife 486; and the children cannot inherit. 4. Children of a marriage, where there was a former marriage, or where the parties were imbecile or lunatic, are bastards, and cannot inherit. Shelford Marriage and Divorce 183, 185, 186, 190; 2 Bac. Abr. 82, title Bastard, letter (A), 87, letter (B). 5. The bastard child of a mother was held not to be within the statute of 32 Henry 8, ch. 1. 1 Th. Coke 147, marg.

It is clear, therefore, that in England, from the earliest times, all persons born out of lawful wedlock, have been incapable of inheriting lands. It must be not only wedlock, but it must be lawful wedlock: that is, the parties must be capable of contracting, must be authorized to contract a marriage with each other; and the marriage ceremony must be performed at the prescribed place and with the prescribed
600 formalities. *Unless born of such a marriage, however he may have been recognized by the parents; however anxiously they may have endeavored to repair the wrong done to the child or to good morals; however ignorant they may have been of any legal prohibition to their marriage, or irregularity in the performance of the ceremony, the child is a bastard, filius nullius, and cannot inherit, even from its mother.

It was under these settled principles of policy and law as to marriage and inheritance, that the courts of England were called upon to construe wills devising estates to children. The settled policy of the law was to confine the transmission of estates to children born of a lawful marriage. The fixed meaning of the term children as to inheritance was the offspring of a lawful marriage. When then these words came to be used in a will, the courts, whether looking to the policy of the law, or the legal meaning of the word in relation to land, or to both, were led to the conclusion that when used in a devise, the word should have the same meaning. But not only did the policy of the law and the legal meaning of the word as to inheritances lead to this conclusion, but this whole doctrine of the law in relation to the inheritance of bastards, and devises to children, has been built up and established in cases, in which the question arose as to the child or children of a man, or of a woman by a particular man. In all that is said in Coke on the subject, the only reference to the children of a woman is in connection with the statute of 32 Henry 8; where a construction favorable to the bastard children was put upon the statute. Of the many cases I have examined in the English books, the first case in which it was held that a devise to the children of a woman without reference to the father was bad, is the case of Mortimer v. West, 3 Cond. Eng. Ch. R. 439 (decided in 1827); and the only other subsequent case which
601 *gives any countenance to it, is that of Dover v. Alexander, 2 Hare 275, 24 Eng. Ch. R. 275: and this was not the case of a will but of a deed. And in both of these cases the question arose in relation to illegitimate children not in esse when the will and deed were made; as to which the courts had frequently decided that a devise to afterborn illegitimate children was void. Methan v. Duke of Devon, 1 P. Wms. R. 529; Earle v. Wilson, 17 Ves. R. 528; Arnold v. Preston, 18 Ves. R. 287.

The question whether illegitimate children are embraced in a devise or bequest, is a question of construction; and I admit that in England, the courts there, under the influence of the settled principles of policy and law in relation to marriage and inheritance in that country, have decided in many cases, that a devise to children, without more, will not include illegitimate children, and that there must be a clear intent, looking to the face of the will, and to the surrounding circumstances, to include them, or they will not be considered as included. Some of the cases have required that the intention to include them should be evidenced by the impossibility of intending legitimate children. Hart v. Durand, cited 2 Jarman Wills 135, marg., and Swaine v. Kennerley, 1 Ves. & Bea. R. 469. These cases even Jarman thinks carry the rule too far; and that they have been overruled by Gill v. Shelley, cited by him, p. 136, marg. The case of Swaine v. Kennerley was decided upon the principle stated by Lord Eldon in Wilkinson v. Adam, 1 Ves. & Bea. R. 422, that the intention to include illegitimate children must appear on the face of the will; which it will be seen, I think, is not now the rule. 2 Jarm. Wills 139-40; and cases which will be referred to presently.

There are other early cases which lay down the rule with great strictness, but with less than those before cited; as Cartwright v. Vawdry, 5 Ves. R. 530; Wil-
602 kinson *v. Adam, 1 Ves. & Bea. R. 422; Godfrey v. Davis, 6 Ves. R. 43; Harris v. Lloyd, 11 Cond. Eng. Ch. R. 174; a case decided upon the rule that you must

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look alone to the face of the will to ascertain the intention; and in which the lord chancellor is guilty of the folly, if a harsher word is not more appropriate, of deciding against the children, after saying that he had not the least doubt that the testator meant illegitimate children.

As I have already said, the cases are cases in which the question arose in relation to the children of a man, or of a woman by a certain man. Of course such children could only be known to be such, after they had acquired the reputation of being the children of such a person. And carrying out this rule in Earle v. Wilson, 17 Ves. R. 528, a bequest to a child of which A may be enceiente by the testator, was held not to be good. This case has however been questioned by Chief Baron Richards. Evans v. Massey, 8 Price Exch. R. 22. In Gordon v. Gordon, 1 Meriv. 141, it was held by Lord Eldon, that a bequest to the natural child of which a woman was enceiente, without reference to any person as the father, was good; and a similar decision was made in Evans v. Massey, 8 Price Exch. R. 22.

In the case of Wilkinson v. Adam, 1 Ves. & Bea. R. 422, in which Lord Eldon laid down the rules on the subject with great strictness, and also held that the intention to include illegitimate children must appear on the face of the will, a bequest was held to include both legitimate and illegitimate children, and was valid; and in the case of Gill v. Shelley, 13 Cond. Eng. Ch. 63, a gift to the children of the late Mary Gladman, there being one legitimate and one illegitimate child, was held to embrace both. And in this case parol evidence was admitted to show the surrounding circumstances. And so in the case of Evans v. Davies, 7 Hare 498, 27 Eng. Ch. R.
603 498, under the word "children," *a bastard child was held to be included in a bequest with legitimate children, upon the obvious intention of the testator. In Beachcroft v. Beachcroft, 1 Madd. R. 234, 430, under the words "to my children," it was held testator's illegitimate children took, upon the evident intention of the testator. And in this case parol evidence was introduced. And so Frazer v. Pigott, 1 Younge's R. 354, upon both points; Meredith v. Farr, 21 Eng. Ch. R. 525; Owen v. Bryant, 13 Eng. Law & Equ. R. 217. In the early case in Moor 10, it was held to be clear that a bequest by a mother to her children would include an illegitimate child: And this case is referred to as authority in 2 Comyn Dig. 245, title Bastard, letter (E); and has never been overruled or questioned in any case. And Lord Eldon said, in Wilkinson v. Adam, 1 Ves. & Bea. R. 422, that he knew no law against the validity of a devise or bequest to the illegitimate children not in esse, of a particular woman, without reference to the father.

It will be seen from the cases herein before referred to, that the sternness of the rules of construction in relation to bequests to illegitimate children, has been somewhat relaxed, even in England; that it is there held to be a question of intention, and although the general rule is, that a bequest to children prima facie includes only legitimate children, yet this rule will yield to an intention, appearing from the will and surrounding circumstances, to include illegitimate children.

I come next to consider the law of Virginia on the subjects of marriage, the relations of husband and wife, parent and child, and of inheritance, as affording the only proper foundation for the policy and principles by which the courts of Virginia are to be guided in the construction of devises and bequests to children. As to the common law in relation to inheritance, we have discarded it utterly, and have
604 adopted a system *of our own, in relation to which, Judge Carr, in Davis v. Rowe, 6 Rand. 355, 364, says, "that the framers of our law looked at the common law canons of descent, to avoid and not to imitate—to pull down and not to build up. All its principles are violated; its landmarks removed; its fences broken down; its traces obliterated." And so the court held in that case, and also in Garland v. Harrison, 8 Leigh 368.

1st. As to marriage, though we require a license or banns; if the marriage ceremony is performed, the marriage is valid, though there has been neither license nor banns. We require no priest, no chapel, and no particular form or ceremony. See the act 1 Rev. Code, ch. 106, p. 393, passim, and §§ 8, 11; which, whilst it inflicts a penalty upon a minister marrying without a license or banns, does not avoid the marriage. Code of 1849, p. 469, 470, §§ 4, 5, 6, 7.

2. By the law of Virginia, a child born before marriage of his parents, if they afterwards marry, and he is recognized by the father, is legitimate. So, the issue of marriages deemed null in law are legitimate. Code of 1849, p. 523, §§ 6, 7; 1 Rev. Code, p. 357, § 19. Under the first provision, the children are legitimated, though the child was born and the marriage took place before the statute was passed. Sleigh v. Strider, 5 Call 439; Rice v. Efford, 3 Hen. & Munf. 225. And a child who died before the marriage of the parents, leaving a legitimate child, is upon the marriage of the parents and recognition by the father, legitimated, so that her child will take as heir to the father. Ash v. Way, 2 Gratt. 203: And this is now engrafted into the statute. Code of 1849, supra. Under the second provision above stated, the issue of a woman by a second marriage, which took place during the lifetime of the first husband, are legitimate, and will inherit from their father. Stones v. Keeling, 5 Call 143. And the act, 1 Rev. Code, p. 400, § 18,
605 which provides for annulling *certain marriages within the prescribed degrees of relationship, provides expressly, that nothing therein contained shall be construed to render illegitimate the issue of any marriage so annulled.

3d. By the law of Virginia, bastards shall

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be capable of inheriting, or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother. 1 Rev. Code, p. 357, § 18; Code of 1849, p. 523, § 5. Under this provision the mother and bastard brothers and sisters of a deceased person may inherit from him. Garland v. Harrison, 8 Leigh 368. So where three negroes, children of the same mother, are born slaves, and the mother and children are afterwards emancipated, on the death of one the others will inherit her estate. Hepburn v. Dundas, 13 Gratt. 219. So under a similar law in Maryland, the children of an incestuous marriage, that of a father and his daughter, the children being illegitimate by the law of Maryland, will inherit from each other. Brewer v. Blougher, 14 Peters' R. 178. Every point stated by the judge in delivering the opinion of the court in Stevenson's heirs v. Sullivant, 5 Wheat. R. 207, has been overruled in Virginia in the cases of Garland v. Harrison, and Hepburn v. Dundas; and in this last case Stevenson's heirs v. Sullivant was expressly repudiated. And the law as settled in these cases, is recognized and enforced in Heath v. White, 5 Conn. R. 228; Brown v. Dye, 2 Root's R. 280; Stover v. Boswell, 3 Dana's R. 232; Black v. Cartmell, 10 B. Monr. R. 188; Flintham v. Holder, 1 Dev. Equ. R. 345.

I say then, it is not our legislative policy to confine the inheritance to persons born in lawful wedlock. The issue of no marriage at all may in all cases inherit from and through their mother, either from their grandfather, or brothers and sisters, legitimate or illegitimate. See the opinions of the judges in the case of Garland v. Harrison, 8 Leigh 368. The issue of
606 *marriages utterly null and void in law, of incestuous marriages, of a second marriage where the first husband is alive, are legitimate, and will inherit in every respect, as will a child born in lawful wedlock, according to the English notions of lawful wedlock. He is in no legal sense filius nullius. He is the son of his father as well as of his mother. And certainly as to him and all his class, the English maxim, which is built on their law of descents, and is the foundation of their decisions upon the subject of devises to children, is utterly false. Qui ex damnato coitu nascuntur, inter liberos non computentur, is not true in Virginia certainly; whatever we may think of the superstructure which has been reared upon it.

And as to children whose parents never marry, they are not in legal contemplation, as respects their mother, the children of nobody. In Garland v. Harrison, Judge Parker, p. 372, says, "Even by the common law, the rule that a bastard is nullius filius, applied only to cases of inheritance; and he was subject to no other disability but the incapacity of inheriting and transmitting inheritance. It was the object of the act to effect a change in his legal condition; to abolish this distinction to a certain extent, between legitimate and illegitimate children; and to endow the latter with heritable blood on the part of the mother. There is no reason for thinking that the legislature meant to retain any of the incapacities ex parte materna, under which the bastard labored."—"It was the object of the law to give him a mother, and to place him in all respects upon the same footing as a lawfully begotten child, born of the same mother."

In the same case Judge Brockenbrough says, "A bastard is still nullius patris filius, but he is not in that position as to his mother. As to her he is as if he had been born in lawful wedlock; in other words, he is her legitimate son, so far as re-
607 gards his capacity to inherit *and transmit inheritance." In the same case, Tucker, P., after referring to the provisions of the statute legitimating the issue of void marriages, says, "But there was another and more numerous class to be provided for. They were bastards who were begotten out of wedlock, and whose fathers the law would not undertake to ascertain." "To declare these legitimate, would have been at once to provide them not a mother only, but a father. To such a length the lawmakers were not prepared to go. They were therefore compelled to adopt another phraseology; to use language which, in relation to the mother and her kindred, would put bastards on the footing of legitimates, while it would leave them, as heretofore, in relation to the father, the sons of nobody. But this was the only difference they could have designed. Was the policy of the marriage institution more fatally invaded by concubinage than by bigamy? Was illicit intercourse out of wedlock more to be depreciated than incest in wedlock?"

It cannot need more to prove that the policy of our law is wholly opposed to the policy of the law of England. That in the language of Judge Carr, the framers of our law looked at the provisions and policy of the English law, "to avoid, not to imitate—to pull down, not to build up. All its principles are violated; its landmarks removed; its fences broken down; its traces obliterated." The foundation principle of the English policy is that the inheritance shall be limited to persons born within lawful wedlock—not only wedlock, but lawful wedlock. For that they sacrifice the strongest feelings of our nature; and to carry out that policy their judges knowingly, avowedly defeat the intention of testators, and compel them, even in their graves, to continue the wrong which they had inflicted upon their children in their lifetime, by forcing them to say what they never said, to do what they
608 *never did; and that when they were attempting anxiously to say and to do what these judges admit they ought to have said and done; and what every body but a judge sees beyond a cavil or question that they have said and done. And it is as an offering to this moloch of English policy, a policy variant from that of all

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the world beside, and from our own, that the court is now asked to defeat our own legislative policy, by defeating sense, justice, the feelings and intentions of the persons whose feelings and intentions it is the very purpose and object of the court to carry into effect. It may be law, but if it is, it is high time it should be changed.

The question whether a devise to children will include illegitimate children, has never been decided by this court. Indeed, so far as I have been able to discover, it has never been alluded to by any judge of this court, but once. That was by Judge Carr in the case of Doe on demise of Thomason v. Andersons, 4 Leigh 118. He expresses no opinion on the question. But the question as presented in that case, was not the question involved in the case before this court. There the question was whether a devise to children not in esse would include illegitimate children; and many of the English cases are of that kind; and they hold that a devise to children not in esse, however clearly expressed, is void: and that upon grounds of public policy. But in our case the illegitimate child was in esse; was known and recognized by the mother and the testator, as her child; and the question even in England would be, not whether the devise was void on grounds of public policy; but whether the intention of the testator to include him, was expressed with sufficient clearness.

So far as I have been able to examine, no one of the states has gone as far in its legislation in favor of children born out of lawful wedlock, as Virginia. None have shown so strong a purpose to break
609 down and *discard the rules of the common law in relation to such persons. In New York and South Carolina, the rules of the common law seem to be maintained; and in other states the modifications of these rules have been greater or less. The law in North Carolina is quoted in Thompson v. McDonald, 2 Dev. & Bat. Equ. R. 463; the case so much relied upon by the appellants; and it is most apparent that the legislation of that state in favor of this class of persons falls far short of that of Virginia. The Kentucky law more nearly resembles ours; and under that law the case of Black v. Cartmill, 10 B. Monr. R. 188, has been decided, to which I beg leave to refer.

If we are to look to the principles upon which the decisions in England are based, rather than to the decisions themselves, it seems to me that the conclusions to which we will be led here, will be directly the reverse of these decisions. There, to be born in lawful wedlock and heritable blood, are primary and incident, so far as inheritance is concerned. And this principle is carried into their construction of devises. Having established that every person is a bastard who is not born in lawful wedlock, and that a bastard is filius nullius, it followed as a necessary conclusion, in carrying out their policy, that a bequest to children did not embrace bastards. As Jarman says, in the language of the rule already quoted, qui ex damnato coitu nascuntur, inter liberos non computentur.

But as we have seen, such is not the law in Virginia. To be born in lawful marriage and heritable blood are not primary and incident as to inheritance here. And here under the rule of the English decisions, very many cases which would shock the English judges beyond measure, would be valid devises and bequests to children eo nomine. Thus where the parents of children marry after their birth, and then have other children. Under a devise by the
610 father to his children, in *England, only those born after the marriage would take; for they only are legitimate: In Virginia all would take, for all are legitimate. So in the case of an incestuous marriage, a devise to children, in England, would not include the offspring of the marriage: In Virginia they would take; for they are legitimate. And the same would be the case in cases of bigamy, imbecility and lunacy. It is impossible then that the English rule, that to be born in lawful wedlock is necessary to entitle a person to take under a devise or bequest to children, can be adopted in Virginia.

Is this English rule to be applied to the bastard children of a woman in Virginia? We have seen that it is not and cannot be applied to the case of children born before the marriage of their parents, who are recognized by them. It cannot be applied to the case of children born of an incestuous marriage, not even to such a case as that of Brewer v. Blougher, 14 Peters' R. 178, which was that of a marriage of a father and his child; nor to such a case as that of Stones v. Keeling, 5 Call 143, a case of bigamy; nor to any case which can occur, where there has been a marriage between the parents, however incompetent the parties may be to contract a marriage; however illegal such marriage may be; or however its depravity may shock the moral sense of all men. And when we see that this English rule is utterly repudiated in cases indicating so much greater depravity than such a case as that before the court, is it still to be enforced in the case of a child, true of an erring, but it may be of a penitent and reformed mother? I may well ask in the language of Judge Tucker, "Is the policy of the marriage institution more fatally invaded by concubinage than by bigamy? Is illicit intercourse out of wedlock more to be depreciated than incest in wedlock?"

We have seen, I trust, that in England the rule as to devises is based upon
611 the rule as to heritable blood. *Bastard children cannot inherit even from their mother, because they have no heritable blood. They have no heritable blood, because born out of lawful wedlock. Now our law says, bastard children shall have heritable blood, as to their mother, and to all persons related to their mother by blood, just as fully as if they were born in lawful wedlock. "Bastards s[illegible]

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capable of inheriting and transmitting inheritance on the part of their mother as if lawfully begotten." Code of 1849, p. 523, § 5. They may be still called bastards, but so far as their relation to their mother is concerned, they are legitimated. It was only as to the inheritance that at the common law such an one was filius nullius; and as to that by the statute he is the son of his mother. He is a bastard, for he was born out of lawful wedlock; he is a legitimate child of his mother, for he may inherit from her. In what sense are any of the issue of marriages deemed null in law legitimate, in which he is not legitimate as to his mother? He takes from her precisely as these others take from their father. In what sense is he a bastard that they are not bastards? They were born out of lawful wedlock. And by the common law definition of a bastard, they are as essentially bastards as he is. The statute does not say they shall cease to be bastards; it only says they shall be legitimate. The fact of bastardy cannot be changed by statute, except by making the marriage lawful; but it is the issue of marriages deemed null in law, or dissolved by a court, that are declared legitimate. The statute then only gives them the rights of property which a legitimate child possesses. It gives them these rights as to the father's as well as to the mother's property. The statute equally gives to a bastard child the rights of property which a legitimate child has; but it gives these rights only as to the property of the mother. And Judge Brockenbrough was well justified in saying, as he
612 *does say in Garland v. Harrison, 8 Leigh 380, "A bastard is still nullius patris filius, but he is not in that position as to his mother. As to her, he is as if he had been born in lawful wedlock; in other words, he is her legitimate son, so far as regards his capacity to inherit and transmit inheritance." And so Judge Parker, Id. 377, says, "The intention I admit was not to legitimate bastards generally; but the object was to make them quasi legitimate on the maternal side; to give the bastard a mother and maternal kindred."

Then why shall a bastard have a rule applied to him in reference to his mother or her estate, which we have seen cannot be applied to the children of marriages deemed null in law. Why shall not he take under this devise of his grandfather, to his mother's children, as he would certainly take if he had been the offspring of an incestuous marriage between his mother and his real father. Is there any principle of public policy which forbids it? If his mother had died in the lifetime of the testator, and the testator had died intestate, in that case this bastard would have taken as one of his heirs and distributees. This the statute has provided for; and he would have taken because he was the child of his mother. The testator gives the property by his will to the children of his mother; and the court whose business it is to regard and carry out the legislative policy, is asked to deprive him of it.

I would quote further from the opinions of the judges in Garland v. Harrison, to show that in their opinions, the provision of our statute in relation to bastards accords with the natural feelings of men, and is such as they would probably make if they made a will; and therefore when a will is made in accordance with its provisions, it ought to be sustained by the courts. But this note is now almost boundless; and I shall therefore conclude by a special reference to those opinions.

613 *Macfarland & Roberts, for the appellants:

The record presents the single question, whether a bequest or a devise to children, includes bastards, when there are both legitimate and illegitimate children of the same parent. In other words, is a bastard child in law, entitled to be counted with the lawful born, in apportioning a bequest or devise to children.

The common law treats bastards as a degraded class: nor is the common law singular in this. All countries professing to be civilized, pagan as well as christian, differ as they may in the degree of their discriminations against bastards, agree in excluding them from a full participation in the privileges of children. They bear, by all codes, some badge of inferiority.

This disparagement has its origin in moral considerations, not to say the religious convictions of all people. It encourages matrimony, and discourages vice. Purity of life is upheld, by enlisting on its side the sensibilities of our nature for the reputation of our offspring. Besides, if offspring were children, however deduced, investigations would be necessary, which could be conducted only at the expense of public decency. Demoralization would ensue from the constant recurrence of questions concerning the actual lineage of persons claiming to be children. Were the law indifferent whether children were born in wedlock or out of it, common opinion would be accommodated to its laxity, and marriage be neglected, as neither enjoined, nor essential to the honor and well being of families.

Our legislation has conformed to the more indulgent spirit of the civil law. It has declared legitimate certain persons who were bastards at the common law, and relieved others, whom it refused so to honor, in part, of their disabilities. It was deemed reasonable and safe, when their parents intermarried, and recognized the antenuptial offspring as their own, that they
614 *should be redeemed from the stain of their birth, and the act therefore declared them legitimate. Such persons are made thereby children, we presume, in a full, legal sense. So again, it was considered unjust and cruel to stigmatize the issue of marriages deemed null in law, or dissolved by a court; and these too are declared legitimate, and become, as we presume, entitled to the name of children. With these changes of the common law we

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have now no concern, except as they serve to fix with precision the relief conceded to the remaining class—that which includes the case before us. As to this, since manifestly it had not the equity of the other two classes, the act does no more than declare that "bastards shall be capable of inheriting, and transmitting inheritance on the part of the mother, as if lawfully begotten."

Now, the exact question is, whether this provision of the statute has repealed the common law rule, which, in the case before us, would exclude the bastard from the devise. Did it do more than change the law of descents quoad the mother? Did it abolish the common law principle, which refused to apply the term children to bastards, when there were lawful born to answer to the description? Did it confer on bastards the name or title of child, so as to constitute it their appropriate legal designation? Did it cancel wholly the distinctions between the natural and lawful children of a mother, and entitle her bastards to the appellation of children, in questions respecting the construction of wills, wherein, not her estate, nor their succession to her, were involved, but rights independent of her, and beyond her control?

It seems to us to state the question is to argue it. The act does not call the bastard a child, nor enact that he shall be so regarded. No change whatever in his designation, or description, is intimated. In the cases in which child was not de-
615 scriptive of him antecedently, *he is unrelieved by the statute, and left subject to the reproach he inherited from his birth. It is as bastard he has conferred upon him an interest in his mother's inheritance, and bastard he remains. Between this and the other two classes mentioned in the act, a broad distinction is preserved. Those are inducted into the family as legitimate, and have the stain of their nativity obliterated; whereas these are provided for as bastards, without intimating they should be, or are relieved from the reproach of their birth. As bastards, and notwithstanding they be such, the act confers upon them a special, defined, restricted hereditable capacity.

It would be an inversion of all the rules of rational deduction, to hold the act made the bastard a child in respect to other rights, when he was not so made in the special matter in which he was relieved. We are accustomed to see it ruled, that language shall be understood as used in authoritative expositions. It is but rational to assume that phrases are used in the sense put upon them in our laws. Otherwise the vaguest conjecture, disrespectful to the public intelligence, is substituted for standards tending to precision and accuracy. Since, then, in statutes referring to children, of which our statute of descents is a striking example, the phrase is confined to lawful born, it must be so confined, when standing alone, in wills and grants.

We do not infer an intention to abandon a body of rules, or the policy in which it had its origin, from the repeal of one or more of its provisions. On the contrary, we presume an intention to stop at what was singled out and altered. Hence, the repeal of the rule which excluded a bastard from the inheritance of the mother, does not authorize the presumption of an intention to change his description, and to include him among children, from which, as a class, he was before excluded. Moreover, we must presume the legislature
616 *had in mind the whole of the disabilities to which bastards were subject; and had the intention been to carry the reform beyond what was specifically enacted, they could and would have used apt language to express their purpose. In the very act, containing the section in question, when the purpose was to relieve the bastard generally, or to change his designation, it is done by declaring him legitimate. The conclusion is therefore irresistible, that as the act stopped with investing the illegitimate qua bastard with a limited hereditary capacity, it did not design to redeem him from any other infirmity which attached to his nativity.

There is neither dependence nor connection between a devise and an heritage; and among those who would acknowledge the equal claim of bastards to share with the lawful born, in their mother's inheritance, opinions, at the least, would be divided as to admitting them to a devise. As the mother's estate was at her own disposal, it would sound capricious and unfeeling to exclude, in the accident of her intestacy, the person who, before all others, was the object of her solicitude and protection, and whom she would have remembered in her will. But a devise is a different affair. As to that, even a frail mother might consent to the justice of disposing of it, as a due regard to domestic purity would decide expedient. But if such sternness be beyond her strength, all others must agree, that the case belongs to legislative discretion, to be dealt with so as to advance the cause of good morals. It would seem like an invitation to licentiousness, to admit legitimate and illegitimate children under a common designation; and it is due to the legislature to insist, that they have not declared they shall be so admitted, either expressly or by implication. So far from it, the exact action had, imports consent to the rules not noticed and repealed.

"It is better (said Tenterden) to abide by this consequence (the defeat of the
617 object of the statute) than *to put upon it a construction not warranted by the words of the act." The King v. Barham, 8 Barn. & Cress. 99. "It is safer (said Ashhurst) to adopt what the legislature has actually said, than to suppose what they meant to say." Jones v. Smart, 1 T. R. 44. To bring a case within the statute, "it should be not only within the mischief contemplated by the statute, but also within the plain, intelligible words of the act of parliament." Holroyd, Brand-

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ling v. Barrington, 6 B. & C. 467. A casus omissus can in no case be supplied by a judgment of law, for that would be to make law. Buller, T. R. 52. Dwar. on Statutes, 9 Law Li. 708–711. The test of the largest latitude which can be claimed for a statute is, that it accomplish its avowed object or end.

The conclusion that the statute does not change the bastard's designation, nor bring him within a description antecedently inapplicable to him, is a logical sequence from the fact, that he is treated as bastard in the provision for his relief, and has his distinctive appellation perpetuated; from the consideration, that it does not follow he is entitled to take his place among the lawful born as a child, in respect to rights aliunde the mother, because admitted to share in her inheritance, since there is a substantial difference between the two cases, and the concession of the first, or of either, is consistent with the refusal of the other; from the consideration that bastards have been uniformly excluded from facts, providing simpliciter for children, and it is only reasonable to infer, that it was intended to use the phrase as comprehensively, in laws providing for children, as when used in wills and grants; from the presumption which invariably obtains, that testators and grantors, when they use language found in acts of assembly, or the judgments of the courts, employ it as therein accepted and understood; and from the consideration that the courts
618 *should follow, and not place themselves in advance of the distinct legislative will, in dealing with a class whom, considerations affecting the moral condition of society, consign to disfavor.

Upon the remaining question, we might content ourselves with a reference to 2 Jarman on Wills 94–112, where, after an elaborate examination of the cases, the conclusion is announced, that illegitimate children are not objects of a gift to children, or issue of any other degree, where there are legitimate children to take under such gift. In other words, that the two classes are not comprehended or described by the same generic term, and when it includes legitimate, it excludes illegitimate children. The cases reviewed by the learned author are distinguished for their general concurrence and high authority. See his analysis at page 112. The correspondence between the construction of the term children in wills and in the laws, is literally preserved; which is in itself rational, and was to be expected of courts in the habit of holding, that the phrases "issue of the body," and "heirs," &c.. in the wills of illiterate testators, meant exactly what they imported in learned treatises. "If a mother dispose of all her lands holden in chivalry to her bastard, she is not within the 32 H. 8, c. 1, which forbids the owners to dispose of above two-thirds of such land for preferment of children; for children in any law must be intended such as are lawfully begotten." Dyer 435 a; 1 Bacon's Ab. 1 Am. from 6th London edition, p. 510. 1 Thomas' Coke, 117 (123 b). So it was held, the lawful born only were intended by children in the statute of descents, which in our statute is distinctly shown, by the special clauses therein for bastards, when their relief was intended. In no one instance in our legislation have bastards been intended, when children are mentioned; so far from it, their premeditated exclu-
619 sion is apparent from the two *sections in the statute of descents, declaring certain of the class to be legitimate. 2 Wms. Ex'ors 804; Sherman v. Angel, 1 Bail. Eq. R. 351; Vanderzee v. Aclom, 4 Ves. R. 771; Collins v. Hoxie, 9 Paige Ch. R. 81; 1 Roper on Legacies 79, 80; Durant v. Friend, 11 Eng. Law & Equ. R. 2; In re Overhill's trusts, 17 Eng. Law & Equ. R. 323; Thompson v. McDonald, 3 Dev. & Bat. Eq. R. 460, 480; 2 Paige C. R. 11; Coke's Litt. 8; Owen v. Bryant, 13 Eng. Law & Eq. R. 217; 3 Lomax's Digest, new edition, top paging 235, 236, marginal paging 151, 152.

The citations ascertain the antiquity and certainty of the rule.

The admission of bastards in certain cases, when there were no children besides them, and their admission where there was something supplemental to indicate they were actually intended, serve to establish the inflexibility of the general rule.

What is said in Sir F. Moor's Reports, page 10, is obviously entitled to no consideration.

ALLEN, P. This case arises upon the sixth clause of the will of Joseph Toler deceased. By that clause he gave to his daughter Mary Bennett the land on which she then lived, and certain slaves; and the clause concludes with these words: "My will is at the death of my daughter Mary Bennett that the land and negroes given to her shall be equally divided amongst her children." At the testator's death his daughter was married to Lewis Bennett, by whom she had several legitimate children. Previous to her marriage she had an illegitimate child by another man. The will bears date the 10th of July 1818, and was admitted to probate the 15th of November 1819. At the death of the testator the legitimate children and the bastard son were all living. And the only question is, whether the illegitimate child took a
620 vested *interest, equally with the lawful children of Mary Bennett under this clause of their grandfather's will. It is said in 2 Jarman on Wills (2 Amer. edi. by J. C. Perkins) 94, "to be an established rule, that a gift to children, sons, daughters or issue, imports prima facie legitimate children or issue, excluding those who are illegitimate, agreeable to the rule, 'Qui ex damnato coitu nascuntur, inter liberos non computentur.'" We have thus the rule that such a gift imports, not absolutely but prima facie legitimate children; and we have the ground on which it rests in the Latin maxim. The bastard is not computed

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amongst children. "We term them all by the name of bastards that be born out of lawful marriage." 1 Thos. Coke 115. "A bastard is in law quasi nullius filius, because he cannot be heir to any." Litt. § 188. If possessed of personal estate, he dies intestate and without wife or children, the estate belonged to the crown; if of real estate, it escheated. For he was supposed to have no relations, no heirs or next of kin, except those arising from his own contract of marriage, his wife and children or descendants. In this state of the law, when the courts came to determine what was the import of the words children, &c., of necessity the word was construed to mean such as the law recognized as children. It was the obvious course to hold, that where a testator was in the act of making a disposition of his estate, which the law permitted, and used a word which by law comprehended one class, he could not be supposed to intend a party who the law declared did not belong to the class named; to intend a person who in law was quasi nullius filius, without relations, heirs or next of kin, except his own wife and progeny. There was still another reason which would preclude the court from giving such an enlarged meaning to the words children, &c., when applied to the children or issue of a man. How was the fact of paternity
621 to be ascertained *except by going into an enquiry which the court could scarcely enter into upon the construction of a will. The birth of a child during a lawful marriage is prima facie evidence of its legitimacy. Formerly so strict was the rule, that if the husband be within the four seas, no proof was admitted to prove the child a bastard, unless in case of apparent impossibility of procreation; though the strictness of this rule has long since been relaxed, and the presumption of legitimacy arising from birth in wedlock, may be rebutted by circumstances inducing a contrary presumption, as proof of non-access, &c., &c. Thomas' Coke 109, n. B. But the presumption exists, until rebutted; and therefore, by the use of the words children, &c., in a devise or bequest, the testator must be understood to mean those who are by law presumed to be his children. But no such presumption can arise in respect to his illegitimate children. They still continue nullius filius as to the father. There must be some recognition; something to show that in the particular instance, he did intend to describe the illegitimate child; and this intention must be arrived at by some description which will serve to designate the individual, and not by naming a class which in law is not presumed to comprehend one of his condition. In the construction of wills in reference to this as to other subjects, the intention of the testator controls. The law contains no restriction upon the power of a testator to devise or bequeath to an illegitimate child. If it appears that the testator intended to make such a devise, effect must be given to the disposition.

It is said by Jarman, p. 94, "that illegitimate children, born at the time of making the will, may be the objects of a devise or bequest, by any description which will identify them. Hence, in the case of a gift to the natural child of a man, or of a woman, or of one by the other, it is
622 simply necessary to prove *that the objects in question had, at the date of the will, acquired the reputation of being such children." In the same connection, this author reviews the most prominent cases which have been decided on this question; and it is observable that in most if not all the cases cited and commented on by him (except the case of Mortimer v. West, 2 Cond. Eng. Ch. R. 439, 3 Russ. R. 370), were devises or bequests to the illegitimate children of the father, or of a woman by a certain individual. The case last mentioned seems to have been the first in which it was held that a devise to the children of a woman without reference to the father, was bad; and the only subsequent case to which we have been referred of like import, is Dovex v. Alexander, 24 Eng. Ch. R. 275 (2 Hare 275), which arose on the construction of a deed.

But though one of the incidents, the uncertainty in regard to paternity does not exist in case of a devise to the children of a woman, without reference to the father; yet the decision was the logical sequence of the first proposition, that by law the natural child is filius nullius, has no relation, and cannot inherit from or transmit inheritance to the mother. In legal language, he is not comprehended in the class of her children; and therefore, as in the case of the putative father, the court could not say he was comprehended in that class by the use of the term. Whether upon a question of intention, this was not straining the rule to an unreasonable extent, is another question. The principle is the same in both cases. In contemplation of law they were not children; and the use of the word children was not sufficient to embrace them.

Some of the cases, as Wilkinson v. Adam, 1 Ves. & Bea. R. 422; Harris v. Lloyd, 11 Cond. Eng. Ch. R. 174, decide, that the face of the will alone can be looked to for the purpose of ascertaining the intention to apply to natural children. But this
623 rule has been *innovated upon by other cases; as Beachcroft v. Beachcroft, 1 Mad. R. 430; Frazer v. Piggott, 1 Young. R. 354. But none of the cases interfere with the general rule, that illegitimate children may take if clearly designated by a description which identifies them.

Coke, as we have seen, terms all by the name of bastards that be born out of lawful marriage. Subsequent marriage and recognition do not legitimate; children of marriages within the prohibited degrees; of marriages not properly solemnized in proper place or by proper license or banns; of a marriage where there was a former marriage, or where the parties were imbecile —are bastards; and therefore inter liberos non computentur. Shelford Marriage &

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Divorce, ch. 3, p. 154 to 157, 171-3, 9, 183, 5, 6, 190; Roper Husband & Wife 486. They have no heritable blood, and are not comprehended in the class of children when that word is used in a will, where there are or by possibility may be legitimate children to answer to the description. As where legitimate children were or might have been entitled under a bequest, this possibility excludes the illegitimate. Because children in its primary sense, we have seen, if unexplained, imports legitimate children only.

In Virginia a child born before marriage, born a bastard, if the parents afterwards marry, and he is recognized by the father, is legitimate. So the issue of marriages deemed null in law are legitimate; Code, p. 523; or of a woman by a second marriage which took place during the lifetime of the first husband. It would not be seriously maintained that under this legislation, persons in this condition would not in this state be comprehended by the word children. In England, as we have seen, they would not be, if there were legitimate children or the possibility of there being such children.

Yet both in England and Virginia
624 *the intention of the testator controls in the construction of wills. And guided by this rule, the courts there hold such children not to be intended—here, that they are. And both are correct, for where words are used which in law have received a legal signification, the party is presumed to use them in that sense, unless the contrary appears. In England they are not computed as children, for not being born in lawful wedlock, the law does not presume them prima facie to be children. In Virginia, being recognized after marriage, or being the issue of a marriage, though unlawful, the law prima facie presumes them to be children; declares them to be legitimate, and therefore necessarily computed as children whenever the word is used. To include them in England, there must be something amounting to an express designatio personarum applicable to them; in Virginia, to exclude them from the class in which the law here comprehends them, there must be something to show clearly that such was the intention.

This brings us to the enquiry as to the condition of children in Virginia not born in wedlock or recognized by the father after marriage. On the paternal side their condition is unchanged. As to him the bastard is still quasi nullius filius; the law indulges no presumption as to his paternity. If acknowledged by the father, that is a fact to be proved, not a presumption of law. A devise or bequest to him by his reputed or acquired name, is good, whether made by his father or a stranger; a bequest to children, if there be legitimate children, does not comprehend him, because there is no legal presumption that he is a child.

But how is it ex parte materna? as to her, does he, as in England, remain quasi nullius filius? without relation, without next of kin, except his own wife and progeny? Or, does the law recognize him as her
625 *child; embrace him in the description of her children? The solution of these questions is to be found in our statute of descents, as construed by this court.

The Code, ch. 123, § 5, p. 522; 1st Rev. Code 355, § 2, 18, provides that where any person having title to real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are not aliens, in the following course: 1, to his children and their descendants. And further: "Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten." The framers of this act we are told by Carr, judge, in Davis v. Rowe, 6 Rand. 364, "looked at the common law canons of descent to avoid, not to imitate; to pull down, not to build up. All its principles are violated; its landmarks removed, its fences broken down, its traces obliterated." Its basis (says Judge Parker in Garland v. Harrison, 8 Leigh 368, referring for his positions to the opinions of Judges Tucker and Roane in Stones v. Keeling, 5 Call 143, 147, 148, "was the statute of distributions and the civil law. It is founded on the great principles of justice. Its object was to make such a will for the intestate as he would himself probably make; and its obvious policy was to follow the lead of the natural affections, and to consider as most worthy, the claims of those who stand nearest to the affections of the last occupant. It ought therefore at all times to be liberally construed in favor of those to whom the intestate himself, had he made a will, might be supposed to be most favorable, without reference to common law rules or feudal disabilities."

Under the influence of these principles, the judges in Garland v. Harrison proceeded to the construction of the provision of the act of descents, declaring that bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, as if lawfully begotten: and
626 the *result can be best arrived at by quoting their own expressions. After enumerating his common law disabilities, Judge Parker says: "It was the object of the law to give the bastard a mother, and to place him in all respects on the same footing as a lawfully begotten child, born of the same mother." Again, after commenting on § 6, Code, ch. 123, and § 19, 1 Rev. Code, p. 357, declaring that a child born before marriage and the parents intermarry, if recognized by the father, shall be deemed legitimate, he says, "I have no doubt that it was intended by the section respecting bastards, to bestow upon illegitimate children the same capacities of inheriting from or through the mother, and passing inheritances to or through her, as they possess under the other section in respect to both parents; that is to say, to make them in all respects the legitimate children of their mother." And again: "These relaxations of the severity of the

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common law rest upon the principle that the relation of parent and child, which exists in this unhappy case, in all its binding and native force, ought to produce the ordinary consequences of consanguinity; and I am convinced that it was the intention of the legislature of Virginia to adopt the most liberal rule in respect to an inheritance in case of bastardy, that was consistent with the certain ascertainment of the parents." So Judge Brockenbrough, in the same case, says, "A bastard may inherit on the part of his mother in like manner as if he were her legitimate son. He may therefore inherit from his mother or from his maternal grandparents in the direct line," &c. And again: "He cannot have whole brothers, but every uterine brother, whether legitimate or spurious, is his half brother." And President Tucker, in the same case, remarks, "To declare them legitimate, would have been at once to provide, not a mother only, but a father.

To such a length the lawmakers were
627 not *prepared to go. They were compelled to adopt another phraseology—to use language which, in relation to the mother and her kindred, would put bastards on the footing of legitimates, while it would leave them, as heretofore, in relation to the father, the sons of nobody. But this was the only difference they could have designed." And in conformity with these views, reiterated in every variety of form, it was held in that case, overruling entirely Stevenson's heirs v. Sullivant, 5 Wheat. R. 207, that the estate of the bastard dying intestate, passed to his mother and to his two uterine bastard brothers.

Comment on these opinions is almost unnecessary. At the common law he had no mother; this statute gives him one. He is placed in all respects upon the same footing as a lawfully begotten child born of the same mother. He is therefore no longer, as to her, quasi filius nullius, but her child, inheriting from and through her, transmitting inheritance to and through her. If seized of property, she dies intestate, the act says it shall descend and pass in parcenary to such of her kindred, &c., in the following course—first, to the children and their descendants. If she dies leaving illegitimate and legitimate children, does not the word children comprehend all in the same class? Would it be argued that the illegitimate child would not take with the legitimate children? And when, as we have seen from the extracts aforesaid, this law, as expounded, includes all her children, legitimate and illegitimate, in the same class as her children, so ascertained by birth, not by legal presumption, and for every purpose, as if all were lawfully begotten, what warrant is there for the pretension that the same general term, when used in a will, is to be construed as excepting them for any purpose? If the term children is to be construed in regard to both parents, as including the child recognized,

or to be deemed legitimate, being
628 *born in wedlock, though illegal because the testator, by the use of the general phrase, is to be, must be held to use it in the sense of the law, there being nothing to show he uses it in another sense. Must we not apply the same rule when the word is used in reference to the illegitimate child of the female? The law declares the estate shall pass and descend to her children; being a child, he is heir, joint heir with every other child born in or out of wedlock; comprehended in the class, not by any personal designation, but by the general word children, comprising all.

In Edwards v. Freeman, 2 P. Wms. R. 435, 441, Lord Raymond says, "The statute of distributions makes such a will for the intestate, as a father, free from the partiality of affections, would himself make; and this I call a parliamentary will." So in Garland v. Harrison, Parker, judge, says, "The intention was to make such a will for the intestate as, if he had died testate, he would have been most likely to have made for himself." And Tucker, president, says, in the same case, "Our law of descents was formed in no small degree upon the human affections; the legislature very justly conceiving that the object of a law of descents was to supply the want of a will, and that it should therefore conform in every case, as nearly as might be, to the probable current of those affections which would have given direction to the provisions of such will. Under the influence of these opinions, they legislated in relation to bastards."

As a legislative will, we have seen that the word children includes the legitimate and illegitimate children of a woman in the same class, placing all the issue of the woman upon the same footing as if born in wedlock. When the testator comes to write his own will, and uses the same words, which in the legislative will comprehends all, comprehends them because of the supposed conformity to the probable cur-
629 rent of those *affections which would have given direction to the provisions of a will, if he had written it, we are asked to say he does not intend to comprehend all, but to exclude the illegitimate child. The law declares the words in the legislative will includes; the court in expounding the law is asked to say the same words used by the testator in reference to the same matter, excludes them. By the statutory will they are her children; by the written will they continue, as to her, quasi nullius filius, and subject to the common law disabilities of bastards. And this construction is invoked, notwithstanding we are informed by the judges, in the case referred to, that the statute should at all times be liberally construed in favor of those to whom the intestate himself, had he made a will, might be supposed to be most favorable, without regard to common law rules or feudal disabilities. In Sleigh v. Strider, 5 Call 439, it was decided that a child born out of wedlock in the year 1774, was legitimated by the subsequent marriage and acknowledgment of parents in 1776, which

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was before the passage of the law of 1785, which took effect January 1, 1787. Stones v. Keeling, 5 Call 143, decided, that the issue of a woman by a second marriage, which took place during the lifetime of her first husband, are legitimate after the death of their father. These cases, and the case of Garland v. Harrison, all show, that this law has invariably been liberally construed by this court in favor of the class intended to be relieved from common law disabilities.

If we depart from the rule of construction as laid down by the English cases, that by the use of a phrase which has received a legal signification as comprehending a particular class, the testator must have intended to use it in the same sense, when treating of the same subject matter, we are at sea without compass or rudder. In the place of a clear, definite rule, the discretion of the judge is to be substi-
630 tuted. The *enquiry is, who are the beneficiaries intended by the testator? He has used a phrase referring to a class, and the question is, who are comprehended in it? The English courts say, in view of their law, he must have intended legitimate children, because the illegitimate children are not by law treated as children, and because where the children of a man are spoken of, there is no presumption of paternity except in the case of children born in wedlock. If it is attempted to bring in illegitimate children, it must be done by proof, and the hazard is encountered of giving his estate to aliens to his blood; to persons never acknowledged by him as children. And as none are legitimate who were not born in lawful wedlock, the children of marriages deemed void, &c., cannot be distinguished from such as are born in a state of concubinage; it is in law concubinage, and therefore no presumption can arise in favor of the children. And the same principle, by a too rigid adherence to the rule, has been applied to the children of a woman; giving, as to her, more weight to a fiction of law than to the palpable fact that the illegitimate child is her offspring.

But if there be no legitimate children or possibility of legitimate children, as in case of a devise to the children of a man deceased, but there were illegitimate children, they must have been intended, as none other answer the description. In Virginia, guided by the same rule of carrying out the intention, the children of a man born in a state of concubinage, would not be considered as falling within the class of children so as to take by such general description. As to the father, the bastard remains nullius filius, and there is no legal presumption as to his paternity. But I take it to be too clear a proposition to require argument to prove it, that in Virginia a child born before marriage, but afterwards recognized by the father who inter-
631 marries *with the mother, or born of a marriage null in law, but by statute deemed legitimate, would in a devise or bequest to children be held to be included with other legitimate children, unless expressly excluded, in conformity with the principle of the English rule; because by the recognition or the birth in wedlock, the law presumes them to be children: though in England it would be otherwise. And so adhering to the principle of the rule, when the law makes the bastard child of a woman her child; endows him with every attribute of a child born in wedlock; includes him in the very class designated as children, to whom her estate is to pass in the event of her dying intestate; a testator speaking of her children, the words must be construed to include in the class all who in law are her children. Instead of departing from, such construction adheres to and carries out the rule. The contrary construction substitutes unlicensed discretion, and involves the courts in a labyrinth without a clew to direct them.

It has been suggested, that this is a will not of the mother, but of the grandfather; and we cannot presume he intended to provide for the child of his daughter's shame. The law presumes otherwise; for if his daughter had been dead, and he had then died intestate, in the statutory will made for him, this child would, equally with the legitimate children have been provided for; and in the language of the judge in Black v. Cartmell, 10 B. Monr. R. 188, it might be furthermore said, "that it cannot be assumed, or even presumed, that if she had an illegitimate son when the will was made, her father would, on account of her fault, have excluded his unoffending grandchild from all participation in his estate, and left him a vagabond dependent upon the charity of others for sustenance and education." Perhaps, indeed, considering that no matter by whom begot, the relationship to the grandfather was the same, and his necessities the greater,
632 *such presumption that he did not intend to include (or rather that he intended to exclude, for the law includes), would be contrary to the fact. And at best, it would be substituting vague conjecture for a certain rule.

The argument against the policy of such construction as affecting female purity and public morality (springing perhaps originally out of the maxims of a fulfilled dispensation, which visited upon the children, to the third and fourth generation, the sins of the parent), may be met by the enquiries of Tucker, president, in Garland v. Harrison, "was the policy of the marriage institution more fatally invaded by concubinage than by bigamy? Was illicit intercourse out of wedlock more to be deprecated than incest in wedlock?" Yet the fruits of such intercourse are legitimate. And in the Lessee of Brewer v. Blougher, 14 Peters' R. 178, which arose under a law similar in substance to ours as to bastards, the court decided that the issue of an incestuous marriage between father and daughter, though illegitimate, were embraced by the statute. Chief Justice Taney says, "the right to inherit would appear to

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have been given upon the principle, that it would be unjust to punish the offspring for the crime of the parents; and their right therefore is not made to depend upon the degree of guilt of which they were the offspring." But in the language of Judge Brockenbrough in Garland v. Harrison, this argument as to public policy "is a consideration which would be more appropriately addressed to a legislative body than a judicial tribunal." And there I leave it. It is for that body to give the law; for this to declare it.

The rule of the English courts had no reference to questions of public policy. It rested upon the intention of the testator, and the mode of arriving at it. The right of an illegitimate child to take, if the testator so intended, was never ques-
633 tioned; and this under *circumstances more likely to affect public morals than a construction which includes a bastard amongst the children of his mother under our statute. Jarman, p. 112, deduces these rules, amongst others from the cases: That illegitimate children may take by any name or description which they have acquired by reputation at the time of making the will: That legitimate and illegitimate children may take concurrently under a designatio personarum applicable to both: That a gift to an illegitimate child en ventre sa mere without reference to the father, is indisputably good: And that it is questionable whether, at this day, a gift to the future illegitimate child of a woman would be sustained on the ground of public morals; though there are dicta which would seem to lead to a different conclusion.

These conclusions show the length to which the English courts have gone in giving effect to the dispositions of testators when the intention is clear; though such dispositions may not commend themselves as calculated to preserve purity in the sexual relations.

I think the illegitimate child in this case was by the law of Virginia within the class comprehended by the word children of a woman: that by the use of the word here the testator must be intended to have referred to and included him with the other children of his daughter, whether born in wedlock or not, and that he takes equally with them, there being nothing in the case to show an intention to exclude him.

I am for affirming the decree with damages and costs.

DANIEL, LEE and ROBERTSON, Js., concurred in the opinion of Allen, P.

MONCURE, J., dissented.

Decree affirmed.

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634 *Bristow v. The Commonwealth.

July Term, 1859, Lewisburg.

1. **Jurors—Challenge for Cause—Waiver of.***—It is a principal cause of challenge to a juror that he was one of the grand jury which found the indictment. But if the objection is not taken until after the verdict, it will not be set aside on this ground, unless it appears from the whole case that the juror was biased against the prisoner; who therefore has not had a fair and impartial trial.

2. **Same—Objection to Mode of Selecting—When Made.**†—An objection to the mode of selecting the jury in a trial for murder, must be made at the time the jury are chosen; and prisoner cannot avail himself of it after verdict.

3. **Same—Selection of.**—After the panel has been completed and the prisoner has struck off eight, the jury may be selected from the remaining sixteen, either by drawing by lot four who shall be discharged, or the twelve who shall constitute the jury.

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*__Appellate Practice—Jurors—Challenge for Cause—Waiver.__—In Sweeney v. Baker, 13 W. Va. 228, it is said: "The decisions in Virginia and West Virginia show, that here the courts regard with extreme jealousy, all attempts to set aside verdicts on the ground of objections to jurors, existing before they were sworn. Here a verdict will not be set aside for any such cause, unless it appears to have operated, so as to inflict injustice. See Smith's Case, 2 Va. Cas. 6; Poore's Case, 2 Va. Cas. 474; Kennedy's Case, 2 Va. Cas. 510; Brown's Case, 2 Va. Cas. 516; Hughes' Case, 5 Rand. 655; Jones' Case, 1 Leigh 598; Hallstock's Case, 2 Gratt. 564; Heath's Case, 1 Rob. R. 735; Curran's Case, 7 Gratt. 619; Dilworth's Case, 12 Gratt. 689; *Bristow's Case, 15 Gratt. 634;* Thompson v. Updegraff *et al.*, 3 W. Va. 629; State v. McDonald, 9 W. Va. 456; Zickefoose v. Kuykendall, 12 W. Va. 23." For the above proposition the principal case is also cited and approved in Simmons v. McConnell, 86 Va. 500, 10 S. E. Rep. 838; Gray v. Com., 92 Va. 777, 23 S. E. Rep. 858; State v. Greer, 22 W. Va. 824; State v. McDonald, 9 W. Va. 465; State v. Hobbs, 37 W. Va. 826, 17 S. E. Rep. 385. See, in accord, State v. Williams, 14 W. Va. 851; Beck v. Thomson, 31 W. Va. 459, 7 S. E. Rep. 447; Flesher v. Hale, 22 W. Va. 44; Poindexter v. Com., 33 Gratt. 766, and *note*; State v. Harrison, 36 W. Va. 729, 15 S. E. Rep. 982; State v. Strauder, 11 W. Va. 745.

†__Jurors—Objection to Mode of Selecting—Waiver.__ In Lawrence v. Com., 30 Gratt. 848, and *note*, the principal case is cited as authority for the proposition that an objection to the mode of selecting the jury in a trial for murder, must be made at the time the jury are chosen, and the prisoner cannot avail himself of it after verdict. But in Lawrence's Case the court went further than the principal case and held that in a felony case a *venire facias* may be presumed to have regularly issued from the recital of the record and an objection after verdict comes too late. This is overruled in Jones v. Com., 87 Va. 68, 12 S. E. Rep. 226, and the court, in commenting on the principal case, at page 66 says: "Bristow's Case, 15 Gratt. 634, which has been referred to, has no application. In that case the objection was, not that there was no *venire*, but that the jury had been improperly selected after the *venire* had been executed, and it was held that the objection came too late after verdict.

"The difference between that case and this is that here the omission to direct a *venire* leaves the record destitute of an essential part, which, therefore, cannot be supplied by presumption nor affected by the doctrine of waiver; whereas any defect in selecting the jury from the persons brought in under the *venire*, not being thus essential, may be waived; and so, upon the same principle, objection

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4. **Criminal Law—Murder—Case at Bar.**‡—Deceased strikes the prisoner's father with his fist and a fight ensues, when the prisoner, who sees it, comes up, and catches the deceased by the collar of his coat behind, and strikes the deceased from behind with a pocket knife, wounding him in the right side. The prisoner, who was about seventeen years old, had lately left the school of the deceased, and had used language on more than one occasion before the affray, and also used language after it, but before it was known deceased was dangerously wounded, which evinced hostility to him. HELD: The killing is murder.

At the November term 1858 of the Circuit court of King & Queen county, Robert B. Bristow was indicted for the murder of L. J. Gogerty. He was put upon his trial at the same term; but the jury not being able to agree upon a verdict, was discharged. At the April term 1859 he was again put upon his trial, when the following facts were proved:

On the morning of Friday the 18th of June in the year 1858, L. J. Gogerty the deceased, was at the office of Dr. Cox, in the village of Centerville, in the county of King & Queen, together with several
635 other *persons. It was stated by some person to the deceased that James Bristow, the father of the prisoner, had said that the deceased had struck his son Julian Bristow (who was a pupil of the deceased, and whom the said deceased had corrected) in the eye with his fist. Thereupon Gogerty said it was a lie, and he intended to ask James Bristow about it the first time he saw him; and if he said so, he would tell him he lied; and if he cut up any rustys, he would thrash him. In a short time some one said James Bristow was coming then, and was in fact in the road passing from his house to his store, approaching the store of D. Butrick, a point necessary to pass in order to get to his store. Gogerty immediately started off in the direction of Butrick's store, and went a short distance up the road, and beyond Butrick's store, to meet James Bristow. When he got within a short distance of James Bristow, he said to him, "he had understood that he had said that he (Gogerty) had struck his son with his fist, and if any person said so, he told a lie." James Bristow said he never had said so—it was his son who said so. Gogerty then said, if either said so, it was a lie. James Bristow replied, "If it had come from any other person than a contemptible flat-footed Yankee, he would notice it." Gogerty thereupon struck him in the face, and one or two blows passed between James Bristow and the deceased. Just as the first blow was struck, Dr. Cox, a justice of the peace (who with others from his office had come up), commanded the peace. The prisoner, who had preceded his father, and had nearly reached his father's store, when attracted by the quarrel, was seen coming back (apparently whittling a stick, which was a habit with him, or cutting his finger nails), gesticulating very much, and talking to himself; and at the moment the deceased and James Bristow closed in fight, the prisoner rushed in to the back of the
636 deceased, somewhat to *his right, laid his left hand upon the collar in the middle, or a little to the left, apparently pulling the deceased off, and did pull him a little back, and struck the deceased round his body at the same time with his right hand. The prisoner was unobserved by the deceased when he came up behind him, as described. A witness, who was within reach of the prisoner when he came up to the back of the deceased, immediately caught prisoner by the skirt of his coat, and pulled him around; and at the instant this was done, the deceased turned from James Bristow, and advanced, striking at the prisoner, and did strike him one blow on the right or left cheek with his hand. The prisoner struck the deceased no other blow than that above mentioned, round the body. The prisoner retreated, warding off the blows as long as the deceased continued to advance on him, which was five or six paces; then a bystander interfered and separated them; and after this, the prisoner did not advance towards Gogerty. Gogerty then advanced towards James Bristow, as if to renew the fight with him, when another bystander interfered. As the prisoner, immediately after striking deceased the blow above mentioned, was pulled around as above stated, an open knife was seen in his hand.

It was proved that there was no impediment to prevent the prisoner from retreating further, when deceased was advancing upon him, and that before and during the fight, there was nothing to indicate any danger of death, or serious bodily harm to any of the combatants.

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to the competency of a juror must be made before he is sworn upon the jury, unless by leave of the court." See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

Upon the question of competency of jurors, see principal case cited in Jackson v. Com., 23 Gratt. 931, and *note*, and cases cited. See monographic *note* on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

‡**Criminal Law—Homicide—Instructions—Self-Defense.**—In Clark v. Com., 90 Va. 369, 18 S. E. Rep. 440, it is said: "In Valden's Case, 12 Gratt. 717, it was held that to make out a case of self-defense in a case of homicide, the accused must show to the jury that the defense was necessary to protect his own life, or to protect himself against grievous bodily harm; and that with regard to the necessity that will justify the slaying of another in self-defense, the accused must not have wrongfully occasioned the necessity, for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself. See, also, *Bristow's Case, 15 Gratt. 634;* Lewis' Case, 78 Va. 732; Honesty's Case, 81 Va. 283, 298; Brown's Case, 86 Va. 466, 470, 10 S. E. Rep. 745; Gaines' Case, 88 Va. 682, 693, 14 S. E. Rep. 375." See Gray v. Com., 92 Va. 775, 22 S. E. Rep. 858, and cases cited, where the instructions given in the principal case are approved. See monographic *note* on "Homicide."

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It was also proved, that after the fight, and the crowd had dispersed, the prisoner, who was at his father's store, said he had stabbed the deceased; and taking his knife from his pocket, said he had stabbed him with that knife, and asked if there was not blood on it. He also at this time took
637 from the shelf a *larger knife, of the value of sixty-two and half cents, and said if he had had that knife at the time of the fight, he would have killed the deceased on the spot. A short time after, prisoner said to another person, he had interfered that morning in a fight between Gogerty and his father James Bristow, and that if they had not interfered with him (prisoner) after the first blow, he would have killed Gogerty the second blow, if he had not been pulled off. That the deceased had taken advantage of his absence to whip his brother Julian at school, and that had he been present he would have killed him at that time; and that if Gogerty ever interfered with him, he would kill him. That about fifteen minutes after the fight, the prisoner said to another witness, "Where is the damned rascal? (meaning Gogerty). I will shoot him or his horse either." That about an hour after the fight, the physician, who attended the deceased, after he had made the first examination of the wound, and at that time thought it slight, said to prisoner, "You have marked Gogerty." He replied, "That is exactly what I intended to do."

When the foregiong expressions were used by the prisoner, he was not apprised of the serious nature of the wound the deceased had received.

It was also proved, that about a week before the fight, the deceased, who was a schoolmaster, and the prisoner at that time his pupil, called him up and asked him about a difficulty which the prisoner had had with another boy, and the prisoner replied, he would whip any boy who would do what that boy had done to him. That upon this, the deceased rebuked the prisoner; and that after the school was dismissed for that day, the prisoner said to one of his schoolmates that at the time the deceased rebuked him, he had his knife open in his pocket, and if the deceased had
638 *touched him, he would have killed him on the spot. That on the day before the fight, about twelve o'clock, the prisoner said he had left the school of the deceased. That he had treated him in an ungentlemanly manner, and he intended to tell him so, and if he resisted him or struck him, he meant to kill him. At this time the prisoner exhibited a knife, saying, "It is a small one, but I always have one about me, even though it is a small one." Early in the night of the last mentioned day, the prisoner said that if he went to the debating society that night, and deceased interfered with him there, he would kill him. The fatal wound was inflicted with a knife, the blade of which had a sharp point, and was from two to two and a half inches long. The wound was located on the left side of the person of the deceased, about midway between the lower rib and the hip bone. It was directed downwards and inwards, and the narrow edge was towards the anterior medium line of the body. In consequence of the compressible nature of that portion of the body, it penetrated about four inches, transfixing two of the small intestines, and entered the large intestine. The wound was inflicted on Friday morning, between eight and nine o'clock, and the deceased died from the effects thereof on the following Sunday, in the afternoon. Some few hours before his death, the deceased, who was then aware of his approaching end, sent for the father of the prisoner, and had an interview with him. In this interview the deceased said that he did not wish the prisoner punished. That it was perfectly natural for the son to defend the parent. That the prisoner had only done what he (the deceased) or any other person would have done.

It was also proved that the age of the prisoner at the time of the homicide was eighteen years and five months.

639 *After the evidence had been introduced, the prisoner, by his counsel, moved the court to instruct the jury as follows:

1st. That every homicide is presumed in law to be murder in the second degree—and in order to elevate the offence to murder in the first degree, the burden of the proof is on the commonwealth; and to reduce the offence to manslaughter, the burden of the proof is on the prisoner.

2d. That if the jury shall believe from the evidence, that there was an existing grudge on the part of the accused against the deceased, but that the killing occurred on a sudden affray and by reason of a new provocation, they are bound to presume the killing to have been caused by the impulse of the affray, unless it be clearly shown by the commonwealth to have been on the old grudge.

3d. That a child will be excused by the law for any injury done by him to one assailing his parent offensively, to the same extent that he would be if the attack was made on himself instead of his parent.

4th. That if the jury shall have rational doubt as to any important fact necessary to convict the accused of any offence whatever, they are bound to give to the accused the benefit of that doubt.

5th. That if the jury shall believe from the evidence that the accused gave to Gogerty the wound which caused his death, whilst Gogerty was advancing on him and striking at him, under the belief at the time that it was necessary to protect his life or his person from serious bodily harm, and whilst he was retreating from Gogerty, that then he was excusable.

6th. If, upon the whole evidence in the case, there is any rational hypothesis consistent with the conclusion that the homicide was justifiable or excusable, the accused cannot be convicted.

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7th. That there is no presumption
640 of malice in this *case, if any proof of alleviation, excuse or justification arise out of the evidence for the prosecution.

To which instructions the attorney for the commonwealth objected. Whereupon, the court, refusing to give the said instructions as prayed for by the prisoner, instructed them as follows:

1st. That every homicide is presumed in law to be murder in the second degree; and in order to elevate the offence to murder in the first degree, the burden of the proof is on the commonwealth; and to reduce the offence to manslaughter, the burden of the proof is on the prisoner.

2d. If the jury shall believe from the evidence, that at the time of the killing there was an exsiting grudge on the part of the accused to the deceased, but that the blow struck by the prisoner, which caused the death of the deceased, was given in a sudden affray, and because of fresh provocation, then the presumption is that the killing was because of the fresh provocation; and to elevate the offence to murder, it devolves on the commonwealth to show that the killing was because of the old grudge.

3d. That a child will be excused by the law for any injury done by him to one assailing his parent offensively, to the same extent that he would be, if the attack was made on himself instead of his parent.

4th. That if the jury shall have any rational doubt as to any important fact necessary to convict the accused of any offence whatever, that they are bound to give the accused the benefit of that doubt.

5th. That if the jury shall believe from the evidence that the accused gave to Gogerty the wound which caused his death, whilst Gogerty was advancing on him, and striking at him, and that he then struck the mortal blow through mere necessity, in order to protect himself from serious bodily injury or death, having first retreated until his further retreat was pre-
641 vented *by some impediment, or as far as the fierceness of the assault permitted, then he was excusable in striking the said blow.

6th. If upon the whole evidence in the case, there is any rational hypothesis consistent with the conclusion that the homicide was excusable or justifiable, the accused cannot be convicted.

7th. Every homicide is presumed in law to be murder in the second degree. It is, however, the duty of the jury to consider the whole testimony (both that introduced by the commonwealth and the prisoner), and ascertain whether the prisoner has been guilty of murder in the first degree, murder in the second degree, or manslaughter (voluntary or involuntary), or whether the homicide was not excusable.

To which opinion of the court, refusing the instructions prayed for by the prisoner, by his counsel, and giving the instructions last aforesaid, the prisoner, by his counsel, excepted.

The attorney for the commonwealth then moved the court to instruct the jury as follows:

1st. Every homicide is presumed by law to be murder in the second degree. If the commonwealth would elevate the offence to murder in the first degree, she must prove the characteristics of that offence; and if the prisoner would reduce the offence, the burden of proof is on him.

2d. If the jury believe from the evidence that previous to the time of killing there was a grudge on the part of the prisoner towards the deceased; that the prisoner had previously declared his purpose to kill the deceased if the deceased interfered with him, and that he killed the deceased because and in pursuance of such declared purpose on the aforesaid grudge, then such killing was willful, deliberate and premeditated. and is murder in the first degree.

3d. If the jury believe from the
642 evidence that the *killing aforesaid was malicious, but not willful, deliberate and premeditated, then such killing was murder in the second degree.

4th. If the jury believe for the evidence that the prisoner killed the deceased in execution of a malicious purpose to do the deceased a serious personal hurt, by wounding or beating him, the offence is murder.

5th. If the jury believe from the evidence the prisoner killed the deceased, even after his own retreat, the excuse of necessity will not prevail, unless there was reasonable ground to apprehend that he would otherwise be killed himself, or that he would suffer great bodily harm; and the same rule applies when the killing is by a child in defence of a parent. The danger to either, in order to excuse the killing. must be serious and imminent.

6th. Where death ensues on a sudden provocation or upon a sudden quarrel, without prepense malice, the killing is manslaughter; and in order to reduce the killing to self-defence, the prisoner must prove two things: First, that before the mortal blow was given, he had declined any further combat, and had retreated as far as he could with safety; and secondly, that he killed his adversary through mere necessity.

To which the counsel for the prisoner objected. But the court, overruling the objections of the prisoner, by his counsel. to the said instructions, granted the same, and gave them to the jury. And the prisoner again excepted.

The jury found the prisoner guilty of murder in the second degree, and ascertained his term of imprisonment in the penitentiary at five years. And thereupon the prisoner, by his counsel, moved the court to set aside the verdict, on the ground that the jury was not drawn and selected in the mode prescribed by law. The point of the objection was, that after the
643 panel of *twenty-four had been completed, and the prisoner had struck off eight, out of the remaining sixteen four were selected by lot and discharged; and the other twelve were sworn as the jury.

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The court overruled the motion; and the prisoner again excepted. There was also a motion for a new trial, on the ground that the verdict was contrary to the evidence, which the court overruled: and there was another exception setting out the facts hereinbefore stated. And afterwards there was another motion to set aside the verdict and grant a new trial, on the ground that Richard Wayne, one of the jury which rendered the verdict, had been a member of the grand jury which made the indictment. This application was accompanied by the affidavit of the prisoner, in which he says that he did not know and had no means of knowing, by ordinary diligence on his part, that the said Richard Wayne was on the grand jury which found the indictment, before or during the trial, and not until after the discharge of the jury. There was also the affidavit of the two counsel for the prisoner, who were present when the jury was impaneled, who say that Wayne was sworn on his voir dire before he was sworn in chief as a juror in the case, and that he did not disclose the fact that he was one of the grand jury which found the indictment; and that they did not know, nor were they informed of the fact until after the verdict was rendered.

Wayne was himself examined, and said that he was a member of the grand jury, but that he had no recollection of the fact at the time that he was called, examined and sworn on the jury; nor did he recollect it until his attention was called to it on the morning after the verdict was rendered. He further stated that he did not when on the jury, nor did he then recollect any of the evidence given before the grand jury which found the indictment; and that such evidence did not weight with him, or in any manner influence his mind
644 *in rendering the verdict; but that his mind was perfectly free and unbiased for or against the prisoner. The court overruled the motion; and the prisoner again excepted. And the court having rendered a judgment upon the verdict, the prisoner applied to this court for a writ of error; which was awarded.

Crump, for the prisoner, insisted:

1st. That Wayne having been a member of the grand jury which found the indictment against the prisoner, he was not a competent juror; and the objection having been made as soon as it was known, the prisoner was not to be subjected to the consequences of a trial by an incompetent jury; because having used the only means in his power to ascertain the juror's competency, he had failed to do so by the misconduct of the juror himself. He referred to Dilworth's Case, 12 Gratt. 689; Cain v. Cain, 1 B. Monr. R. 213; Williams v. The State of Georgia, 3 Georgia R. 453; McKinley v. Smith, Hardin's R. 167; Herndon v. Bradshaw, 4 Bibb's R. 45; Sellers v. The People of Illinois, 3 Scam. R. 412; Booly v. The State, 4 Yerg. R. 111; Monroe v. State of Georgia, 5 Georgia R. 85, 140; and the cases cited in 9 Bac. Abr. 597, title Trial, 3 L; Wharton Cr. Law 850, 923.

2d. That the jury were not chosen in the mode prescribed by the statute. If the twelve who were to constitute the jury had been drawn, the four who were rejected would have been upon it, and four of those upon it would have been rejected.

3d. That the evidence did not make out a higher grade of offence than manslaughter. That the prisoner was justified in going to the assistance of his father, who had been insulted and was then beaten by the deceased; and if in the heat of blood he killed the deceased, it was not murder, unless there was previous malice which prompted the killing. And he insisted
645 *earnestly that the idle talk or even threats of a mere boy, as was the prisoner, was not to be regarded as evidence of previous malice, especially when the circumstances and excitement of the moment were sufficient to account for his conduct. Certainly it was for the commonwealth to satisfy the court that the prisoner was prompted by the previous grudge. He referred to Foster's Cr. Law 290, Mason's Case; Davis' Crim. Law 83. 1 Russ. Crimes 513, 588, 589; Copeland v. The State, 7 Humph. R. 479; The State v. Ford, 1 Spears' R. 150, 154.

The Attorney General, for the commonwealth, insisted:

1st. That the objection to the juror not having been taken until after the trial, the objection came too late. That the act is broad enough in its terms to exclude all objections to a juror after he is sworn. Code, ch. 162, § 4, p. 628. And this seems to have been the construction of the act in Jones' Case, 1 Leigh 598; though Judge Daniel supposes that it does not refer to common law objections. Dilworth's Case, 12 Gratt. 689. He referred also to Tooel's Case, 11 Leigh 714; Heath's Case, 1 Rob. R. 735. And he insisted, that after verdict the only question is, whether the verdict is a just and proper one?

2d. That the evidence made out a case of murder. That without looking to the evidence of previous malice, the circumstances attending the killing, and the manner in which it was done, made out a case of murder. But that the evidence of previous malice and threats was abundant, and his conduct showed he was acting on that previous malice. He referred to Wharton's Cr. Law 368; Davis' Cr. Law 86; Johnston's Case, 5 Gratt. 660; Davis' Cr. Law 85, 98, 99; Whart. Cr. Law 373, 374.

ROBERTSON, J. If the juror
646 Wayne had been challenged *before he was sworn, because of his having been a member of the grand jury that found the indictment, there can be no doubt that the court would have been bound to exclude him from the jury for the trial of the prisoner. But not having been so challenged, his serving upon it was not of itself sufficient ground upon which to set aside the

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verdict. A party is not entitled to a new trial, as a matter of right, because he is able after verdict to show such cause of challenge against a juror as would have been allowed if made before he was sworn.

"When the prisoner excepts to a juror for cause, before he is sworn, it is matter of right, to be adjudged by the court; when he excepts after trial, for cause existing before the juror was elected and sworn, it is matter addressed to the discretion of the court: in the exercise of this discretion the court ought to consider the whole case, and be satisfied that justice has been done."

This is the rule as laid down in Jones' Case, 1 Leigh 598; and it has been uniformly adhered to in this state. In applying it, the court regards with extreme jealousy all attempts to set aside verdicts on the ground of objections to jurors existing before they were sworn. A verdict will not be disturbed for any such cause, unless it appears to have operated so as to inflict injustice upon the prisoner. Heath v. The Commonwealth, 1 Rob. R. 735; Curran's Case, 7 Gratt. 619.

In the case of Dilworth v. The Commonwealth, 12 Gratt. 689, the objection that one of the jurors had been a member of the grand jury that found the indictment, was made after the jury were sworn, but before any of the evidence was heard. The prisoner's affidavit that he did not know of the objection until after the juror had been sworn, was sustained by the affidavit of the jailor who gave him the information. The prisoner brought the matter to the notice of the court as soon as possible, and there was no reason to
647 *suspect that, in making the objection, he had any other object in view than to secure an impartial jury for his trial.

Under these circumstances, this court held that the court below exercised its discretion erroneously, in refusing to set aside the juror and substitute another in his place. But the case was carefully distinguished from that of an attempt on the part of a prisoner to avoid the effect of an adverse verdict, "on the score of objections to his triers, existing before they were chosen and sworn;" and the decision was rested on the ground that "the principles to be deduced from the modern decisions justify an indulgence to motions to set aside jurors after they have been sworn and before they have rendered a verdict, which would not be allowed to applications for new trials founded on exceptions to jurors taken after verdict."

In England, after a juror has been sworn, he cannot, except by consent, be challenged for any pre-existing cause. Hawkins' Pleas of the Crown, book II, ch. 43; Bacon's Abr. tit. Juries E. 11; 1 Chitty's Crim. Law 545. But (as was suggested in Dilworth's Case) it is probable "that English judges would not now deny their power to set aside a juror, at the instance of a prisoner, at any time before the examination of the witnesses had commenced."

In the United States, the decisions on this subject are conflicting, the English rule being adhered to in some of the states, while in others it appears to be held that where the objection to the juror would be good cause of challenge for favor, if discovered in time, it will be ground for a new trial, as a matter of right, if not found out until after verdict.

Even if we were not bound by our own decisions, we would not hesitate to prefer the rule which has been established here, as being the one most consonant with justice and public policy.

648 *It is a principal cause of challenge to a juror, that he was one of the grand jury which found the indictment. But unless he is challenged before he is sworn, the objection will be considered as waived, and his being on the jury will not vitiate the verdict. The only case in which the failure to make the challenge cannot properly be regarded as a waiver, is where the objection was not known, and could not, by the exercise of reasonable diligence, be known to the prisoner until after the juror was sworn. But while in such case the prisoner ought not, on the one hand, to be treated as if he had waived the objection, he should not, on the other, be allowed the same benefit of it after verdict, as if it had been made before the jury were sworn. The juror is excluded if objected to before he is sworn, because of his presumed bias. It is probable, from his position, that he will not be able to act impartially; and because of this probability, the prisoner has the right to exclude him. But it is a different matter after verdict. The fairness of the juror has then been tested by experiment. The court can, upon a review of the whole case, and of every thing relating to the conduct of the juror in reference to it, determine, with a reasonable degree of certainty, whether the apprehended bias did really exist. If it appears that it did exist, the prisoner is entitled to have the verdict set aside, because his trial has not been fair and impartial; but if it is obvious that the juror was not influenced by any bias against the prisoner, and that justice has been done, surely the circumstance that it was at one time probable that he would be so influenced, can afford no reason for disturbing the verdict.

To permit prisoners to avail themselves, after verdict, of pre-existing objections to the competency of jurors, as a matter of right, would not only be unreasonable, but most mischievous in its consequences.

649 *The delays in the administration of criminal justice, and the chances for the escape of the guilty, would be greatly increased. Proper verdicts, especially in trials for grave offences, would be continually set aside. A prisoner knowing, or willfully remaining ignorant of the incompetency of a juror, would take the chances of a favorable verdict, with him upon the jury; and if the verdict should be adverse, would readily enough make the affidavit necessary to avoid its effect.

I think, therefore, if it be conceded that the prisoner in this case was ignorant until

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after the verdict that Wayne was a member of the grand jury, and that he could not, by an exercise of proper diligence, have sooner ascertained the fact, that the court was not bound to set aside the verdict and grant a new trial because Wayne was also upon the petit jury, unless it appeared that his serving on it caused injustice to be done to the prisoner.

But there is no sufficient evidence that it could not, by the exercise of due diligence, have been ascertained before the verdict was rendered, that Wayne was a member of the grand jury. It is true, the affidavit of the prisoner states that he had no means of knowing it before or during the trial, by the exercise of ordinary diligence on his part. But what is "ordinary diligence," is a matter for the court, and not for the prisoner to determine. The affidavit should have stated the circumstances under which, and the person from whom the information was obtained, so as to enable the court to judge for itself whether due diligence was used; and for the further purpose of affording the means of testing the truth of the allegation of want of knowledge.

The prisoner was entitled to a list of the jury summoned for his trial; and it was his duty to inform himself, before they were sworn, whether objections
650 *existed to any of them. If there was as much anxiety before as after the verdict, to discover objections to the competency of jurors, it is difficult, in the absence of any statement of the circumstances under which the discovery was made, to understand how it happened that a fact apparent on the record of his own case, should have remained unknown to the prisoner until the termination of a trial which lasted five days, and should then have been ascertained just in time to be used on a motion for a new trial.

But waiving all objections to the sufficiency of the affidavits, and regarding the prisoner as having brought himself within the rule applicable to those who, having exercised a reasonable degree of diligence, are ignorant until after verdict of a pre-existing objection to a juror, it does not appear that the court, in the exercise of its discretion, ought to have granted a new trial because of the objection to Wayne as a juror.

There is nothing to warrant the conclusion by this court that Wayne was guilty of perjury or corruption. His explanation of his position seems to have been credited by the judge of the Circuit court, and the prisoner did not attempt to impeach its truth.

In determining whether such injustice was done the prisoner as to make it proper to set the verdict aside, the third ground of error assigned in the petition, namely, that "the facts certified do not warrant a conviction for murder," must necessarily be disposed of.

The court committed no error in substituting for the instructions asked for by the prisoner, those which were given in their stead, or in giving those asked for by the commonwealth's attorney. The law applicable to the case, in any aspect in which it might be viewed by the jury, and especially in reference to the questions of provocation and malice, was stated in a full and perspicuous manner; and there is nothing in any of the instructions of which
651 the prisoner has a right to *complain.

The question then for consideration is, did the facts proved justify the conclusion that the killing was malicious? It seems to me, after making all possible allowances for the youth and indiscretion of the prisoner, that the finding was proper.

It is true, there was provocation at the time, which, in the absence of proof of express malice, might have been sufficient to reduce the killing to manslaughter. But the proof that malicious and revengeful feelings existed, and that the prisoner acted under their influence, is abundant. He had for a week previously manifested strong animosity against the deceased, and had repeatedly stated that, on receiving any provocation from him, he would kill him. The first thing that he did, on taking part in the contest between his father and the deceased, was to use a deadly weapon, without warning and from behind, when there was no necessity, real or apparent, for the use of such weapon. His declarations, after the fight and before he knew the serious character of the wound he had inflicted, showed that he had been prompted by the desire and intent to kill, and referred that desire and intent not to the immediate provocation, but to the previous act of the deceased in whipping his brother Julian.

If all this does not show express malice, it is difficult to say what would be sufficient proof for the purpose.

The prisoner, then, was guilty of murder, and as the verdict ascertained the minimum punishment prescribed by law for that offence, it cannot possibly be regarded as harsh or unjust. It may be further observed, that no effort was made by the prisoner to show that the verdict was more severe than it probably would have been if Wayne had not been a member of the jury.

The only remaining assignment of error relates to the mode of selecting the
652 jury. If the objection were *valid, the prisoner, having failed to make it at the time the jury were chosen, could not avail himself of it after verdict. But there would have been nothing in the objection if made at the proper time. The mode adopted was as full a compliance with the law requiring the jury to be selected by lot, as is the more usual one of drawing out the names of the twelve who are to serve.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Robertson, J.

Judgment affirmed.

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653 *Shumate v. The Commonwealth.

January Term, 1860, Richmond.

1. **Statute*—Betting on Elections—Remedial.†**—The 10th section of chapter 198 of the Code, in relation to betting on elections, is to be construed as a remedial statute.

2. **Statute—Ch. 198, § 20—To What it Applies.†**—The 20th section of chapter 198 of the Code applies to all the preceding sections of that chapter.‡

3. **Elections—Wager on—Case at Bar.†**—A short time before the election of county officers for A to be made in May 1858, M sold to S a wagon at the price of one hundred and fifty dollars, and worth that sum, to be paid by S when K, one of the candidates for the office of county court clerk at said election, should be elected to that office, and not at all, if he was not elected; and S at the time of said sale put up his check agreeably to that understanding; and upon these terms took possession of the wagon. HELD:

1. **Same—Same—Same.†**—This is a wager on the part of both M and S, within the meaning of the Code, ch. 198, § 10, p. 744.§

2. **Same—Same—Limits of Fine.†**—Both M and S are liable to a fine not exceeding the amount that either might lose.§

This was an indictment for betting on an election, in the Circuit court of Augusta county. The facts are fully stated in the opinion of Judge Robertson.

Imboden, for the appellant.

The Attorney General, for the commonwealth.

ROBERTSON, J. Joseph T. Mitchell and William J. Shumate were jointly indicted, at June term 1858, in the Circuit court of Augusta, for a violation of the law prohibiting betting on elections.

654 *The defendants having elected to be tried separately, an issue was made up as to the defendant Shumate, upon the plea of "not guilty," and a jury sworn. Upon the trial it was proved that a short time before the election of county officers for Augusta, to be made in May 1858, Joseph T. Mitchell sold to the defendant Shumate a wagon, at the price of one hundred and fifty dollars, to be paid by the defendant when Jefferson Kinney, one of the candidates for the office of County court clerk, at said election, should be elected to that office, and not at all, if he was not elected: and that the defendant at the time of said sale put up his check agreeably to that understanding, and upon those terms took possession of the wagon. The witness who proved these facts further stated that he was under the impression that at the time of the sale, Mitchell remarked that the wagon had cost him one hundred and thirty dollars. The witness himself was of the opinion that it was fully worth that sum, and perhaps as much as one hundred and fifty dollars, to any one who needed such a wagon.

The defendant then introduced a witness, who proved that he was a master mechanic and contractor, and thought he was well acquainted with the value of such a wagon as that which the defendant had purchased from Mitchell; that he had seen and examined the identical wagon in question, and regarded it, at the time the defendant got it from Mitchell, as fairly worth one hundred and fifty dollars in money.

This being all the evidence, the case was argued before the jury; and then the defendant, by his counsel, moved the court to give the jury the following instructions, to wit:

"1st. A bet implies risk in both parties; and where one person sells another property at a fair valuation, to be paid for when a particular candidate shall be elected, it is not a wager, within the mean-

655 ing of the *act of assembly under which this prosecution is had; therefore, if the jury believe from the evidence in this case, that the wagon sold by Joseph T. Mitchell to the defendant, was worth one hundred and fifty dollars, they must find the defendant not guilty.

2d. Under section 10 of chapter 198 of the Code, the limit of the fine to which a party can be subjected for a violation of said section, is the amount or value of such money or other thing bet or wagered by him; and therefore, if the jury believe that the defendant purchased property at more than its fair valuation, to be paid for when a particular candidate was elected, then the amount so bet or wagered by him was the difference between a fair valuation of the property so purchased and the price at which it was sold, and the jury cannot impose a fine of greater amount than such difference in value and price.

3d. The act under which this prosecution is had, must be construed as a penal and not a remedial statute."

But the court refused to give said instructions. To which opinion of the court the defendant excepted: and the jury having found him guilty, and assessed his amercement at one hundred and thirty dollars, he moved the court to set aside the verdict and grant him a new trial, on the ground that said verdict was contrary to the law and the evidence of the case; but the court overruled the said motion: to which ruling of the court he again excepted. And judgment having been entered in conformity with said verdict, a writ of supersedeas has been awarded from this court, on the petition of said Shumate, who assigns as matters of error, the refusal of the court to

*See principal case cited in State v. Griggs, 34 W. Va. 81, 11 S. E. Rep. 741.

†See monographic *note* on "Elections" appended to West v. Ferguson, 16 Gratt. 270; monographic *note* on "Gaming" appended to Neal v. Com., 22 Gratt. 917.

‡See JUDGE ROBERTSON'S opinion for the act.

§Code, ch. 198, § 10, p. 744. "If a free person bet or wager money or other thing, over the value of five dollars, on any election, or appointment to any office or place, to be made under the authority of the constitution and laws of this state, or of the United States, he shall be fined not exceeding the value of money or other thing."

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give the three several instructions prayed for as above stated.

The question which it will be most convenient to consider first, is, whether the act, under which the prosecution was had, is to be construed as a penal
656 or *as a remedial statute. The 20th section of chapter 198 of the Code provides, that "All laws for suppressing gaming, lotteries, unchartered banks, and the circulation of bank notes for less than five dollars, shall be construed as remedial."

The question under consideration is, therefore, narrowed to the enquiry, whether the act prohibiting betting on elections is a law "for suppressing gaming," within the meaning of the 20th section; which, as it changes the rule of interpretation prescribed by the common law in reference to penal statutes, must itself be construed strictly.

Under a strict construction of this section, and on the authority of Chubb's Case, 5 Rand. 715, it might well be doubted whether we would be justified in coming to the conclusion that the law against betting on elections is embraced by the general words "all laws for suppressing gaming," were it not for the light which is thrown on the subject by the history of the legislation respecting it, and by the table of contents prefixed to chapter 198 of the Code, and the captions to the sections of that chapter.

Our first statute against betting on elections was passed in the year 1840. Acts 1839-40, ch. 21, p. 30. It declared that any person violating it should "be guilty of unlawful gaming." The offence was of course thus brought within the operation of the act providing that all laws against gaming should be construed remedially.

In the revisal of the criminal code, made in 1848, the provision against betting on elections is to be found in the chapter relating to offences against public policy, and is in the following words:

"Any free person who shall bet or wager any money or other thing over the value of five dollars upon any election or appointment to any office or place, to be made under authority of the constitution
657 and laws of *this state, or of the United States, shall be deemed guilty of unlawful gaming, and be punished by fine not exceeding the value of the money or thing so bet or wagered." Acts 1847-8, ch. 10, § 11, p. 115.

The revisors, in their report, follow the whole of this chapter very closely, adopting not only, for the most part, its provisions, but adhering to the same arrangement of the subjects. Wherever any substantial alteration is proposed, attention is generally called to it by means of a note; but the phraseology of most of the sections is changed by them for the sake, it would seem, of brevity and supposed clearness.

The 11th section above quoted is, in the report, made the 10th section of the chapter, and is to be found there in the following words:

"If a free person bet or wager money or other thing over the value of five dollars, on any election or appointment to any office or place, to be made under the law, he shall be fined not exceeding the value of such money or other thing."

No note, indicating that any change in the law was designed, is appended.

The committee of revision proposed to amend the section, by striking out the words "the law," and inserting, in their place, the words "authority of the constitution and laws of this state or of the United States." This amendment was adopted by the legislature, so that the section as now to be found in the Code, is in the following words:

"If a free person bet or wager money or other thing over the value of five dollars, on any election or appointment to any office or place to be made under authority of the constitution and laws of this state or of the United States, he shall be fined not exceeding the value of such money or other thing."

The fair presumption is, that the
658 words "shall be *deemed guilty of unlawful gaming," were omitted simply because they were regarded as superfluous and unnecessary. If there could be any doubt about it, it would be removed by reference to the table of contents prefixed to the chapter, and the captions to the sections. These may be looked to as showing the contemporaneous construction of the Code by the revisors when engaged, under the authority of the legislature, in preparing it for publication.

The first general head is "Gaming, lotteries and lottery tickets." Under it are included the first fifteen sections—the tenth occupying the same relative position that the eleventh did in the act of 1848—following immediately after the sections relating to "gaming," and preceding those relating to "lotteries and lottery tickets."

The next general head is "Unchartered banks and illegal circulation," the sections under it extending from 16 to 19, inclusive. Then we find, as a caption to sections 20 and 21, the words, "Previous sections remedial; attorney's fee under them."

The 20th section has been already quoted. It refers to the subjects treated of in the sections preceding it, instead of the sections themselves, but does not mention eo nomine the law against betting on elections, although it is contained in one of the preceding sections of the chapter.

The 21st section, however, refers to the preceding sections themselves, and shows that all of them are embraced under it. It is in these words:

"In every case of conviction for an offence under any preceding section of this chapter, an attorney's fee of ten dollars shall be taxed in the costs."

The caption to the two sections shows that the provision for the attorney's fee applies to the same sections which it is declared shall be construed as remedial, *thus making it apparent that
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the words "previous sections" were intended to mean all previous sections. This is rendered still more certain by reference to the table of contents prefixed to the chapter. We find there, opposite to section 20, the words, "All previous sections remedial."

But it may be asked, why it is, if precisely the same previous sections are referred to in the 20th and 21st sections, that the same language was not used in each. The answer is, that it was designed by the 20th section to fix a general rule of construction, which should embrace not only the laws then enacted, but all such as might thereafter be passed upon the subjects referred to.

It is manifest that no change was intended to be made in the law prohibiting betting on elections, or in the rule of construction applicable to it; and that the act under which this prosecution was had, should, like the previous laws on the same subject, be construed as remedial.

We come next to the consideration of the propriety of the refusal to give the other instructions asked for.

The fine being limited to an amount not exceeding the value of the money or other thing bet or wagered by the party prosecuted, it is insisted, that "if A bets ten dollars against one thousand dollars, with B, that a particular candidate will be elected, the value of the money bet by A is only ten dollars, and if prosecuted, he could only be fined ten dollars, whilst B might be fined one thousand dollars. The risk, therefore, must fix the amount of the fine. Hence, if a man buys property at a fair valuation, payble when a particular candidate is elected, he risks nothing; and it is not a bet or wager, within the meaning of the statute."

Such cannot have been the intention of the legislature. It could never have
660 been designed that where *parties are equally guilty, the punishment should be so unequal that, in the case supposed, the loser of one thousand dollars should be liable to a fine one hundred times greater than that which could possibly be imposed on the winner of the same amount. Yet this conclusion seems logically to follow from the premise that the amount bet by a party is the amount risked by him.

The reasoning which leads to such results must be fallacious. The fallacy consists in the assumption that the amount bet by a party must always and of necessity be the amount risked by him, and that one cannot be without incurring some risk of loss.

It is true, that a bet does imply risk, but it does not necessarily imply risk in both parties. There must be between them a chance of gain and a chance of loss; but it does not follow that each of the parties to the bet must have both these chances. If, from the terms of the engagement, one of the parties may gain but cannot lose, and the other may lose but cannot gain, and there must be either a gain by the one or a loss by the other, according to the happening of the contingency, it is as much a bet or wager as if the parties had shared equally the chances of gain and of loss. The amount bet by them is the amount which the one may win, and the other may lose; and each of them may, under the statute, be fined "not exceeding" that amount, the fine, within that limit, being in the discretion of the jury, who may, if they choose, discriminate between the winner and the loser: a discrimination which may often with great propriety be made in favor of the loser, and against the winner.

One person alone cannot be guilty of the offence of betting. There must be always at least two parties engaged in it. It is a joint act: and when the chance of gain and the chance of loss are created, it matters
661 *not how those chances are distributed between the parties there exists all that is necessary to constitute a bet. The parties are jointly and equally guilty, and each of them is liable to the same penalty, unless the jury think proper to discriminate —it being in their power to fine each the full amount risked, or which may be won by either; or by anyone of them when more than two are engaged in the bet.

It might therefore well be insisted, that even upon a strict construction of the statute, the court was right in refusing both the first and second instructions asked for. But, as has been shown, the act is a remedial one, and it is therefore to be construed liberally, so as to suppress the mischief and advance the remedy. So construing it, there cannot be the slightest doubt upon the subject. The object of the law is to preserve the purity of elections; which is always impaired whenever private and personal interests are brought to bear upon them, instead of those high considerations of public duty by which alone the voters ought to be influenced.

One of the worst forms in which private interest is made to operate on elections, is that of betting upon the result. It is not only calculated to prevent the parties to the bet from exercising the right of suffrage in a proper manner themselves, but it exposes their friends and all within their reach to improper influences and solicitations.

It cannot be pretended that a bet, under the form of a sale, by which one party sells for its precise value an article to be paid for only in the event of the election resulting in a particular way, is not as fully within the mischief intended to be remedied, as any bet whatever can be. The party selling is influenced by the fear of losing his property for nothing—the party purchasing, by the hope of getting it for nothing. Each has a pecuniary
662 *interest in the result, which must affect him in the same manner, although it may be not to the same degree, as if he had the chances of both gain and loss.

But a Tennessee case (Quarles v. The State, 5 Humph. R. 561) is relied on as an authority to show that in order to constitute a bet or wager, there must be a risk in-

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curred by both parties; and it is directly in point for the purpose.

The same question, however, seems to have been decided differently elsewhere. In the case of Marean v. Longley, 21 Maine R. 26, it appeared that a horse, estimated to be worth one hundred dollars, was sold for that amount, to be paid when Mr. Van Buren should be elected president of the United States. The transaction was held to be a bet. And if the reporter's abstract of the case of Tramwell v. Gordon, 11 Alab. R. 656, is correct in the statement that the notes were given for the value of the land, that is a decision to the same effect. So that if this case were to be determined upon the authority of decisions in other states, the preponderance would seem to be in favor of the conclusion to which I have arrived. But such decisions have no binding force here, and are of authority only so far as they commend themselves to our approval, by the reasons on which they are founded. The Tennessee case simply announces the judgment of the court, without giving any reason or referring to any authority, while in the cases referred to from Maine and Alabama, this particular point does not seem to have been discussed either at the bar, or by the court, it appearing to be taken for granted that the circumstance that one of the parties incurred no risk, did not affect the question (which was controverted on other grounds) whether the transaction amounted to a bet or wager.

It was therefore proper to examine
663 the question irrespective *of authority; and having done so, I entertain no doubt that the Circuit court correctly refused to give the instructions asked for.

The court was right also in overruling the motion for a new trial, the verdict being in accordance both with the law and the evidence.

I am for affirming the judgment.

The other judges concurred in the opinion of Robertson, J.

Judgment affirmed.

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664 *Commonwealth v. Young.

January Term, 1860, Richmond.
(Absent ALLEN, P., and LEE, J.*)

1. **Retailing Ardent Spirits†—Indictments.††**—In an indictment under § 18, ch. 38 of the Code, p. 209, for retailing ardent spirits, the words "not to be drank where sold," not being in the statute, need not be in the indictment.‡
2. **Same§—Same.††**—In an indictment under § 18, ch. 38 of the Code, the words "without having a license therefor according to law," are not equivalent to the words "without paying such tax and obtaining such certificate as is prescribed by the 14th section," which are the words used in the statute; and the indictment is defective.‡
3. **Indictments¶—Statutory Offence—Description of Offence.††**—In an indictment for a statutory offence, it is generally proper and safest to describe the offence in the very terms used by the statute for the purpose. But it is sufficient to use in the indictment such terms of description, as that, if true, the accused must of necessity be guilty of the offence described in the statute.
4. **Same**—When Insufficient.††**—If the indictment may be true, and still the accused may not be guilty of the offence described in the statute, the indictment is insufficient.

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*They were sitting in the Special court of appeals.

†**Retailing Ardent Spirits—Indictments.**—See principal case cited in Arrington v. Com., 87 Va. 96, 12 S. E. Rep. 224; State v. Church, 4 W. Va. 748; State v. Cain, 8 W. Va. 738.

See Boyle's Case, 14 Gratt. 674; monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 887.

§**Same—Same.**—See monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 887.

‡See JUDGE MONCURE'S opinion for the statute.

¶**Indictments—Statutory Offence—Description of the Offence.**—"JUDGE MONCURE, in delivering the opinion of the court in Commonwealth v. Young, 15 Gratt. 666, said: 'In an indictment for a statutory offence, it is generally proper and safest to describe the offence in the very terms used by the statute for that purpose. But it is sufficient to use in the indictment such terms in the description, as that, if true, the accused must of necessity be guilty of the offence described in the statute; and especially so in a case failing, as this does, in that class, concerning which the law provides, that "no exception shall be allowed for any defect or want of form in the presentment, indictment or information, but the court shall give judgment thereon according to the very right of the case." Code, ch. 207, sec. 24, p. 772. * * *.' I adopt the language of the learned judge, because in my view, it not only clearly enunciates the true principle, but is exceedingly *appropos* in this case." MOORE, J., delivering the opinion of the court in State v. Riffe, 10 W. Va. 797.

The principal case was also cited and approved as to this proposition in Dull v. Com., 25 Gratt. 974; Morgenstern v. Com., 27 Gratt. 1020; Benton's Case, 91 Va. 793, 21 S. E. Rep. 495; State v. Charlton, 11 W. Va. 334; Cousins v. Com., 19 Gratt. 812, and *foot-note*; State v. Boggess, 36 W. Va. 719, 15 S. E. Rep. 425; *foot-note* to Burner v. Com., 18 Gratt. 778; *foot-note* to Taylor v. Com., 20 Gratt. 825; State v. Cain, 9 W. Va. 564.

Same—Inference.—See principal case cited in *foot-note* to Boyle's Case, 14 Gratt 674.

Same—When Insufficient.—In State v. Bruce, 26 W. Va. 157, it was said: "In Young's Case, 15 Gratt. 664-66, the court, after quoting the Virginia statute, says: 'If the indictment may be true, and still the accused may be not guilty of the offence, the indictment is insufficient, even though it fall within the class to which the provision aforesaid refers. This decision shows plainly that the statute does not cure the defect in the indictments now before us; for, as we have seen, every averment they contain may be true and still the accused may not be guilty of a subsisting, indictable offence." See also, the principal case cited and approved as to this proposition in Morgan v. Com., 26 Gratt. 993; State v. Riffe, 10 W. Va. 797; State v. Cain, 9 W. Va. 564. See, in accord, Glass v. Com., 33 Gratt. 832, and *foot-note*, where the principal case is cited.

††Concerning each of the propositions contained in the syllabus and *foot-note* to this case, see, further, monographic *note* on "Intoxicating Liquors" appended to Thon v. Com., 31 Gratt. 887; monographic *note* on "Indictments" appended to Boyle v. Com., 14 Gratt. 674.

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At the October term 1858 of the Circuit court of Jackson county, the grand jury indicted Henry Young, for that he "unlawfully and without having a license therefor according to law, on the home farm of Charles Carney, in the said county of Jackson, and within the jurisdiction of the Circuit court for said county, did sell, by retail, wine, ardent spirits, and mixtures thereof, contrary to the form of the statute," &c.

At the May term of the court for 1859 the defendant appeared, and moved the court to quash the indictment; which motion the court sustained. And thereupon the commonwealth applied to this court for a writ of error; which was allowed.

665 *The Attorney General, for the commonwealth.

There was no counsel for the appellee.

MONCURE, J. This is a supersedeas obtained by the commonwealth to a judgment of the Circuit court of Jackson county quashing an indictment against Henry Young, for that he, "on the first day of October in the year one thousand eight hundred and fifty-eight, unlawfully, and without having a license therefor according to law, on the home farm of Charles Carney, in the said county of Jackson, and within the jurisdiction of the Circuit court for said county, did sell, by retail, wine, ardent spirits, and mixtures thereof, contrary to the form of the statute in such case made and provided, and against the peace," &c.

The indictment was no doubt intended to be for the offence described in the first branch of § 18, ch. 38 of the Code, p. 209; which section is in these words: "If any person shall, without paying such tax and obtaining such certificate as is prescribed by the 14th section, sell, by retail, wine, ardent spirits, or a mixture thereof, he shall forfeit thirty dollars. And if any person sell, by retail, wine, ardent spirits, or a mixture thereof, to be drank in or at the store, or other place of sale, he shall, unless he be licensed to keep an ordinary at such store or place, forfeit thirty dollars."

No counsel appeared for the defendant in error in this court; and it does not appear what specific objections were made to the indictment in the court below, except from the petition for the supersedeas and the argument of the attorney general. From them it appears the objections were twofold: First, that the words "not to be drank where sold," are not in the indictment; and secondly, that the words "without having a license therefor according to
666 law," are used *in the indictment, instead of the words "without paying such tax and obtaining such certificate as is prescribed by the 14th section," contained in the statute.

To the first objection, it is a sufficient answer, that the words "not to be drank where sold," are not in the statute, and therefore need not be in the indictment.

The second objection is a more serious one. In an indictment for a statutory offence, it is generally proper and safest to describe the offence in the very terms used by the statute for that purpose. But it is sufficient to use in the indictment such terms of description, as that, if true, the accused must of necessity be guilty of the offence described in the statute; and especially so in a case, falling, as this does, in that class, concerning which the law provides, that "no exception shall be allowed for any defect or want of form in the presentment, indictment or information, but the court shall give judgment thereon according to the very right of the case." Code, ch. 207, § 24, p. 772. If the indictment may be true, and still the accused may not be guilty of that offence, the indictment is insufficient, even though it fall within the class to which the provision aforesaid refers. Let us apply this principle to the present case, and enquire, whether the words "without having a license therefor according to law" in the indictment, are a sufficient substitute for the words "without paying such tax and obtaining such certificate as is prescribed by the 14th section," which are material terms of description used in the statute? In other words, whether, if the indictment be true, the accused must of necessity be guilty of the offence described in the statute? May he not have retailed ardent spirits "without having a license therefor according to law," and still not "without having paid such tax and obtained
667 such certificate" *as aforesaid? To enable us to answer this question, it will be necessary to notice briefly the sections of chapter 38 of the Code which precede the 18th section (on which the indictment in this case is founded), and relate to the same subject.

The 10th section declares, that "no person shall, without obtaining a license as a merchant, sell at any store," &c., "any goods," &c., "except," &c. "Any person who shall violate this section, shall pay a fine of not less than twenty nor more than two hundred dollars."

The 11th, 12th and 13th sections relate to the tax to be paid for the license.

The 14th section, which is expressly referred to in the first branch of the 18th (on which the indictment in this case is founded), is in these words: "If the merchant shall desire his license to include permission to sell, by retail, wine, ardent spirits, or a mixture thereof, he shall pay the additional tax prescribed for this privilege, and obtain from the court of the county or corporation in which his store or place of sale is situated, a certificate that he is a person of good character, and that the court sees no objection to such permission being granted."

If this had been all, it might well have been contended, that upon the mere payment of the additional tax and obtaining the certificate mentioned in the 14th section, the merchant's license (in addition to its general effect under the 10th section), be-

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came, ipso facto, a license to retail ardent spirits; and therefore that the word "without having a license therefor according to law," in the indictment, were equivalent to the words "without paying such tax and obtaining such certificate" as aforesaid in the statute.

But the 15th section follows in these words: "Such certificate shall be pro-
668 duced, with the receipt for the *tax, to the commissioner, who shall grant to the merchant such license as he may be entitled to. The license shall, in addition to what is prescribed by the second section, state the fact of such certificate, and the situation of the store or place of sale. If the person applying for such license asks that it shall be to him as a commission merchant, the commissioner shall so express on its face."

So that if a merchant desire his license to include permission to retail ardent spirits, he is not only required by the 14th section to pay the additional tax and obtain the certificate therein mentioned, but is directed by the 15th section to obtain a license which will include such permission on its face. If he comply with the requisition of the 14th section, he will be entitled as a matter of course to such a license, upon the mere production of such a certificate with the receipt for the tax to the commissioner, as directed by the 15th section. A penalty is imposed by the 18th section on a person who retails ardent spirits without having complied with the requisition of the 14th section; but not on a person who does so without having complied with the direction of the 15th section. The indictment in this case is for the latter act; that is, for retailing ardent spirits "without having a license therefor according to law." This plainly refers to the license mentioned in the 15th section, which includes on its face permission to retail ardent spirits; and not to the general merchants' license mentioned in the 10th section. The indictment may be true, and still the accused may not be guilty of the offence described in the statute, and therefore the motion to quash it was properly sustained.

The construction I have put upon the law in question, not only agrees with its literal meaning, but with the probable intention of the legislature. It would
669 *have been at least as easy to have said, "without license therefor," as to say, "without paying such tax and obtaining such certificate as is prescribed by the 14th section;" and the former would no doubt have been said, if it had been intended by the legislature. In every other instance, I believe, in which a license to do an act is required to be obtained, the law imposes a penalty on doing the act without license; not on doing it without paying the tax required to be paid. The difference of phraseology in this instance indicates a difference of intention; for which, indeed, there seems to be some reason. But whether there be or not, the literal import of the law is sufficiently plain; and, being a penal law, it must be construed strictly.

There are two decisions of the late General court, which would seem at first view to be in conflict with the conclusion to which I have come; but, upon examination, they will be found not to be so. I mean Peers' Case, 5 Gratt. 674, and Hatcher's Case, 6 Id. 667. In each of these cases the indictment was for retailing ardent spirits not to be drank where sold, without having obtained a license therefor; and yet was held to be sufficient. But they were founded on the act of March 7, 1834 (Sess. Acts, ch. 3, p. 7), or the act of March 3, 1840 (Sess. Acts, ch. 2, p. 5), which acts are almost identical; the 3d section of which subjects to the penalty therein mentioned, any person, &c., who shall, otherwise than as thereinafter expressly provided, retail ardent spirits, &c.; and the 5th section of which provides, that if any person, having obtained a merchant's license, &c., shall, in addition thereto, have obtained a certificate as therein mentioned, he shall, "by virtue of such certificate, but not otherwise, be authorized, during the time for which his merchant's license may have been granted," to retail ardent spirits, &c. In
670 an indictment on either of these acts, the *words "without having obtained a license therefor," were plainly equivalent to the words, "without having obtained a merchant's license and certificate, as required by the 5th section." The merchant's license and certificate together constituted a license to retail ardent spirits. After the certificate was obtained, nothing more was directed by these acts to be done. In this respect, they materially differ from the Code.

I think there is no error in the judgment, and am for affirming it.

DANIEL and ROBERTSON, Js., concurred in the opinion of Moncure, J.

Judgment affirmed.

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APPELLATE COURT.

1. A court having set aside an office judgment and the execution which had issued upon it, after the fifteenth day of the term, and permitted the defendant to plead, the plaintiff may have a supersedeas from this order; and though that part of the order setting aside the judgment is interlocutory, the appellate court will reverse the whole order.
Enders' ex'ors *v.* Burch, 64

2. On an exception to an opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, if the exception states neither the facts proved nor the evidence introduced on the trial, nor refers to another bill of exceptions in which all the facts or evidence given on the trial are shown to be stated, the appellate court cannot review the judgment of the court below.
Washington & New Orl. Tel. Co. *v.* Hobson & Son, 122

3. It must appear from the record that a point decided by the court has been saved before the jury retires; though the exception may be prepared and may be signed by the judge either during the trial or after it is ended during the same term. If this appears from the whole record it is sufficient, though it is not expressly stated in the bill of exceptions: but if it does not so appear from the record, the appellate court cannot review the judgment of the court below upon the point. Idem, 122

4. Secondary evidence having been admitted in the court below without objection, it cannot be objected to in the appellate court.
Shue *v.* Turk, sheriff, 256

5. The decree appealed from reciting that the suit had been revived in the name of the heirs of the plaintiff, and they being parties to the appeal as appellees, the appellant cannot object that the suit was not regularly revived in their names.
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6. A purchaser of land which had been sold by the vendor when an infant, having sued the first purchaser to recover the land, and the decree having directed the first purchaser to convey to the plaintiff, without providing for the payment of the purchase money due from the plaintiff, the appellate court will amend the decree and affirm it. Idem, 329

7. Though the service of an attachment upon garnishees and the return thereon may be irregular, yet if the garnishees appear to the action and defend it without objecting to their irregularity, they cannot afterwards make the objection in the appellate court.
Pulliam, &c., *v.* Aler, 54

8. In a bill to set aside a deed of trust for payment of debts as fraudulent per se, no account is prayed for, but there is a prayer for general relief. The court below having dismissed the bill generally, and it not appearing that the plaintiffs asked for an account or that the court considered the question, the appellate court will affirm the decree sustaining the deed, and reverse as to the account; but without costs.
Marks & als. *v.* Hill & als., 400

9. A plea of the act of limitations should state on what act the defendant relies. Though if it appears that the plaintiff could not probably be mistaken as to the act relied on, the appellate court will not reverse the judgment for the failure of the plea to specify the act.
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10. If the evidence set forth in a demurrer to evidence shows that the plaintiff was entitled to recover, the refusal of the court to compel him to join in the demurrer is not ground for reversing the judgment.
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11. When it appears to the Court of appeals that the order of the Circuit court was based upon the evidence of facts not found in the record, the court may reasonably and justly presume that the order is right; and that it is in accordance with and was justified by the facts.
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1. An attachment may be issued under the first section of the Code, ch. 151, p. 600, after the action has been commenced, if it be done before the abatement of the suit by the return of the officer.
Pulliam, &c., *v.* Aler, 54

2. An attachment is not defective because it does not designate any person in whose possession property or effects of the absent debtor may be found. Idem, 54

3. Though the service of an attachment upon garnishees and the return thereon may be irregular, yet if the garnishees ap-

pear to the action and defend it without objecting to the irregularity, they cannot afterwards make the objection in the appellate court. Idem, 54

4. Money is left with a person who is a member of a firm, on a special deposit, and in his absence it is entered on the books of the firm to the credit of the depositor, and paid out by the firm for their own uses, they paying the depositor's checks upon it, by checks in their name upon the bank, and then an attachment is served upon the firm as garnishees in a suit against the depositor; the summons being served on the other member of the firm. The attachment binds the money in the hands of the firm. Idem, 54

5. Justifiable probable cause for suing out an attachment against the effects of a debtor, is a belief by the attaching creditor in the existence of the facts essential to the prosecution of the attachment, founded upon such circumstances as supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to produce such belief.
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1. Rail road companies conveying passengers, combining in themselves the ownership as well of the road as of the cars and locomotives, they are bound to the most exact care and diligence not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers.
Va. Central R. R. Co. *v.* Sanger, 230

2. The duty of a rail road company to employ the utmost care and diligence in guarding their road against obstructions on the track, is clearly embraced within its warranty to carry their passengers safely, so far as human foresight and care can go.
Idem, 230

3. If a rail road company, whilst using its track for the carriage of passengers,
673 *engages in a work to be done on its road and in the immediate proximity of its track, negligence in the performance of which would, in the opinion of cautious persons, involve the hazard of obstructions to the passage of its cars, and an accident to a passenger is caused by an obstruction arising from negligence in the performance of the work; it is no defence to show merely that they had placed the work in the hands of a contractor, and that the obstruction was caused by the carelessness of his employees. Idem, 230

4. In such case it is for the jury to enquire whether there was not danger in the work arising from the mode and manner in which it was done; whether the company did not know, or by the exercise of proper diligence might not have ascertained, the existence of such danger; and whether they have used due care and foresight in guarding against it: And if they have failed in this, the company is responsible to the passenger for the injury he has sustained.
Idem, 230

CAVEATS.

The entry and survey of both the caveator and caveatee, being upon land which had been previously granted by the commonwealth, and which had never been forfeited, the commonwealth having no interest in the land which could be vested in the caveator, he can have no right to it; and therefore cannot maintain a caveat; though the caveatee may have no better right.
Carter *v.* Ramey, 346

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1. The case of Gallego's ex'ors *v.* The Attorney General, 3 Leigh 450, recognized as law, except so far as it may have been modified by statute.
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2. The act, Code, ch. 77, § 8, p. 362, does not authorize a devise of land for the use of a religious congregation, but only a conveyance by deed. Idem, 423

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1. The act of March 15, 1856, Sess. Acts 1855-56, ch. 8, § 2, p. 8, extending the term of the sheriff from July 1, 1856, to January 1857, is constitutional.
Commonwealth *v.* Drewry, 1

2. The act does not embrace two subjects in the sense of the constitution, article 4, § 16. Idem, 1

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See Constitutionality of Statutes, and
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See Statutes—construction of.

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Spengler *v.* Davy, 381

CONTRACTS.

1. By the contract for building a house the builder is to furnish the materials and build the house in a workmanlike manner, and the price is to be fixed by referees chosen by the parties. Soon after the work is finished, it is valued and the price fixed; but afterwards defects become apparent by the shrinking of the timber, showing that the work was executed in a very defective and unworkmanlike manner. The valuation does not conclude the owner of the house; but he is entitled to compensation for the defects: And in a suit by the assignee of the builder to enforce the lien for the price of building the house, the owner will only be required to pay what the building was really worth.
Iaege, &c., *v.* Bossieux, 83

2. "The trustee of N & A will pay to B the sum of one thousand and eighty dollars, with interest from the 15th of March 1850, out of any moneys in his hands belonging to me, A," is not a bill of exchange, nor does it import a valuable consideration, or a promise by the drawer to the payee, to pay if the money is not paid by the drawee.
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674 *3. Contracts by infants for sale of their lands, the power and mode of avoiding the same, and its effects. See Infants, No. 1, 2, 3, 4, 5, 6, 7, and
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4. W sells her crop of wheat to H by sample, the wheat not then being cleaned from the chaff; and W is to deliver it to H at G depot of a rail road, to be carried by the rail road company to Richmond; W paying the freight to Richmond, and H to take it from the depot in Richmond at his own cost, to his mill, where it is to be weighed and tested by the sample, and when thus weighed and tested, the price to be paid. The wheat is delivered at the depot at G, and taken by the rail road company to their depot in Richmond, and all but four hundred and forty bushels is taken away by H. This four hundred and forty bushels is consumed by fire at the depot in Richmond before it can be removed. The title to the wheat was vested in H, and he is to bear the loss.
Haxall, Brothers & Co. *v.* Willis, 434

CONVERSION.

1. Real estate may in equity be converted out and out into personalty by the agreement of partners or the manner in which it is conveyed to them. So real estate bought with partnership effects for partnership purposes, though conveyed to the individual partners, is thereby converted into personalty, at least to the extent that may be necessary for the purpose of paying the debts of the partnership, and adjusting the accounts between the partners: Quære: if it is converted to any further extent, or out and out.
Davis *v.* Christian & als., 11

2. But every conversion of real estate into personalty, whether express or implied, complete or partial, is equitable only; and the property can only be conveyed as real estate, and by each partner, in order to pass the whole to the grantee.
Idem, 11

CONVEYANCES—Fraudulent.

1. A provision in a deed of trust to secure creditors, that the trustee may continue the business and replenish the stock, if intended merely as a means of realizing the trust fund, and with a view to winding up the business, is not fraudulent per se, so as to avoid the deed.
Marks & als. *v.* Hill & als., 400

2. In such a case a provision in the deed that one of the grantors shall attend to the business, but he being under the control of the trustee, who may at any time on his own motion, and shall at the request of creditors, sell the property at auction, is not fraudulent per se, so as to avoid the deed.
Idem, 400

COURTS.

A cause which has been pending in a County court for more than a year, is called for trial, and a motion by the defendant for a continuance is overruled; and he then moves the court to remove the cause to the Circuit court. The motion is properly overruled.
Spengler *v.* Davy, 381

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. It is a principal cause of challenge to

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a juror, that he was one of the grand jury which found the indictment. But if the objection is not taken until after the verdict, that will not be set aside on this ground, unless it appears from the whole case that the juror was biased against the prisoner; who therefore has not had a fair and impartial trial.

Bristow's Case, 634

2. An objection to the mode of selecting the jury in a trial for murder, must be made at the time the jury are chosen; and prisoner cannot avail himself of it after verdict. Idem, 634

3. After the panel has been completed, and the prisoner has struck off eight, the jury may be selected from the remaining sixteen, either by drawing by lot four who shall be discharged, or the twelve who shall constitute the jury. Idem, 634

CUSTOMS.

1. If there could be in Virginia a legal, valid usage or custom, the effect of which is to operate per se as an exception to the general rules of the common law; a usage or custom for the inspector of flour, who by the statute is to receive a specified money compensation, to take to his own use the flour drawn from the barrel in the process of inspection, called the draft flour, as an additional compensation or perquisite, would be bad, as unreasonable, unjust, and contrary to law.

Delaplane *v.* Crenshaw & Fisher, 457
Same *v.* Haxall, Crenshaw & Co., 457

2. Although a custom when otherwise good, may override and displace the common law rule, yet a statute introducing a new principle, with a negative either ex-
675 press or necessarily implied, must be strictly pursued, and no custom can be set up against it. Idem, 457

3. A custom for the inspector of flour to take the draft flour, may have existed longer than the memory of any living man, yet as the statutes show the commencement of the inspection of flour in Virginia, and as this period is within the limitation prescribed for the commencement of a custom, the custom is bad. Idem, 457

4. The doctrine of presumption cannot be applied to this custom, because, 1st, the presumption is repelled by the evidence; and, 2d, because the doctrine of presumptions can only apply to things which lie in grant, and where there is a party by whom the grant could be made as well as one to receive it. Idem, 457

5. There is no customary law in Virginia which per se can vest a right in a party claiming under it. Idem, 457

6. If a custom has been recognized by a statute, either expressly or by necessary implication, it will thereby receive vitality, and the right claimed under it may be asserted as conferred by statute.

Idem, 457

7. The act, Code, ch. 88, p. 413, does not recognize either expressly or by implication, the right of the inspector to take the draft flour; or to use an auger or trier of more than half an inch in diameter.

Idem, 457

8. The act having directed, that an auger of not more than a half inch in diameter shall be used in inspecting flour, a custom to use a larger auger is bad, though the inspector says he cannot execute his duty satisfactorily with an auger of the size prescribed by the statute. Idem, 457

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Washington & New Orl. Tel. Co. *v.* Hobson & Son, 122

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Claytor *v.* Anthony, 518
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M gives to J a power of attorney to sell her lands in the county of R, with power to J to appoint other agents or attorneys. J executes a power to C to act in the name of J, and it is signed by J in his own name, without any reference to his principal. This power does not authorize C to convey the land by deed in the name of M.

Stinchcomb *v.* Marsh, 202

DELINQUENT AND FORFEITED LANDS.

1. A certificate purporting to be made by the auditor of the state, in pursuance of the act of March 15, 1838, Sess. Acts, p. 16, § 7, of land forfeited for non-payment of taxes, being in the usual form in which he certifies such papers from his office, is evidence of the execution of such certificate, and of the official character of such paper, and also of the facts therein contained.

Ushers' heirs *v.* Pride, 190

2. Though such certificate was made in 1844, yet it having been offered in evidence in 1856, it is prima facie evidence by the act, Code, ch. 176, § 4, p. 660, though said act was passed after the certificate was made. Idem, 190

3. Lands returned delinquent for non-payment of taxes between 1820 and 1831, were forfeited by the act of April 1, 1831, Sup. R. C. p. 345, § 2, if not redeemed before the 1st November 1833; and by subsequent acts the time was extended; but the forfeiture became complete on the 1st of October 1834; and was not released unless the owner redeemed the land in the mode provided by statute. Idem, 190

4. The heirs of a patentee of land forfeited for non-payment of taxes and not redeemed, cannot maintain ejectment for it against a party who has entered upon it peaceably, though the tenant has no title to the land.

Idem, 190

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5. Purchasers under a decree are in possession; and the decree is reversed and a reconveyance directed. Pending the appeal the land is returned delinquent for non-payment of taxes, in the name of the original owner, and is sold and bought by the purchasers under the decree. Quære: If it was not their duty to pay the taxes, and if they can set up a title under that sale and purchase against the original owner.
Miller *v.* Williams & al., 213

6. J, a commissioner of forfeited and delinquent land, sells a tract of land and receives the purchase money. He is then removed, and B is appointed in his place. B has no authority to convey the land to the purchaser; and his conveyance does not pass the title. Idem, 213

676 *7. In such a case the court must make an order directing B to convey the land, before he can make a valid conveyance. Idem, 213

8. The report of J of the forfeited lands in the county being lost, and the report of the sale of the land not showing plainly the land sold or the interest which the person in whose name it was forfeited had therein, it was not competent for the commissioner to resort to evidence aliunde to ascertain these facts; and therefore his deed is invalid. Idem, 213

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Idem, 213

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Ushers' heirs *v.* Pride, 190

2. In an action of ejectment, the record of another action of ejectment between other parties, is not competent evidence upon a question of boundaries or the location of the land in controversy.
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Miller *v.* Williams & al., 213

4. A recovery of a judgment in ejectment is subject to any easement in the public to use the land as a street or highway; and the right of the public to the easement is not drawn in question, or in any way affected by a controversy between the plaintiff and the city as to the ownership of the soil.
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Shue *v.* Turk, sheriff, 256

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Monteith, sheriff, & als. *v.* The Commonwealth, 172

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1. A certificate purporting to be
677 made *by the auditor of the state, in pursuance of the act of March 15, 1838, Sess. Acts, p. 16, § 7, of land forfeited for non-payment of taxes, being in the usual form in which he certifies papers from his office, is evidence of the execution

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of such certificate, and of the official character of the paper, and also of the facts therein contained.
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2. Though such certificate was made in 1844, yet it having been offered in evidence in 1856, it is prima facie evidence by the act, Code, ch. 176, § 4, p. 660, though said act was passed after the certificate was made. Idem, 190

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11. In suits for freedom entries of testator of defendants, are not evidence against the plaintiffs. Idem, 314

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Davis *v.* Christian & als., 11

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Idem, 11

3. Where a discretionary power to sell is given to executors, a purchaser from them, if he acted bona fide, will not be affected by the manner in which they exercised their discretion. And if the power is to sell for the payment of debts generally, the purchaser is not bound to see to the application of the purchase money.
Idem, 11

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Hill & wife *v.* Huston's ex'or & others, 350

FAILURE OF CONSIDERATION.

1. The mere fact that an article sold proves to be worthless, will not entitle the purchaser to recover back the price paid.
Mason *v.* Chappell, 572

FRAUD.

1. To constitute fraud in a sale, it is not sufficient that there shall be false representations by the vendor; but he must know at the time he makes them, that they are false; or at least he must make them as statements of facts within his own knowledge, when he has no knowledge on the subject.
Mason *v.* Chappell, 572

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2. What notice will or will not be sufficient to affect a purchaser with notice of a fraud, by an executor in making a sale of real estate. See Vendor and Purchaser, No. 2, 3, 4, and
Davis *v.* Christian & als., 11

GAMING.

1. The 10th section of chapter 198 of the Code, in relation to betting on elections, is to be construed as a remedial statute.
Shumate's Case, 653

2. The 20th section of chapter 198 of the Code, applies to all the preceding sections of that chapter. Idem, 653

3. A short time before the election of county officers for A, to be made in May 1858, M sold to S a wagon at the price of one hundred and fifty dollars, and worth that sum, to be paid by S when K, one of the candidates for the office of county court clerk at said election, should be elected to that office, and not at all, if he was not elected; and S at the time of said sale put up his check agreeably to that understanding; and upon these terms took possession of the wagon: *held*:

1st. This is a wager on the part of both M and S, within the meaning of the Code, ch. 198, § 10, p. 744. Idem, 653

2d. Both M and S are liable to a fine not exceeding the amount that either might lose. Idem, 653

GUARDIAN AND WARD.

A County court having regularly appointed a guardian for an infant under fourteen years of age, the infant after he attains that age has not the right, at his mere election, to have his guardian thus appointed displaced, and a new one of his own nomination substituted.
Ham *v.* Ham, 74

HABEAS CORPUS.

A slave having been emancipated and registered as a free man, an execution is levied upon him by the creditors of his former owner: if he is not liable to be taken under the execution he may obtain relief by habeas corpus.
Shue *v.* Turk, sheriff, 256

HUSBAND AND WIFE.

1. The principles applicable to a wife's right to a settlement out of her property, stated.
Poindexter & wife *v.* Jeffries & als., 363

2. It seems real, as well as personal, estate is subject to the wife's equity.
Idem, 363

3. The settlement should be reasonable and adequate; and may be of a part or of the whole of the property, according to the sound discretion of the court, upon all the circumstances of the case. Idem, 363

4. If the husband lives with and supports his wife, the settlement may be made to take effect when he ceases to do so, or at his death. But if he has deserted or ill-treated her, or is insolvent, or unable or fails to support her, it will be directed to commence immediately. Idem, 363

5. If property of the wife which a court of equity would direct to be settled upon her, is conveyed by the husband to a trustee for her benefit, the court will sustain the deed against creditors of the husband.
Idem, 363

6. The wife's portion as one of the distributees of her father, of his personal estate, though there are no debts or they are satisfied, and the administrator who is also a distributee, files a bill for the distribution of the estate, and commissioners are appointed to divide the property, who make the division before the wife petitions for a settlement, and although the division is afterwards confirmed, but subject to the future decision of the court upon her right, is not so vested in the husband as to
679 deprive her *of her right to a settlement out of her property.
Idem, 363

7. The wife's real estate descended to her from her father, though undivided, is immediately and before the actual entry upon possession of it by the husband, so vested in the husband to the extent of his life estate, as that the wife is not entitled to a settlement out of the life estate of the husband, though he is insolvent and doing nothing to support her; and though advancements had been made to the wife by her father in his lifetime, which renders it necessary to resort to a court of equity for a settlement of accounts and for partition.
Idem, 363

8. Where land sold, wife's contingent right of dower in the surplus to be provided for by the court.
Iaege & als. *v.* Bossieux, 83

INDICTMENTS.

1. In an indictment under § 18, ch. 38, of the Code, p. 209, for retailing ardent spirits, the words "not to be drank where sold," not being in the statute, need not be in the indictment.
Young's Case, 664

2. In an indictment under § 18, ch. 38, of the Code, the words "without having a license therefor according to law," are not equivalent to the words "without paying such tax and obtaining such certificate as is prescribed by the 14th section," which are the words used in the statute; and the indictment is defective. Idem, 664

3. In an indictment for a statutory offence, it is generally proper and safest to describe the offence in the very terms used by the statute for the purpose. But it is sufficient to use in the indictment such terms of description, as that, if true, the deceased must of necessity be guilty of the offence described in the statute.
Idem, 664

4. If the indictment may be true, and still the accused may not be guilty of the offence

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described in the statute, the indictment is insufficient. Idem, 664

INFANTS.

1. An infant sells his tract of land, puts the purchaser in possession, and executes a bond in a penalty with condition to make the title. The contract is voidable, but not void.

Mustard *v.* Wohlford's heirs, 329

2. In such a case the infant on coming of age, sells the land to another person, and executes to him a bond in a penalty with condition to make the title. This is an avoiding of the first contract.

Idem, 329

3. In this state a party out of possession may sell and convey his interest in land; and therefore, though the first purchaser from the infant has been put in possession of the land, and has received a conveyance, the infant on coming of age, may convey, and his deed will avoid the first deed.

Idem, 329

4. The effect of the disaffirmance of the first contract of the infant, by his sale after coming of age, is to render the first contract void; to extinguish any interest, in law or equity, which the first purchaser may have acquired under it; and to entitle the vendor, or second purchaser in his name, to recover possession of the land at law; and hold it free from any equity of the first purchaser.

Idem, 329

5. If an infant after coming of age disaffirm a sale made by him whilst an infant, he becomes reinvested with the title to the property, and may demand and recover it not only from his vendee, but from any other person who may have it in possession, though he may be a purchaser from his vendee. Idem, 329

6. If an infant after coming of age avoids his contract for the sale of his property, and sues to recover it, the purchaser is entitled to recover the consideration received by the infant, or so much of it as may then remain in his hands in kind.

Idem, 329

7. But in a contract executory on his part, if he has during his infancy wasted, sold or otherwise ceased to possess the consideration, and has none of it in his hands in kind on his arrival at age, he is not liable therefor; and may recover the property sold by him without accounting for the consideration received. Idem, 329

8. The purchaser from the infant, with knowledge of the sale made by him of the land after he came of age, obtains from him a deed for it. He can derive no benefit from the deed; but holds the legal title acquired under it in trust for the second purchaser; and may be compelled by a court of equity to convey said title to such second purchaser; or if he dies, to his heirs.

Idem, 329

9. Though the second purchaser purchase with knowledge of the first purchase from the infant, he is not affected thereby; the same having been disaffirmed and avoided by the second sale. Idem, 329

680 *10. Any claim which the purchaser from the infant may have on account of payments made under his contract, or to obtain the deed, is a personal claim against his vendor, and cannot be enforced in a suit brought by the second purchaser to recover the land; he has no interest in or to the land or the purchase money due from the second purchaser. Idem, 329

11. A father has property of his infant children in his possession, and during his life does not apply to the court to have any of the profits of that property applied to their support, nor does he make any charge against them during his life. His estate will not be allowed any thing for their support without the clearest proof that justice requires it.

Evans *v.* Pearce & als., 513

12. In such a case the father will be treated as a guardian; and his accounts will be settled on the principle of guardians' accounts. Idem, 513

13. Where a contingent limitation over is defeated by the vesting of a previous contingent limitation, the remaindermen under the defeated limitation are not necessary parties to a suit by the guardian of the other remaindermen, for the sale of the real estate.

Cooper *v.* Hepburn & als., 551

14. M as guardian of his infant children files a bill for the sale of the real estate held by himself for life, and by his children in remainder; and it is sold accordingly. This is authorized by the statute.

Idem, 551

15. Though the bill does not formally aver that the suit is brought as guardian, yet it states the plaintiff is the guardian, and the whole frame of the bill is in pursuance of what is required to be set out in such case, and the infants are made defendants. The omission of this formal averment does not vitiate the proceedings.

Idem, 551

16. One of the infant defendants having been over fourteen years of age when the bill was filed, it was irregular not to require him to file an answer. But the sale having been decreed, and it having been made more than six months after the decree, and confirmed without objection, it is too late for the purchaser eighteen months afterwards, to object to the irregularity.

Idem, 551

17. The court, if it deemed it necessary for the protection of the purchaser, might have directed the infant to file an answer after the objection was made.

Idem, 551

18. Upon a bill for the sale of infant's real estate, the court decrees a sale, and directs the commissioner to sell at private sale; and he advertises for sealed proposals, which are to be opened on a certain day in the presence of the court. Proposals are put in, and the court accepts one of them,

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and forthwith confirms the sale, and directs the party to execute it according to its terms. Such a purchaser stands upon the same footing as any other purchaser at a judicial sale; and is not entitled to any other or further relief. Idem, 551

INJUNCTIONS.

1. If a person, not a party to a judgment, enjoins it, and the injunction is dissolved, he is liable to pay the ten per cent. damages prescribed by the statute:
Claytor *v.* Anthony, 518
Creasy *v.* Same, 518

2. Though the condition of the injunction bond provides for the payment of such damages as may be awarded by the court, and the court simply dissolves the injunction and dismisses the bill; yet the order of dissolution necessarily imports that the damages are to be paid, unless they be expressly remitted by the terms of the order. Idem, 518

3. Where upon a bill of review an injunction is granted to a judgment which is afterwards dissolved, the damages are to be computed, not upon the amount of the judgment at the time it was first granted on the original bill, but on the amount of the judgment at the time it was granted on the bill of review. Idem, 518

4. If the judgment, principal, interest, costs and damages on the injunction, amount to more than the penalty of the injunction bond, yet the plaintiff in the judgment having sued out execution on the judgment and made the money, principal, interest and costs, may recover the damages by suit upon the bond. Idem, 518

INSPECTION OF FLOUR.

1. What custom in the inspection of flour is bad. See Customs, No. 1, 3, and
Delaplane *v.* Crenshaw & Fisher, 457
Same *v.* Haxall, Crenshaw & Co., 457

2. The act, Code, ch. 88. p. 413, does not recognize either expressly or by implication, the right of the inspector to take the draft flour; or to use an auger or trier more than half an inch in diameter. Idem, 457

681 *3. The act having directed, that an auger of not more than half an inch in diameter shall be used in inspecting flour, a custom to use a larger auger is bad, though the inspector says he cannot execute his duty satisfactorily with an auger of the size prescribed by the statute. Idem, 457

4. The inspector of flour is bound to inspect by boring through the head of the barrel, with an auger not exceeding a half inch in diameter. Idem, 457

5. An inspector of flour refusing to inspect flour by boring through the head of the barrel with a half inch auger, he will be compelled to do it, by mandamus from the court. Idem, 457

INSTRUCTIONS.

An instruction which is susceptible of two constructions, one of which is erroneous, and which may therefore mislead the jury, should not be given.
Va. Central R. R. Co. *v.* Sanger, 230

JEOFAILS.

In an action for maliciously suing out an attachment against the effects of the plaintiff, the declaration alleges, that the attachment was sued out "wrongfully and without good cause," instead of "maliciously and without probable cause." Though this was irregular, it is cured by the verdict.
Spengler *v.* Davy, 381

JUDGMENTS.

1. If the term of a Circuit court lasts more than fifteen days, all office judgments in which no writ of enquiry is ordered become final judgments on the fifteenth day; and cannot be afterwards set aside by the court.
Enders' ex'ors *v.* Burch, 64

2. When a court authorizes executions to issue upon judgments recovered during the term, the judgments become final from the time when execution may issue, and cannot be afterwards set aside by the court. Idem, 64

JUDICIAL SALES.

1. A judicial sale of land is partly on a credit, and the purchaser pays the cash payment, and executes his bonds with security for the deferred payments; and the sale is confirmed by the court. When the bonds become due the purchaser fails to pay them. He may be proceeded against by a rule made upon him to show cause why the land shall not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for a sale of the land.
Clarkson *v.* Read & als., 289

2. How purchaser at private sale under decree will be treated. See Infants, No. 18, and
Cooper *v.* Hepburn & als., 551

JURISDICTION.

1. In a proceeding before the mayor or other justice to impose a penalty upon the party for obstructing a street, if a claim to the freehold is set up in the defendant or in those for whom he acts, the mayor or justice has jurisdiction to try the fact whether the claim is bona fide made.
Warwick & Barksdale *v.* Mayo, mayor, 528

2. In such case if the claim is bona fide made, the jurisdiction of the mayor or justice is ousted; he cannot enquire into the validity of the claim; and he has no power in such case to proceed to a summary conviction. Idem, 528

3. This principle applies as well to the case where an incorporeal hereditament or real franchise is claimed or resisted, as to a controversy touching the freehold itself. Idem, 5[illegible]

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JURORS.

It is a principal cause of challenge to a juror that he was one of the grand jury which found the indictment. But if the objection is not taken until after the verdict, it will not be set aside on this ground, unless it appears from the whole case, that the juror was biased against the prisoner, who therefore has not had a fair and impartial trial. Bristow's Case, 634

JURY.

1. An objection to the mode of selecting a jury in a trial for murder, must be made at the time the jury are chosen; and prisoner cannot avail himself of it, after verdict. Bristow's Case, 634

2. After the panel has been completed, and the prisoner has struck off eight, the jury may be selected from the remaining sixteen, either by drawing by lot four who shall be discharged, or the twelve who shall constitute the jury. Idem, 634

682 *JUSTICES.

As to jurisdiction of justices where title to land, or interest in land, is involved, see Jurisdiction, No. 1, 2, 3, and

Warwick & Barksdale *v.* Mayo, mayor, 528

LANDLORD AND TENANT.

1. Purchasers under a decree put a tenant in possession. The decree is afterwards reversed, and a reconveyance directed, which is done; and then tenant attorns to this party. The attornment was not illegal, and the party, getting possession through and from the tenant, is not the tenant of the purchasers so as to entitle them to recover in ejectment without showing title in themselves.

Miller *v.* Williams & al., 213

2. Though, as a general rule, a tenant is not allowed to question his landlord's title; yet if a person in possession of land claiming title to it, is by fraud or mistake induced to believe that another has a better right to it, and to take a lease from him; in an action by the landlord to recover possession, the tenant may set up such fraud or mistake, and show that he has a good title to the property.

Alderson *v.* Miller, 279

3. A is in possession of land under a deed from G, made in 1829, and there is a decree in 1855 in favor of S against G, for all of a large tract in the possession of G or not conveyed by him before 1837. M induces A to take a lease of his land from him, and at the end of the term sues A to recover possession, and relies alone on the lease. A offers in evidence a copy of the decree and his deed from G, and states that he proposes to follow it up with proof that the lease was obtained from him by a person claiming under the decree, by fraud or mistake. The evidence is admissible.

Idem, 279

LEGACIES AND LEGATEES.

1. A party accepting a legacy coupled with a condition, may bind himself to the performance of the condition, although the burden may exceed the benefit.

Hill & wife *v.* Huston's ex'or & others, 350

2. But to bind a person in such a case, it must appear that he elected to accept the legacy and perform the condition, with full knowledge of all the facts and circumstances necessary to enable him to make a judicious choice. To make an election conclusive, the party must be informed as to the relative values of the things he elects between.

Idem, 350

3. Where a party has made an election without sufficient information or under a mistake, he will be relieved against the consequences, upon the terms of restoring other persons whose rights may be affected by his acts, to the same situation as if those acts had not been performed.

Idem, 350

4. The bequest of testator's whole property to a legatee, in consideration of which she is to pay testator's debts, though accepted, does not bind the legatee to pay the debts beyond the value of the legacy.

Idem, 350

LIENS.

1. Under the statute, Code, ch. 119, § 2, p. 510, creating the mechanic's lien upon the building, the suit may be brought within six months from the time the building is finished, to enforce the lien as to the installments of the contract price due; and though some of them are not due and payable at the time the suit is commenced, the court may in its decree provide for them.

Iaege, &c., *v.* Bossieux, 83

2. The contract and lien under the statute may be assigned, and the assignee may enforce the lien in the same mode that the mechanic might do it. Idem, 83

3. When the lien of a building fund company, for advances made to a member to enable him to build a house, will have priority over the lien of the mechanic who builds the house. Idem, 83

4. In a controversy between a building fund company claiming a lien for advances made to a member to enable him to build a house, and the assignee of the mechanic's lien, before decreeing a sale of the house and lot, the court should determine the priority between them. And it is error merely to decree a sale and direct the proceeds to be brought into court.

Idem, 83

5. The trustee and beneficiaries in a deed to secure bona fide debts, without notice, are purchasers for valuable consideration, within the meaning of the exception in the statute, Code, ch. 188, § 3, p. 717; and will be preferred to an execution creditor of the grantor in the deed, as to a chose in action thereby conveyed.

Evans, trustee, *v.* Greenhow & als., 153

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6. Vendor retaining title, his right to subject the property for the purchase
683 *money continues until it is actually paid.
Yancey *v.* Mauck & als., 300

LIMITATION OF ESTATE.

H devises real estate to M during his natural life, and to his children if he should have lawful issue; if not, then at his decease to H's grandchildren. At the death of H, M is not married, but he afterwards marries and has lawful children. Upon the birth of the first child of M the remainder vested in the child, subject to open and let in the after-born children as they severally came into being; and the remainder in favor of the grandchildren was defeated. The grandchildren were therefore not necessary parties to a suit by the guardian of M's children for the sale of the real estate.
Cooper *v.* Hepburn & als., 551

LIMITATIONS—Statute of.

1. The act, Code, ch. 149, § 5, p. 591, limiting actions on store accounts to two years, does not embrace wholesale dealings of importing and wholesale merchants, but applies exclusively to the store accounts of retail dealers with their customers.
Wortham & Co. *v.* Smith & Sampson, 487

2. There being no evidence before the jury to show whether the account filed was for dealings by wholesale or by retail, other than what appears from the face of the account, proved to be correct, if the items of the account indicate that the sales were by wholesale and not by retail, they should be so regarded. Idem, 487

3. A plea of the act of limitations should state on what act the defendant relies. Though if it appears that the plaintiff could not probably be mistaken as to the act relied on, the appellate court will not reverse the judgment for the failure of the plea to specify the act. Idem, 487

LIS PENDENS.

The doctrine of lis pendens only applies where there is a suit to affect the property purchased, and can have no effect upon it unless a decree may be made in the suit to affect it, nor until such decree is made.
Davis *v.* Christian & als., 11

MALICIOUS PROSECUTION.

1. The improper motive, or want of proper motive, inferrible from a wrongful act based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action for malicious prosecution.
Spengler *v.* Davy, 381

2. In an action for maliciously suing out an attachment against the effects of the plaintiff, the declaration alleges, that the attachment was sued out "wrongfully and without good cause," instead of "maliciously and without probable cause." Though this was irregular, it was cured by the verdict. Idem, 381

3. What is justifiable, probable cause for suing out an attachment against the effects of a debtor. See Attachments, No. 4, and Idem, 381

MANDAMUS.

An inspector of flour refusing to inspect flour by boring through the head of the barrel with a half inch auger, he will be compelled to do it by mandamus from the court.
Delaplane *v.* Crenshaw & Fisher, 457
Same *v.* Haxall, Crenshaw & Co., 457

MURDER.

Deceased strikes the prisoner's father with his fist, and a fight ensues, when the prisoner, who sees it, comes up, and catches the deceased by the collar of his coat behind, and strikes the deceased from behind with a pocket knife, wounding him in the right side. The prisoner, who was about seventeen years old, had lately left the school of the deceased, and had used language on more than one occasion before the affray, and also used language after it, but before it was known deceased was dangerously wounded, which evinced hostility to him: *held*, the killing is murder.
Bristow's Case, 634

NOTICE.

1. On a motion against a sheriff and his sureties for his failure to pay the taxes due to the commonwealth, it is not necessary that the notice should state on what bond of the sheriff the motion will be made.
Monteith, sheriff, & als. *v.* The Commonwealth, 172

2. The notice to the sheriff and his sureties being of a motion for a balance of the land, property and free negro taxes of 1857, and the judgment being for a balance due upon these and also for the license tax; this is error. Idem, 172
684 *3. What sufficient notice of protest for non-payment of a negotiable note. where the endorser is dead and there is no representative of his estate at the time the note falls due. See Promissory Notes and Bills of Exchange, No. 4, and
Boyd's adm'r *v.* City Savings Bank, 501

OFFICE JUDGMENTS.

See Judgments.

PARENT AND CHILD.

1. A father has property of his infant children in his possession, and during his life does not apply to the court to have any of the profits of that property applied to their support, nor does he make any charge against them during his life. His estate will not be allowed any thing for their support without the clearest proof that justice requires it.
Evans *v.* Pearce & als., 513

2. In such a case the father will be treated

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as a guardian; and his accounts will be settled on the principles applicable to guardians' accounts. Idem, 513

3. Upon a devise to a daughter for life, and at her death the property to be equally divided among her children: an illegitimate child of the daughter will take with her legitimate children.
Bennett & als. *v.* Toler & als., 588

PARTIES.

Who not necessary parties in bill for sale of infants' lands. See Limitations of Estates, No. 1, and
Cooper *v.* Hepburn & als., 551

PARTNERS.

1. Though as a general rule, a partnership, whether for a definite or indefinite period, is terminated by the death of one of the partners; yet it may be continued longer by express agreement between the partners, or under the provisions of the will of the deceased partner, with the consent of the surviving partner. But in the latter case, if the testator merely direct that the partnership be continued after his death, the responsibility of his estate will be limited to the funds already embarked in the trade: though he may make it cover his whole estate, if he chooses so to direct.
Davis *v.* Christian & als., 11

2. Testator directs his partnership with C to be continued if C will consent to it, and gives him full power over his interest in the partnership for carrying it on; and also authorizes his executors to sell all his estate to enable C to carry on the business to greater advantage, or to pay the debts which may be due and owing from the partnership at any time during its continuance. The effect of this provision is not to give the executors a mere discretion to sell the real estate or not, at their pleasure, during the continuance of the partnership, but to create a trust in favor of creditors of the partnership. Idem, 11

3. Real estate may, in equity, be converted out and out into personalty by the agreement of the partners, or the manner in which it is conveyed to them. So real estate bought with partnership effects for partnership purposes, though conveyed to the individual partners, is thereby converted into personalty, at least to the extent that may be necessary for the purpose of paying the debts of the partnership, and adjusting the accounts between the partners. Quære: If it is converted to any further extent, or out and out. Idem, 11

4. But every such conversion of real estate into personalty, whether express or implied, complete or partial, is equitable only; and the property can only be conveyed as real estate, and by each partner, in order to pass the whole to the grantee.
Idem, 11

5. Partnership effects may be applied, by the concurrence of the partners, to pay an individual debt of one of them, if the other receives a sufficient consideration therefor, though they may be unable to pay all their partnership debts.
Marks & als. *v.* Hill & als., 400

6. H and N form a partnership, each to put in twenty-five hundred dollars. N borrows the money on his own note with security. H is unable to borrow on his own credit; and with the consent of N gives the note of the firm for the amount. They fail, and agree that both notes shall be paid out of the partnership assets; and the assets are conveyed in trust to secure these debts as well as other partnership debts. The agreement is upon a sufficient consideration, and valid against partnership creditors not secured by the deed.
Idem, 400

PLEADING AT LAW.

In an action for maliciously suing out an attachment against the effects of the plaintiff, the declaration alleges, that the
685 *attachment was sued out "wrongfully and without good cause," instead of "maliciously and without probable cause." Though this was irregular, it was cured by the verdict.
Spengler *v.* Davy, 381

POWERS.

1. It seems that a power given to executors by name, if the will does not point to a joint exercise of it, may be executed by the survivor.
Davis *v.* Christian & als., 11

2. A power given to executors will survive, though a discretion is given to them in regard to the exercise of it.
Idem, 11

3. Where a discretionary power to sell is given to executors, a purchaser from them, if he acted bona fide, will not be affected by the manner in which they exercised their discretion. And if the power is for the payment of debts generally, the purchaser is not bound to see to the application of the purchase money. Idem, 11

4. What notice will or will not be sufficient to affect a purchaser with notice of a fraud by his vendor in making the sale under a power. See Vendor and Purchaser, No. 2, 3, 4, and Idem, 11

POWER OF ATTORNEY.

M gives J a power of attorney to sell her lands in the county of R, with power to J to appoint other agents or attorneys. J executes a power to C to sell the lands, but the power only authorizes C to act in the name of J, and it is signed by J in his own name, without any reference to his principal. This power does not authorize C to convey the land as attorney of M.
Stinchcomb *v.* Marsh, 202

PRACTICE AT COMMON LAW.

1. If the term of a Circuit court lasts more than fifteen days, all office judgments in which no writ of enquiry is ordered, be-

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come final judgments on the fifteenth day; and cannot be afterwards set aside by the court.

Enders' ex'ors *v.* Burch, 64

2. When a court authorizes executions to issue upon judgments recovered during the term, the judgments become final judgments from the time when execution may issue, and cannot be afterwards set aside by the court. Idem, 64

3. If the court sets aside such a judgment and quashes the execution which has issued thereon, and gives leave to defendant to plead, there may be a supersedeas from the order, and the whole will be reversed. Idem, 64

4. In an action against a telegraph company, the line of which extends through several states, though it appears that some of the defendants live out of the state, this is not cause for arresting the judgment against the company. If it is good ground for objection to the jurisdiction of the state court, it must be taken by plea in abatement before the defendants plead in bar. Code, ch. 171, § 19, p. 648.

Washington and New Orleans Telegraph Co. *v.* Hobson & Son, 122

5. What bill of exceptions to the opinion of the court overruling a motion for a new trial, on the ground that the verdict is contrary to evidence, must show. See Appellate Court, No. 2, and Idem, 122

6. When point must be saved, and how record must show it. See Appellate Court, No. 3, and Idem, 122

7. An instruction which is susceptible of two constructions, one of which is erroneous, and which may therefore mislead the jury, should not be given.

Va. Central R. R. Co. *v.* Sanger, 230

8. Where evidence is offered which is only admissible in connection with other evidence which the party states he intends to introduce, if the court has any reason to believe, that the evidence is offered merely to produce an improper impression on the jury, and with no intention to introduce the other evidence, the party may be required to reverse the order of his proofs: but this is a matter to be left in a great measure to the discretion of the court which tries the case.

Alderson *v.* Miller, 279

9. If in such case, the evidence offered is admitted, and the party fails to produce the other evidence, the court may instruct the jury to disregard that introduced. Idem, 279

10. A witness who is present being unable to state the facts to which he was called to testify, because the party had failed to inform him as to the object for which he was called, a continuance properly refused.

Spengler *v.* Davy, 3381

11. A cause which had been pending in a County court for more than a year, is called for trial, and a motion by the defendant for a continuance is overruled; and then he moves the court to remove the cause to the Circuit court. The motion is properly overruled. Idem, 81

12. In a civil suit (whatever may be the law in a criminal case), after the
686 judge *presiding at the trial has given an instruction to the jury, the counsel should not be allowed to discuss before the jury the same matter which the court has already decided.

Delaplane *v.* Crenshaw & Fisher, 457
Same *v.* Haxall, Crenshaw & Co., 457

13. If on the trial of a cause, the evidence is documentary, and presents a question of law which is not plainly against the defendant, he is entitled to demur to the evidence, and the court should compel the plaintiff to join in the demurrer.

Boyd's adm'r *v.* City Savings Bank, 501

PRACTICE IN CHANCERY.

1. A suit to enforce the mechanic's lien under the statute, Code, ch. 119, § 2, p. 510, may be brought before all the installments are due, and the court may in its decree provide for them.

Iaege, &c., *v.* Bossieux, 83

2. In a controversy between parties claiming under distinct liens, before decreeing a sale of the property, the court should determine the priorities as between them. And it is error merely to decree a sale and direct the proceeds to be brought into court. Idem, 83

3. The wife of the grantor having joined in the first lien, but not in the second, the property should be sold out and out, and applied to pay the first lien. And the wife being a party in the suit, and having a contingent dower interest in the remainder, the court should make a proper provision to compensate that interest out of the surplus proceeds of sale, if any, before any part of it is paid over on the second lien. Idem, 83

4. A copy of a paper is filed with the bill, and though noticed in the answer, is not objected to. It is received as evidence by the commissioner who settles the accounts, and no call is made for the original before him; but there is an exception without date endorsed upon it as being a copy. The exception either came too late, or was waived by the party. Idem, 83

5. A judicial sale of land is partly on a credit, and the purchaser pays the cash payment, and executes his bonds with security for the deferred payments; and the sale is confirmed by the court. When the bonds become due the purchaser fails to pay them. He may be proceeded against by a rule upon him to show cause why the land shall not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for the sale of the land.

Clarkson *v.* Read & als., 288

6. In a bill by creditors to set aside a deed of trust for payment of debts, on the ground that it is fraudulent on its face, the

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bill does not ask for an account, but there is a prayer for general relief. Though the deed is sustained as valid, the plaintiffs are entitled to an account.
Marks & als. *v.* Hill & als., 400

7. On sale of infant's real estate. See Infants, No. 13, 14, 15, 16, 17, 18, and
Cooper *v.* Hepburn & als., 551

8. When decree should provide for payment of purchase money by plaintiff. See Appellate Court, No. 6, and
Mustard *v.* Wohlford's heirs, 329

PRACTICE IN CRIMINAL CASES.

See Criminal Jurisdiction and Proceedings.

PRESUMPTIONS.

1. When presumptions cannot be admitted. See Customs, No. 4, and
Delaplane *v.* Crenshaw & Fisher, 457
Same *v.* Haxall, Crenshaw & Co., 457

2. How presumption of slavery from African descent may be repelled. See Suits for Freedom, No. 5, and
Fulton's ex'ors *v.* Gracey & als., 314

PROHIBITION.

In prohibition a variance between the affidavit and declaration, not being a matter to bar the proceeding, cannot be taken advantage of by demurrer to the declaration.
Warwick & Barksdale *v.* Mayo, mayor, 528

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. A writing for the payment of money or other purpose which is not required to be by deed, having a scroll at the foot thereof, with the word "seal" written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument.
Clegg *v.* Lemessurier, 108

2. Evidence aliunde is not admissible to prove that a scroll at the foot of a writing was intended as a seal. Idem, 108

3. "The trustees of N and A will pay to B the sum of one thousand and eighty dollars, with interest from 15th March 1850, out of any money in his hands belonging *to me, A" is not a bill of exchange, nor does it import a valuable consideration, or a promise by the drawer to the payee to pay if the money is not paid by the drawee.
687
Averett's adm'r *v.* Booker, 163

4. An endorser of a negotiable note dies intestate before it falls due; and when it falls due it is regularly protested for nonpayment; and no person having then qualified as administrator on the estate of the endorser, the notary on the same day deposits in the post-office at Lynchburg, where the note had been made payable and was discounted, the notice of protest, directed to "the legal representative" of the endorser, "Lynchburg;" the endorser having lived in that place, and his family still living in the same house. The notice is sufficient.
Boyd's adm'r *v.* City Savings Bank, 501

PUBLIC OFFICERS.

In general it is not necessary to prove the written appointment of public officers. That one has acted as such officer and been recognized by the public as such, is sufficient evidence that he has been duly appointed until the contrary appears. And the case is still stronger where the official character has been recognized by the appointing power.
Callison *v.* Hedrick, 244

RAIL ROAD COMPANIES.

For the liability of rail road companies in the carriage of passengers, see Carriers, passim, and
Va. Central R. R. Co. *v.* Sanger, 230

RELIGIOUS CONGREGATIONS.

1. The act, Code, ch. 77, § 8, p. 362, does not authorize a devise of land for the use of a religious congregation, but only a conveyance by deed.
Seaburn's ex'or *v.* Seaburn & als., 423

2. A fortiori the act does not authorize a bequest of money to be expended in building a church at a specified place, or for the support of the pastor of the church.
Idem, 423

REMOVAL OF CAUSES.

See Courts.

SALES.

1. To constitute fraud in a sale, it is not sufficient that there shall be false representations by the vendor; but he must know at the time he makes them, that they are false; or at least he must make them as statements of facts within his own knowledge, when he has no knowledge on the subject.
Mason *v.* Chappell, 572

2. Any affirmance of the quality of the article at the time of the sale, intended as an assurance to the purchaser of the truth of the fact affirmed, and acted on by the purchaser, is an express warranty. But no affirmation, however strong, will constitute a warranty unless it was so intended.
Idem, 572

3. Where a specific article is ordered and furnished, though the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for the purpose; and he will not, in the absence of fraud or express warranty, be held liable, however unfit or defective it may turn out to be. Idem, 572

4. The mere fact that an article sold does not answer to the representations made respecting it, is not ground to assume that it was not the genuine article sold, so as to entitle the purchaser to recover for a

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failure by the vendor to comply with his contract. Idem, 572

5. The mere fact that an article proves to be worthless, will not entitle the purchaser to recover back the price paid. Idem, 572

6. As to sales by infants, see Infants, No. 1, 2, 3, 4, 5, and
Mustard *v.* Wohlford's heirs, 329

7. As to sales by sample, and what constitutes a perfected contract so as to pass the title, see Contracts, No. 4, and
Haxall, Brothers & Co. *v.* Willis, 434

8. As to sale of infant's land, see Infants, No. 14, 15, 16, 17, 18, and
Cooper *v.* Hepburn & als., 551

SEALED INSTRUMENTS.

1. A writing for the payment of money or other purpose which is not required to be by deed, having a scroll at the foot thereof with the word "seal" written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument.
Clegg *v.* Lemessurier, 108

2. Evidence aliunde is not admissible to prove that a scroll at the foot of a writing was intended as a seal. Idem, 108

SHERIFFS.

1. The act of March 15, 1856, Sess. 688 *Acts 1855–56, ch. 8, § 2, p. 8, extending the term of the sheriff from July 1, 1856, to January 1, 1857, is constitutional.
Commonwealth *v.* Drewry, 1

2. The act does not embrace two subjects in the sense of the constitution, article 4, § 16. Idem, 1

3. The sheriff elected in May 1854, executed his official bond, and entered upon his office and continued to act until January 1857, but did not execute a bond under the act of March 15, 1856. His successor elected in May 1856, executed his official bond in June following, but did not enter upon his office until January 1857. If the said act was unconstitutional, still the first sheriff held over after the 1st of July under the constitution, article 6, § 23; and having collected the state taxes of 1856, his sureties in the bond of 1854 are liable for them. Idem, 1

4. On a motion against a sheriff and his sureties for his failure to pay the taxes due to the commonwealth, it is not necessary that the notice should state on what bond of the sheriff the motion will be made.
Monteith, sheriff, & als. *v.* The Commonwealth, 172

5. M is elected sheriff of S in May 1854, and gives bond as such. In July 1856 he gives bond under the act of March 15th, 1856, extending the time for which sheriffs should hold office, to January 1, 1857. In May 1856 he is re-elected sheriff for a regular term of two years commencing the 1st January 1857; but he does not give his official bond under that election within sixty days from his election, nor until the 12th of January 1857, when it is executed by himself and his sureties. This bond recites his election for two years from the 1st of January 1857, is acknowledged in open court, and ordered to be recorded; and M is permitted by the court to qualify as sheriff and act as such: *held*:

1st. If M is not sheriff de jure he is sheriff de facto, and as such is bound for his acts. Idem, 172

2d. The sureties of M in his last bond are estopped by the recitals thereof from saying M is not sheriff, and the bond is binding upon them. Idem, 172

3d. M having professed to enter upon his office and act under his last election, it cannot be held that he continued to hold over, and act under his first election, on the ground that his successor had not qualified, so as to subject his sureties in the previous bonds. Idem, 172

6. The notice to the sheriff and his sureties being of a motion for a balance of the land, property and free negro taxes of 1857, and the judgment being for a balance due upon these and also for the license tax; this is error for which the judgment will be reversed in the appellate court. Idem, 172

SLAVES AND FREE NEGROES.

1. D sells slave to H at half his value, with a condition that when H is repaid from the earnings of the slave, H shall emancipate him. When H is so repaid, D may enforce the condition against H.
Shue *v.* Turk, sheriff, 256

2. H having been repaid his advance, emancipates the slave: but H is then insolvent. His creditors cannot subject the emancipated slave to satisfy their debts. Idem, 256

3. The slave having been emancipated and registered as a freeman; if an execution is levied upon him by the creditors of H, he may obtain relief by habeas corpus. Idem, 256

4. A resident of Ohio being in the county of R on a visit, there acquires a slave and emancipates him. That was a sufficient residence in R to authorize the recording of the deed in the clerk's office of that county. Idem, 256

STATUTES.

1. The act of March 15, 1856, Sess. Acts 1855–56, ch. 8, § 2, p. 8, extending the term of the sheriff from July 1, 1856, to January 1, 1857, construed in
Commonwealth *v.* Drewry, 1

2. Article 4, § 16 of the Constitution, construed in Idem, 1

3. Article 6, § 23 of the Constitution, construed in Idem, 1

4. The act, Code, ch. 151, p. 600, § 1, 7, 9, in relation to attachments, construed in
Pulliam, &c. *v.* Aler, 54

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5. The act, Code, ch. 171, § 44, 45, p. 652, in relation to office judgments, construed in
Enders' ex'ors *v.* Burch, 64

6. The act, Code, ch. 177, § 21, p. 674, in relation to judgments on which executions are directed to issue, construed in
Idem, 64

7. The act, Code, ch. 127, p. 533, in relation to the appointment of guardians, construed in
Ham *v.* Ham, 74

8. The act, Code, ch. 119, § 2, p. 510, in relation to the mechanic's lien, construed in
Iaege, &c., *v.* Bossieux, 83

9. The act, Code, ch. 171, § 19, p. 689 648, *in relation to objections to the jurisdiction of the court, construed in
Washington & New Orl. Tel. Co. *v.* Hobson & Son, 122

10. The act, Code, ch. 188, § 3, p. 717, in relation to the lien of a fi. fa. construed in
Evans, trustee, *v.* Greenhow & als., 153

11. The act, Code, ch. 176, § 4, p. 661, in relation to certificates of the auditor, construed in
Ushers' heirs *v.* Pride, 190

12. The act of 1838, Sess. Acts, p. 19, § 9, in relation to sales by commissioners of delinquent lands, construed in
Miller *v.* Williams & al., 213

13. The act, Code, ch. 7, § 6, p. 349, in relation to damages for land taken for public road, construed in
Callison *v.* Hedrick, 244

14. The act, Code, ch. 174, § 1, p. 657, Sess. Acts 1850-51, p. 34, in relation to the removal of causes from the County courts, construed in
Spengler *v.* Davy, 381

15. The act, Code, ch. 181, § 3, p. 680, in relation to jeofails, construed in
Idem, 381

16. The act, Code, ch. 77, § 8, p. 362, in relation to conveyances for use of religious congregation, construed in
Seaburn's ex'or *v.* Seaburn & als., 423

17. The act, Code, ch. 88, § 20, 36, in relation to the inspection of flour, construed in
Delaplane *v.* Crenshaw & Fisher, 457
Same *v.* Haxall, Crenshaw & Co., 457

18. The acts, 1 Rev. Code of 1819, ch. 108, § 16, 17, 18, 19, 20, p. 409; Sup. Rev. Code, ch. 104, § 2, p. 134; Code, ch. 128, § 2, 3, 4, 5, p. 535-6, in relation to the sale of infants' lands, construed in
Cooper *v.* Hepburn & als., 551

19. The act, Code, ch. 178, § 8, p. 676, in relation to sales under decrees, construed in Idem, 551

20. The act, Code, ch. 198, § 10, 20, p. 744, 745, in relation to betting on elections, construed in Shumate's Case, 653

STATUTES—Construction of.

1. The general terms of a statute will be restricted, to carry out the intention of the legislature.
Spengler *v.* Davy, 381

2. The act, Code, ch. 98, § 10, p. 744, in relation to betting on elections, to be construed as a remedial statute.
Shumate's Case, 653

SUITS FOR FREEDOM.

1. In a suit for freedom, the declarations of the testator of the defendants, made some fourteen or fifteen years before the trial, that the plaintiffs were then free, and declarations made some twenty odd years before the trial, that they would be free at the age of twenty-eight years, are competent evidence for the plaintiffs: And this though the testator had but a temporary interest in the negroes.
Fulton's ex'ors *v.* Gracey & als., 314

2. The plaintiffs claim their freedom as being the children of a negro woman named Nan. The registry of Nan as a free woman, and the certificate of the clerk of the county court in which Nan was registered, to the correctness of the registry, and the affidavit of the person to whom Nan had been bequeathed for the time she was to serve, by a person under whom the testator of the defendants claimed the plaintiffs, of the fact that Nan was free, which affidavit was acted on by the court, and was filed in the clerk's office when the registry of Nan was directed by the court, are competent evidence for the plaintiffs. Idem, 314

3. Quære: If a register, made and certified according to law, is not prima facie evidence of every fact therein stated, in any controversy involving the freedom of the negro registered, or of any other persons claiming freedom under such negro. It is at least evidence of the negro's freedom at the time it was made. Idem, 314

4. In a suit for freedom, the plaintiff must make out his title against all the world. The admissions of the defendant that the plaintiff is free, is evidence against the defendant, whether he ever had any interest in the plaintiff as a slave or not, or whatever such interest, if any, may have been. But it is only presumptive evidence, liable to be repelled by proof that the plaintiff is the slave of the defendant or some other person. Idem, 314

5. The presumption of law is that a person of African descent is a slave: but that presumption may be repelled by any evidence tending to show he is free. A deed by which the mother of such person is conveyed to another for a certain number of years, and then to be discharged from further service; and her children born before that time to serve till twenty-eight years, and then to be discharged from all service; though such deed not having been recorded, cannot confer freedom, yet it tends to 690 repel the presumption *of slavery, and is competent testimony.
Idem, 314

6. Entries by the testator of the defendants in a book, of the ages of the plaintiffs, made along with the ages of other slaves owned by the testator, are not competent evidence for the defendants, to show that

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some of the plaintiffs who were the children of another plaintiff, were born before she attained the age of twenty-eight years, and that the children had not attained that age; even if such fact were material to be proved. Idem, 314

7. When person claiming to be free, may assert it by writ of habeas corpus. See Slaves and Free Negroes, No. 3, and Shue *v.* Turk, sheriff, 256

SURETIES.

1. The sureties of a sheriff estopped by the recitals in the bond, from saying he was not sheriff. See Sheriffs, No. 5, and Monteith, sheriff, & als. *v.* The Commonwealth, 172

2. Sureties of a sheriff, in what bond liable. See Sheriffs, No. 3, 5, and Idem, 172

Commonwealth *v.* Drewry, 1

TELEGRAPH COMPANIES.

1. In an action against a telegraph company for damages sustained by the plaintiffs by the alteration of a message sent on their line, whereby an order to the plaintiffs' factors in Mobile, to buy five hundred bales of cotton, was altered to twenty-five hundred, but not charging negligence in the company, an instruction that the defendants are not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, is not authorized by the pleadings; and is properly refused.
Washington & New Orl. Tel. Co. *v.* Hobson & Son, 122

2. In such case the factors having bought two thousand and seventy-eight bales of cotton before the mistake in the message was discovered, if the company is liable to the plaintiffs for the damages arising from the alteration of the message, the commissions of the factors upon the purchase of the cotton are a part of the damages for which the company is liable; and the plaintiffs are not bound to accept any offer of the company to pay the damages which excludes these commissions. Idem, 122

3. In such case, if the company is liable to the plaintiffs for damages arising from the alteration of the message, the measure of these damages is what was lost on the sale at Mobile, of the excess of the cotton above that ordered, or if not sold there, what would have been the loss on the sale of the cotton at Mobile in the condition and circumstances in which it was when the mistake was ascertained; including in such loss all proper costs and charges thereon. Idem, 122

4. When the mistake was ascertained a part of the cotton was on board of a ship to be sent to Liverpool, a part was under a contract of affreightment to the same place, but not on board. The whole should have been sold as it was at Mobile; and the plaintiffs having sent it to Liverpool and sold it there, the loss to the company is not to be increased by this act of the plaintiffs, but must be based upon an estimate of what it would have sold for, a part on shipboard and a part under contract of affreightment. Idem, 122

5. If the plaintiffs sent the cotton to Liverpool for purposes of speculation; with the intention of taking to themselves the profits, if any, and in the event of a loss, visiting the loss on the company, they are not entitled to recover for any loss sustained upon it. Idem, 122

6. But if the plaintiffs sent the cotton to Liverpool, not with the purpose of taking the profits, if any, but only to indemnify themselves out of the proceeds to the extent of the cost and the obligations incurred by them, they do not thereby lose their right to recover from the company the damages they would have sustained if the cotton had been sold in Mobile. Idem, 122

7. The plaintiffs, if they intended to hold the company responsible for the excess of the cotton purchased, should, as soon as they were apprised of the purchase, have notified the company of such intention; should have made a tender of such excess to the company on the condition of its paying the price and all the charges incident to the purchase; and also, that in case of its refusal to accept said tender and comply with its conditions, they would proceed to sell such excess at Mobile; and after crediting said company with the net profits, would look to it for the difference between the amount of such proceeds and the cost of the excess, including all proper charges. And upon the failure of the company, after notice, to accede to their offer, they should have proceeded accordingly. Idem, 122

691 *TRUSTS AND TRUSTEES.

1. The trustee and beneficiaries in a deed to secure bona fide debts, without notice, are purchasers for valuable consideration, within the meaning of the exception in the statute, Code, ch. 188, § 3, p. 717; and will be preferred to an execution creditor of the grantor in the deed, as to a chose in action thereby conveyed.
Evans, trustee, *v.* Greenhow & als., 153

2. A provision in a deed of trust to secure creditors, that the trustee may continue the business and replenish the stock, if intended merely as a means of realizing the trust fund, and with a view to winding up the business, is not fraudulent per se, so as to avoid the deed.
Marks & als. *v.* Hill & als., 400

3. In such a case a provision in the deed that one of the grantors shall attend to the business, but he being under the control of the trustee, who may at any time on his own motion, and shall at the request of the creditors, sell the property, is not fraudulent per se, so as to avoid the deed. Idem, 400

4. In a bill by creditors to set aside a deed of trust for payment of debts, on the

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ground that it is fraudulent on its face, the bill does not ask for an account, but there is a prayer for general relief. Though the deed is sustained as valid, the plaintiffs are entitled to an account. Idem, 400

5. What charitable trusts void. See Charitable Trusts, passim, and

Seaburn's ex'or *v.* Seaburn & als., 423

6. When court of equity will sustain a deed by husband settling wife's property upon her.

Poindexter & wife *v.* Jeffries & als., 363

TURNPIKE ROADS.

1. The plat or map of the survey and location of a turnpike road, with the certificates thereon by the surveyor, returned to the clerk's office and recorded in pursuance of the statute, is evidence of the line of the road as located, in an action by the owner of the land against a contractor for entering thereon and injuring the land: and a partial mistaken change in the name of the road will not exclude them as evidence.

Callison *v.* Hedrick, 244

2. An act authorizes the construction of a road from M to L, and the road was located and the plat thereof returned to the clerk's office; and an owner of land through which the road was to pass did not apply to the County court within the year to have her damages assessed. The road was in fact made but a part of the distance, and stopped; and at the next session of the legislature a company was incorporated to construct the remainder of the road. The company is entitled to make their road upon the location made under the previous law; and the owner of the land not having applied for damages within the year from the return of the plat, is concluded from recovering them. Idem, 244

3. In such a case, if the road is changed in any part of it, from the location made, the owner of the land may recover damages for that. Idem, 244

VARIANCE.

In prohibition a variance between the affidavit and declaration, not being a matter in bar of the proceeding, cannot be taken advantage of by demurrer to the declaration.

Warwick & Barksdale *v.* Mayo, mayor, 528

VENDOR AND PURCHASER.

1. Where a discretionary power to sell is given to executors, a purchaser from them, if he acted bona fide, will not be affected by the manner in which they exercised their discretion. And if the power is to sell for the payment of debts generally, the purchaser is not bound to see to the application of the purchase money.

Davis *v.* Christian & als., 11

2. To convict a purchaser of a fraudulent participation in a breach of trust by an executor having authority to sell, the evidence of notice of a fraudulent intent on the part of the executor, ought to be very strong. The purchaser has a right to presume, in the absence of all direct or plain proof to the contrary, that the executor is exercising his power fairly and faithfully in conformity to his duty. Idem, 11

3. A purchaser having constructive or actual notice of a pending suit, can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed at the time of his purchase, would have informed him. If these facts inform him that the vendor is committing a fraud in making the sale, he becomes a party to the fraud. But he cannot be charged with a knowledge of facts afterwards brought into the cause. Idem, 11

4. The doctrine of lis pendens only
692 applies *where there is a suit to affect the property purchased, and can have no effect upon it unless a decree may be made in the suit to affect it, nor until such decree is made. Idem, 11

5. The trustees and beneficiaries in a deed to secure bona fide debts, without notice, are purchasers for valuable consideration within the meaning of the exception in the statute, Code, ch. 188, § 3, p. 717: and will be preferred to an execution creditor of the grantor in the deed, as to a chose in action thereby conveyed.

Evans, trustee, *v.* Greenhow & als., 153

6. Y sells land to M and is to convey it when the first payment is made. Before this payment falls due they make an arrangement by which M executes his bonds with Y as his surety to S, for a debt due from Y to S equal to the whole purchase money of the land; and the bonds of M are surrendered to him and destroyed. M becomes insolvent and conveys the land to secure creditors; and afterwards Y is compelled to pay the bond to S. Y not having parted with the title, may subject the land in equity to the payment of the purchase money.

Yancey *v.* Mauck & als., 300

7. As to sales by infants, and their avoidance thereof, and the effects of such avoidance, see Infants, No. 1, 2, 3, 4, 5, 6, 7, and

Mustard *v.* Wohlford's heirs, 329

VENIRE.

See Jury.

WARRANTY.

1. Any affirmance of the quality of an article at the time of its sale, intended as an assurance to the purchaser of the truth of the fact affirmed, and acted on by the purchaser, is an express warranty. But no affirmation, however strong, will constitute a warranty, unless it was so intended.

Mason *v.* Chappell, 572

2. Where a specific article is ordered and furnished, though the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of

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the vendor that it is suitable for the purpose; and he will not, in the absence of fraud or an express warranty, be held liable, however unfit and defective it may turn out to be. Idem, 572

WILLS.

1. In construing wills courts are not bound to give a strict and literal interpretation to the words used, and by adhering to the letter defeat the manifest object and design of the testator.
Hill & wife *v.* Huston's ex'or and others, 350

2. Upon a devise to a daughter for life, and at her death the property to be equally divided among her children; an illegitimate child of the daughter will take with her legitimate children.
Bennett & als. *v.* Toler & als., 588

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